New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com

An incisivemedia publication
VOLUME 240—NO. 48
MONDAY, SEPTEMBER 8, 2008

OUTSIDE COUNSEL

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Election of Remedies Provisions and Retaliation Claims

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The U.S. Court of Appeals for the Second Circuit recently issued its opinion in *Richardson v. Commission on Human Rights and Opportunities*,[1] which holds that a provision in a collective bargaining agreement requiring an employee to choose between arbitrating a grievance or filing a charge with a government agency as a prerequisite to a lawsuit does not constitute a form of retaliation violative of Title VII of the federal Civil Rights Act of 1964 (Title VII).

The Second Circuit's position in this case is contrary to that of the Seventh Circuit and the Equal Employment Opportunity Commission (EEOC) and opens up an alternative approach to arbitration of discrimination claims in the collective bargaining sector, in addition to the one being considered by the U.S. Supreme Court in *14 Penn Plaza LLC v. Pyett*.[2]

Background of 'Richardson'

The plaintiff-appellant in Richardson, Leonyer M. Richardson, is an African-American woman who had worked for the state of Connecticut, in various divisions, for more than 15 years. After transferring from the Connecticut Office of Policy Management to the Connecticut Commission on Human Rights and Opportunities (CHRO), she had a "series of vituperative interactions" with her immediate supervisor.[3] Ms. Richardson pursued the employer's internal grievance procedure on several occasions, but ultimately filed a charge with the CHRO, which was not only her employer but also the state analogue to the federal EEOC. Initially, Ms. Richardson alleged disparate treatment and retaliation by her immediate supervisor, Leanne Appleton, but due to increasing conflict with her superiors amended her charge to include a claim for retaliation by Appleton's direct supervisor, Cynthia Watts Elder. Ms. Watts Elder ultimately terminated Ms. Richardson's employment. Ms. Richardson grieved her termination pursuant to the collective bargaining agreement (CBA) with her union, the Administrative and Residual Employees Union Local 4200 (the union).

While this grievance was pending, Ms. Richardson amended her charge with the CHRO to include a claim that her termination from employment constituted further discriminatory retaliation. The union subsequently withdrew its grievance concerning Ms. Richardson's termination because, in its view, complaints of unlawful discrimination filed with the CHRO are not arbitrable under the CBA. The relevant clause in the CBA provided:

> Disputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint is filed with the Commission on Human Rights and Opportunities arising from the same common nucleus of operative facts.[4]

Ms. Richardson then filed an additional charge with the CHRO alleging that the union's refusal to pursue arbitration of her grievance constituted an independent act of retaliation.

In Connecticut, charges filed with the CHRO are automatically cross-filed with the EEOC. As a result, both the CHRO and EEOC investigated Ms. Richardson's assorted charges, with conflicting results. The CHRO found that the union's withdrawal of its grievance over Ms. Richardson's termination did not constitute retaliation. The EEOC determined, however, that there was cause to believe that the election-of-remedies provision in the CBA violated Title VII. Ms. Richardson then filed suit in federal district court against the CHRO, certain of her supervisors, and the union, alleging violations of Title VII as well as state discrimination laws.

The U.S. District Court for the District of Connecticut granted the motions for summary judgment of the CHRO and Ms. Richardson's supervisors, and also granted the union's motion for summary judgment because "the union proceeded according to the collective bargaining agreement …and the record is devoid of any evidence of discrimination."[5] Ms. Richardson appealed the district court's decision to the Second Circuit.

The Second Circuit's Opinion

On appeal, Ms. Richardson argued that the CBA's election-of-remedies provision violates Title VII because it "constitute[d] a prima facie case of forbidden retaliation" and reflected a "retaliatory policy."[6] The Court of Appeals disagreed, holding that the election-of-remedies provision does not constitute actionable retaliation under Title VII. Analyzing the election-of-remedies provision in the CBA, the Second Circuit first held that it did not violate the rule of set out in *Alexander v. Gardner-Denver Co.*[7]

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The court explained that the union had not prospectively waived any of Ms. Richardson's Title VII rights. Ms. Richardson was free to file a charge with the EEOC and pursue a Title VII action in federal court and she had done both. She simply had to choose whether to pursue those avenues or an arbitration under the CBA.

The court found the provision to be a "rather sensible outcome of the collective bargaining process": the employer may not wish to simultaneously defend against a legal action and prepare for an arbitration on the same discrimination claim and the union may want to "deploy its scarce resources selectively."[8]

The appeals court then ruled that the election-of-remedies provision did not violate Title VII's antiretaliation provision. The court explained that "to establish a prima facie case of retaliation, an employee must show (1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action."

Relying upon its prior decision in *United States v. N.Y. City Transit Authority (NYC Transit)*,[9] the Second Circuit reasoned that Ms. Richardson failed to make a prima facie showing of an adverse employment action because, in the eyes of the court, the election-of-remedies provision qualified as a "reasonable defensive measure." Under *NYC Transit,* reasonable defensive measures do not violate the antiretaliation provision of Title VII, even if they are adverse to the charging employee and result in differential treatment, because they serve "essential purposes" and have nothing to do with retaliation, malice, or discrimination.

