



# THE KZR QUARTERLY REPORT FROM COUNSEL ON LABOR & EMPLOYMENT LAW

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### Corporate Campaigns: Is There a Legal Remedy for the Company?

Since the early 1980s, unions have used “corporate campaigns” as the economic weapon of last resort in major labor disputes. Cintas Corporation, the largest uniform supplier in North America, was the target of such a campaign initiated by UNITE HERE, Change to Win, and the Teamsters, who were trying to organize Cintas locations by pressuring Cintas to agree to card check recognition, a procedure that would allow the unions to avoid National Labor Relations Board elections and obtain recognition at Cintas locations based on a card check. Cintas responded with a suit under the Racketeer Influenced and Corrupt Organizations (“RICO”) Act, claiming that the unions had falsely portrayed Cintas as an anti-union company which harasses and fires employees who seek to organize and as a racist and sexist company; that the unions sent disparaging and misleading information to Cintas shareholders, potential investors and stock analysts, with the intent of driving down the price of Cintas stock and causing customers to stop doing business with Cintas, which, according to the complaint, actually occurred.

The primary issue in this case was whether these kinds of claims were actionable as a matter of law. The federal district court found that they were not and dismissed the complaint. *Cintas Corp v. UNITE HERE, et al.*, 601 F. Supp. 2d 571 (S.D.N.Y., 2009). That decision was affirmed (in an unpublished opinion) by the court of appeals (DLR, 12/11/09, 2d Circuit).

Without attempting to summarize all of the elements of a RICO claim, certain aspects of the district court’s decision illustrate how that court viewed the union’s activities. For example, RICO claims require at least two acts of “racketeering,” which Cintas claimed occurred when the unions attempted to extort property (a card check agreement) through fear of economic loss. The court concluded that a card check agreement provided at least some value to Cintas and that Cintas had no right to operate free from criticism and union pressure which was largely protected constitutionally.

Cintas fared no better on its claim of trademark infringement which, among other things, requires that Cintas show that the unions used the Cintas trademark in a manner that caused confusion as to association of Cintas with the person using their trademark (the unions). The court noted that there was no confusion in this instance since the unions were not in competition with Cintas, did not associate themselves with Cintas and lacked the bad faith required for trademark infringement since they were simply seeking to further their own legitimate objectives by criticizing Cintas’ practices.

The lesson one draws from this case is the difficulty—perhaps the impossibility—of using RICO to restrict corporate campaigns. Although the court did not emphasize it, the fact is that most of the allegedly unlawful actions that the unions used against Cintas were protected under the National Labor Relations Act which restricts union actions like picketing and striking for certain objectives but grants broad leeway to unions to achieve their objectives through publicity and free speech, which is essentially what the unions were doing in this case, even if the effect of that speech was harmful to Cintas.

## Title VII Developments on Retaliation, Harassment and Timeliness

### 1. Retaliation: What Must a Plaintiff Prove?

In 2006, the Supreme Court established the criteria to be applied in determining whether a claim of employment retaliation can be sustained. Specifically, it held that “retaliation is unlawful when the retaliatory acts were harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Burlington N. & Sante Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). The Supreme Court’s criteria were applied in a recent case decided by the Second Circuit Court of Appeals in New York, *Hicks, et al. v. Baines*, 593 F.3d 159 (2d Cir. 2010). This case, like the cases discussed below, appears to turn on somewhat technical issues, but these issues play an important role in the resolution of the parties’ substantive rights.

In the *Hicks* case, the plaintiff, White, claimed that his supervisor, Baines, retaliated against him because White had participated in an internal company investigation which resulted in disciplinary action against Baines. The Second Circuit’s decision is informative for two reasons—it explains what the plaintiff must prove in a retaliation case and also what kind of evidence the plaintiff must adduce to defeat a motion for summary judgment.

As to what a plaintiff must prove, the Court notes that the plaintiff need not show that the retaliator’s motive was solely or even predominantly the cause of the adverse action which plaintiff suffered; it is enough to establish that retaliation “played a part” in the retaliator’s actions. The Court noted that the protection against retaliation is actually broader than the protection against discrimination because, in a discrimination case, the plaintiff must show that the employer’s actions affected the plaintiff’s terms and conditions of employment, not just that they were sufficient to dissuade a reasonable worker from supporting a charge of discrimination (by, in this case, participating in an employment investigation). Nonetheless, even in a retaliation case, the plaintiff must show that he suffered a “material adversity”; in other words, “petty slights or minor annoyances” do not constitute actionable retaliation.

What this case also makes clear is that in opposing a defendant’s motion for summary judgment (which is a motion made to dismiss a case before trial), the plaintiff cannot prevail simply by repeating the claims of his complaint or with summary and unsubstantiated recitations. For example, White claimed that Baines retaliated against him by compromising the security of White’s workplace, which could only have been done by “someone” who had the security codes and keys to the facility, which Baines did. The Court found that this claim was insufficient to create a triable issue because White offered no evidence to show that Baines was the only person who had the keys and codes and, therefore, White’s claim against Baines was “speculation.” Similarly, White claimed that Baines referred to him as “Hick.” But the Court found this claim also to be insufficient because White offered no evidence to show that Baines’ use of the word “Hick” was “retaliatory,” in other words, that Baines began using that word in response to White’s participation in the employment investigation.

