



ROBINSON & COLE LLP

Labor, Employment & Benefits



Court Dismisses ADEA Claim Due to Valid OWBPA Waiver

In [O'Neill v. New York Times Company](#) (5/7/04) the U.S. District Court for Massachusetts dismissed age discrimination claims under the Age Discrimination in Employment Act filed by Gerard O'Neill, age 58, a well-known investigative journalist at the Boston Globe, finding that he had signed a valid waiver of ADEA claims under the Older Workers Benefit Protection Act. The Globe studied instituting a buy-out program as a cost-savings measure. Managers were asked to generate a list of employees who had 20 years of service, were at least 52 years old, were not in certain salary bands, and were non-union. There were 44 employees on the list. Senior managers then reviewed the list to decide who would not have to be replaced if they accepted the offer. As a result, 27 persons were removed from the list and the buy-out was offered to the remaining 17 employees. Five employees accepted the offer, including O'Neill. As part of the buy-out, employees were required to sign a waiver of their ADEA claims. The waiver included a list of the job titles, ages, and years of service of the 17 employees who were eligible and the ages and years of service for the employees with those job titles who were not eligible for the buy-out. The next year, the Globe offered a more generous buy-out package. O'Neill asked for the more generous benefits and the Globe refused.

In his lawsuit, O'Neill asserted that his waiver was not knowing and voluntary under the OWBPA because the waiver did not disclose that 44 employees were originally on the list, that the criteria for selecting employees had changed, and that the offer was not voluntary because he believed it was a "take-it-or-leave-it" package. The court rejected each of his claims. The waiver complied with the OWBPA and did not require the disclosure of the additional information sought by O'Neill. The court also found that O'Neill, despite being advised to consult with legal counsel, reviewed the offer with his financial advisor and through negotiations obtained additional paid leave to study at Oxford University. For these reasons, the court found O'Neill had knowingly and voluntarily waived his rights to sue under the ADEA.

Court Rejects Disabled Employee's Claim that Attorneys and Vocational Experts Are Needed for ADA's Interactive Process

In [Ammons v. Aramark Uniform Services, Inc.](#) (5/21/04) the U.S. Court of Appeals for the Seventh Circuit ruled that Clyde Ammons, an engineer and mechanic with permanent knee problems, was not entitled to have his lawyers or a vocational counselor participate in the interactive process for a reasonable accommodation under the Americans with Disabilities Act. The appeals court noted that, although there may be cases where an attorney or a vocational expert would be of considerable assistance in the interactive process, there is no requirement that an attorney or vocational expert participate. The court noted that the ADA envisions no more than a flexible, interactive process in which the employer and employee determine the appropriate reasonable accommodations. The appeals court noted that Ammons, whose doctor imposed limitations on his duties, met with the plant's general manager and union steward to discuss possible accommodations. Aramark rejected Ammons' proposed accommodations, believing he was requesting that Aramark fashion a new job for him, something that the ADA does not require.

Back Pay Not Available Remedy for ERISA Retaliation Claim

After McDonnell Douglas closed its Tulsa, Oklahoma facility, a group of 1074 employees who lost their jobs sued McDonnell Douglas alleging that the plant closure violated Section 510 of the Employee Retirement Income Security Act. The employees claimed that McDonnell Douglas violated ERISA by discharging or discriminating against them for the purpose of interfering with their right to benefits. The U.S. District for Oklahoma ruled in favor of the employees, finding that McDonnell Douglas closed the Tulsa facility for the purpose of depriving the employees of their retirement benefits. The employees requested that the court award back pay of \$90 million. McDonnell Douglas argued that ERISA only permitted equitable relief, not a legal award of money damages.

In [Millsap v. McDonnell Douglas Corporation](#) (5/21/04) the U.S. Court of Appeals for the Tenth Circuit determined that the remedy of back pay is not available under ERISA. The appeals court rejected the employees' arguments that back pay was an equitable remedy because it was a monetary award intertwined with their claim for reinstatement of their positions. The appeals court analyzed ERISA and concluded that the employees' claim for back pay was in the nature of compensatory damages, which is a legal remedy, not an equitable remedy.