The *Richardson* opinion does not provide an extensive analysis of what constitutes such "essential purposes." The court did, however, find that the election-of-remedies provision in the CBA serves the type of "essential purposes" considered in *NYC Transit* because it "avoided parallel and duplicative proceedings…in the two fora maintained by the employer for adjudicating claims of discrimination without affecting a complainant's work, working conditions, or compensation."[10] The court further noted that the election-of-remedies provision did not foreclose avenues of relief such as the right to pursue claims in federal court or with the EEOC; "[i]t only requires that the employee make a concrete choice, at a specific time, between filing a state claim with the CHRO and having the union pursue his or her grievance in arbitration."[11]

Ms. Richardson attempted to distinguish *NYC Transit* on the ground that she had "a contractual or other entitlement to 'internal claims-handling procedures.'"[12] The appeals court rejected this contention because, pursuant to the CBA, "[Ms.] Richardson has no contractual right to internal arbitration if she has filed a charge with the CHRO." Moreover, the union had no obligation to pursue arbitration once Ms. Richardson filed her charge with the CHRO; "indeed, it was contractually obligated to desist." The court noted that "it would have been futile for the union to continue to arbitrate because the employer was relieved of its contractual obligation to arbitrate once [Ms.] Richardson filed her claim….We cannot conclude that the union's refusal to persist in a futile act, where the futility is attributable entirely to an employer's reasonable defensive measures, constituted an adverse employment action."[13]

A collective bargaining agreement requiring an employee to choose between arbitrating a grievance or filing a charge with a government agency as a prerequisite to a lawsuit is not retaliation in violation of Title VII of the federal Civil Rights Act.

The court also clarified its prior opinion in *Johnson v. Palma*.[14] The Second Circuit acknowledged that it decided in *Palma* that "a union's refusal to proceed with the grievance process constituted an adverse employment action, even though the employer…had a policy of discontinuing internal grievance proceedings once an employee filed a charge with the state antidiscrimination agency."[15]

The court explained that the underlying assumption in *Palma*—that the employer's policy violated the antiretaliation provision of Title VII—was no longer viable in light of *NYC Transit.* The court further pointed out that in *NYC Transit* it interpreted *Palma* as "holding that a union's abandonment of a grievance that the union has a contractual responsibility to pursue on the employee's behalf amounts to an adverse employment action."[16]

Finally, the court rejected Ms. Richardson's reliance on the Seventh Circuit decision in *EEOC v. Board of Governors*,[17] which held that a "collective bargaining agreement may not provide that grievances will proceed to arbitration only if the employee refrains from participating in protected activity under the [Age Discrimination in Employment Act]."[18] According to the Second Circuit, the *Board of Governors* decision "assumes, without explanation, that an employer's decision to withdraw from arbitration constitutes an adverse employment action, even though the language of the CBA explicitly authorizes such action…*NYC Transit* does not permit [courts in the Second Circuit] to make a similar assumption."[19]

More to Come

The Second Circuit in *Richardson* made clear that it is willing to take a different approach from other circuits. The *Richardson* court outright rejects the Seventh Circuit's ruling in *Board of Governors* as well as the EEOC's position. Moreover, although the Second Circuit in *Richardson* essentially turned away from its prior holding in *Palma*, it continues to adhere to its decision in *Pyett*. The defendants in *Pyett* have successfully sought review of the decision by the U.S. Supreme Court.[20] The *Richardson* opinion, which has created a conflict in the circuits and with the federal EEOC, is also independently certworthy. The Supreme Court's decisions should, in the end, bring clarity to this important area of law.

1. — F.3d —, 2008 WL 2630055 (2d Cir. July 7, 2008).
2. 128 S.Ct. 1223 (Feb. 19, 2008) (No. 07-581).
3. 2008 WL 2630055, at *1.
4. 2008 WL 2630055, at *2 (quoting the CBA Article 14, §10(a)(2)).
5. Id. at *3.
6. Id. at *5.
7. 415 U.S. 36 (1974).
8. 2008 WL 2630055, at *6.
9. 97 F.3d 672 (2d Cir. 1996).
10. 2008 WL 2630055, at *7.
11. Id. at *7.
12. Id. (quoting Appellant's Brief. at 7).
13. Id. at *8.
14. 931 F.2d 203 (2d Cir. 1991).
15. 2008 WL 2630055, at *8 (internal citation and quotation omitted).
16. Id. at *8 (quoting *NYC Transit*, 97 F.3d at 678).
17. 957 F.2d 424 (7th Cir. 1992).
18. 2008 WL 26030055, at *8 (quoting *Board of Governors*, 957 F.2d at 431).
19. Id. at * 9.
20. 128 S.Ct. 1223.