This case is instructive in two different ways. It shows that the legal standard of a plaintiff’s proof in a retaliation case is lower than in a typical discrimination case but it reaffirms that to get his case to trial, the plaintiff must produce evidence supporting his claim, not just conclusory or unsubstantiated allegations.

## 2. Female/Male Harassment, Retaliation and Statute of Limitations

Another recent court of appeals decision addresses the issues of female harassment of a male, statute of limitations, and retaliation. *Turner v. The Saloon, Ltd.*, 595 F.3d 379 (7<sup>th</sup> Cir. 2010). In this case, the plaintiff, Turner, a male, claimed that his manager, Lake, a female, sexually harassed him through a series of sexually inappropriate statements and actions and also that he was subsequently fired (retaliation) for complaining about Lake's harassment. The lower court dismissed the harassment charge finding that virtually all of the alleged acts of harassment occurred outside of the statute of limitations period. It also dismissed the retaliation claim.

The court of appeals reversed on both counts. As to the harassment claim, the court noted that the statute of limitations applies differently depending on whether the plaintiff is asserting a claim for discrete acts of discrimination or a hostile work environment claim. In the former situation, the statute of limitations prevents recovery for discrete acts that occur outside the statutory time period. In contrast, a hostile environment claim requires analysis of a chain of events, so that this kind of action will be timely if any of the material events occurred within the statutory time period. The court found that the lower court had misconstrued the nature of Turner's claim by treating it as a series of inappropriate acts rather than as a hostile environment claim. Because one of the alleged hostile acts occurred inside the limitations period, Turner's hostile environment claim was held to be timely.

The court noted that this was the atypical case of a male allegedly being harassed by a female. (Actually, EEOC statistics indicate that these kind of claims are being asserted much more frequently than in the past.) Referring to a different Circuit's opinion, the Seventh Circuit Court of Appeals held that the standards for discrimination are the same regardless of which sex is doing the harassing. Like the Fifth Circuit, this Court found "it helpful to 'hypothetically transpose the sexes of the parties in this case'", and concluded that if "Lake were male and Turner female, and the allegations were similar, there would be no doubt that the case would survive summary judgment."

Turner did not fare as well with his retaliation claim which essentially alleged that he was fired because he had complained about Lake's harassment a year and a half before the termination. The Court found that the 18-month period between Turner's complaint against Lake and his subsequent discharge was "far too long" to withstand summary judgment. It noted that Lake gave Turner a positive review after Turner made his complaint and that he had received at least ten reprimands from management before he was fired, including a one-week suspension for exposing himself in the basement of the restaurant. Based on these facts, the Court concluded that no reasonable jury could have found that Turner's discharge was caused by his earlier complaint about Lake.

### **Employment Arbitration Agreements: Do Unconscionable Provisions Prevent Enforcement?**

Many employers have employment contracts with some or all of their employees under which the employee agrees that all employment-related disputes will be resolved through arbitration, thereby waiving the employee's right to bring such claims in court. There are many cases in which an employee seeks to avoid arbitration by arguing that the agreement is "oppressive" or "unconscionable." The Second Circuit Court of Appeals has issued a decision holding that "unconscionable" provisions in arbitration agreements may not prevent enforcement of the arbitration obligation if the employer waives the unconscionable clauses. *Ragone v. Atlantic Video*, 595 F.3d 115 (2d Cir. 2010).

In the Second Circuit, in order to set aside an arbitration agreement as "unconscionable," there must typically be a showing that the agreement is both procedurally and substantively unconscionable. An agreement will not be found procedurally unconscionable because it was offered on a "take it or leave it" basis, or because the employee did not read the agreement, or because the employee is not fluent in English or lacks a college degree. In exceptional cases, an arbitration agreement can be overturned based on substantive unconscionability alone. The test of unconscionability is whether the clause effectively prevents the employee from pursuing her statutory rights.

The Court strongly suggested that there were clauses in the arbitration agreement in this case which were unconscionable. For example, the employment agreement had a 90-day statute of limitations, which, if enforced, would have overridden the 300-day statute of limitations under Title VII. The agreement also provided that there could be no appeal from any arbitration award. Although appeals from arbitration awards can be asserted only on limited grounds, such as bias of the arbitrator or because the award fails to "draw its essence" from the contract, the clause in this case would deprive the employee of her statutory right to appeal even on these narrow but important grounds. Similarly, the employment agreement provided that the loser will pay the costs of arbitration. That provision conflicts directly with Title VII, under which costs can not be assessed against unsuccessful plaintiffs unless the plaintiff's claims were frivolous.

The most interesting part of this decision is the Court's conclusion that because the employer agreed to waive enforcement of these objectionable clauses, the balance of the agreement could be enforced. This result, according to the Court, is justified by the duty of courts to encourage and support arbitration.

The plaintiff made a strong argument that such a rule encourages employers to overreach in drafting arbitration clauses, knowing that they can later say "never mind" to clauses that should not have been included in the first place. This is not to say that such a strategy is appropriate, but rather that there are employers who, as a practical matter, can be expected to use such a strategy to broaden their contractual rights, even if those rights might not be enforceable.

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