Employee on Disability Leave Is Not Qualified for Promotion or Transfer, Defeating Title VII Claim

Charlina Williams was a sales training manager for R.H. Donnelley Corporation who accepted a position relocating her from Las Vegas, Nevada to Purchase, New York. Ten months later, Williams requested a return to Las Vegas and applied for several positions. A short time later, on the advice of her physician, Williams requested and was granted an indefinite disability leave of absence. A few months after she returned from leave, she resigned and sued Donnelley alleging discrimination based on her race and sex in violation of Title VII. The trial court found that Williams was not qualified for any of the positions she sought and dismissed her claims. Williams appealed.

In [Williams v. R.H. Donnelley Corporation](#) (5/13/04) the U.S. Court of Appeals for the Second Circuit ruled that Williams failed to prove her claims of race and sex discrimination because she was on disability leave and, therefore, was unable to fill any of the positions. The appeals court noted that, where an applicant has taken an indefinite leave of absence and has given no indication of when she will return to the workplace, she need not be considered available to fill a position for which there is an immediate need, and will be deemed unqualified.

Employees May Pursue Class Action Age Claims under ADEA despite OWBPA Waiver

Capital One Services was sued by five former employees alleging that they and similarly-situated employees were discriminated against on the basis of their age in violation of the Age Discrimination and Employment Act and that the letter agreement they signed as part of their termination, in which they purportedly waived claims under the ADEA in exchange for additional compensation, violated the tender back provisions under the Older Workers Benefit Protection Act. Capital One requested that the court dismiss the employees' claims, arguing that the OWBPA does not provide for an award of money damages and that the tender-back language was not exercised and, therefore, cannot constitute ADEA retaliation. In [Krane v. Capital One Services Inc.](#) (4/20/04) the U.S. District Court for Virginia ruled that, even though the OWBPA does not provide for a remedy of compensatory damages, employees may sue for declaratory or injunctive relief and combine that relief with a claim under the ADEA for compensatory damages. The court refused to dismiss the OWBPA claims because the employees combined their claims under the OWBPA and the ADEA. However, the court dismissed the retaliation claims, noting that, while the employees engaged in protected activity by suing under the ADEA, the mere threat of enforcement of the tender back provision was not a sufficient adverse employment action for purposes of a retaliation claim. The court remarked, however, that tender back provisions may be used as evidence of a scheme to protect against the discovery of age discrimination.

Honest Belief that Employee was Not Qualified for Position Warranted Dismissal of Retaliation Claims under Title VII, ADA, and ADEA

Judith Hill, age 54, was general manager of an auto center owned by Steven Motors. She suffered a stroke and was unable to work for five months. During her

absence, Steven Motors relocated the dealership and its CEO told her that she would not be able to work as the general manager of the dealership even if she were able to return to work. When Hill returned to work, her doctor restricted her to a 40-hour workweek and an 8-hour workday. Because she could not work the 50 or 60 hours a week and long days typically worked by general managers, Hill was not returned to her former position as a general manager. She sued Steven Motors for sex discrimination under Title VII, disability discrimination under the Americans with Disabilities Act, and age discrimination under the Age Discrimination and Employment Act, and for retaliation under all three statutes. In [Hill v. Steven Motors Inc.](#) (5/5/04) the U.S. Court of Appeals for the Tenth Circuit affirmed dismissal of her claims, ruling that she failed to prove that her superiors were aware of her limited hours or that her managers did not sincerely believe that the job of general manager required that she be able to work more than 40 hours a week. Without proof of pretext, the court was entitled to rely on Steven Motors' articulated nondiscriminatory reason for its actions. The appeals court stated that Hill's opinions about her own performance and assertions about the accuracy of another general manager's opinions did not establish that Steven Motors manufactured its reasons for terminating her employment.

Sexual Harassment Claim Reinstated despite Evidence that Female Employee Accepted Her Boss's Advances

In [Miles v. DDF Inc.](#) (5/11/04) the Minnesota Court of Appeals ruled that the determination of whether Kelly Miles voluntarily participated in and accepted the sexual advances from her boss created an issue of fact that required a trial. The trial court had dismissed Miles' claim based on evidence that she paid for hotel rooms and purchased drinks in furtherance of her affair with her boss. But the appeals court ruled that the trial court ignored evidence that Miles initially objected to his advances and that she testified that she complied only because she thought her job depended on it. The court explained that the question of whether her conduct was unwelcome presented difficult problems of proof and turned largely on credibility determinations, which should be resolved by a jury.

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