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Election of Remedies Clause in CBA is a per se Violation of Federal Civil Rights Laws

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Recently, the District Court for the Western District of Michigan examined the election of remedies clause in a Collective Bargaining Agreement (CBA), which requires employees to choose between the grievance procedure or pursuing discrimination charges administratively or by civil litigation, and found that it is *per se* retaliatory and unlawful.

In *Trayling v St Joseph County Employers Chapter of Local No. 2955 and County of St. Joseph*, the plaintiff was employed by the County of St. Joseph and was a member of the American Federation of State County and Municipal Employers (AFSCME). After exercising "bumping" rights, the plaintiff was laid off. She believed the decision was based on her age, which is in violation of the Age Discrimination in Employment Act (ADEA), and her disability, which is in violation of the Americans with Disabilities Act (ADA). The plaintiff filed a grievance through AFSCME. About five weeks later, she also filed a charge of discrimination with the Michigan Department of Civil Rights (MDCR) and the Equal Employment Opportunity Commission (EEOC). As a result, her grievance was dismissed under the election of remedies clause in the CBA.

Specifically, the CBA stated:

Election of Remedies. When remedies are available for any complaint and/or grievance of an employee through any administrative or statutory scheme or procedure, such as, but not limited to, a veteran's preference hearing, civil rights hearing, or Department of Labor hearing, in addition to the grievance procedure provided under this contract, and the employee elects to utilize the statutory or administrative remedy, the Union and the affected employee shall not process the complaint through any grievance procedure provided for in this contract beyond Step 2. … If an employee elects to use the grievance procedure provided for in this contract and, subsequently, elects to utilize the statutory or administrative remedies, then the grievance procedure provided for hereunder shall not be applicable and any relief granted shall be forfeited.

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Once the plaintiff filed her charges of discrimination with the EEOC and MDCR, the county and AFSCME no longer processed her grievance. Thereafter, she filed retaliation charges against the county and AFSCME. The EEOC eventually found reasonable cause based on the election of remedies clause and issued a right to sue letter to the plaintiff. She filed suit against both the county and AFSCME shortly thereafter.

The plaintiff filed a motion asking the Western District court to rule that the election of remedies provision is *per se* retaliatory since an employee's grievance is dismissed if they exercise rights under civil rights laws. The provision also creates a powerful disincentive to an employee from pursuing charges with the EEOC or MDCR. In response, the defendants argued that it was a '"reasonable defensive measure to avoid duplicative proceedings in two different forums."

The plaintiff relied on *EEOC v Bd. of Governors of State Colleges & Universities*, a decision by the Seventh Circuit Court of Appeals, to support her position. In this case, the court found that "the employer's motivation for including the election-of-remedies provision – avoiding duplicative litigation – was merely a justification for its retaliation, and did not operate to rebut the claim that the employer discriminated against employees who engaged in protected activity."

It was the employee's participation in the statutorily protected activity (pursuing legal remedies) that was the determining factor in the adverse employment action (terminating the grievance proceedings). Therefore, it was *per se* retaliatory and unlawful. Moreover, under the election of remedies provision, employees who exercised rights were treated differently than those who did not and, therefore, it was discriminatory.

The court rejected the reasoning used in *Richardson v Comm'n on Human Rights & Opportunities,* a U.S. Court of Appeals for the Second Circuit case that was relied upon by the defendants. *Richardson* had a more narrow provision (involving disputes "arising from the same common nucleus of operative fact") and approved of an employer's desire to avoid duplicative proceedings and a union's desire "to deploy its scarce resources selectively." While neither decision is controlling on courts in Michigan, the Western District found the reasoning in *Board of Governors* to be more persuasive.

Employers would be wise to review their grievance procedures and collective bargaining agreements to determine whether they contain an election of remedies provision since it may be found to be unlawful as a matter of law. If you need assistance, please contact the author or your Plunkett Cooney employment attorney.

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