Charge-Barring Agreements Retaliatory?

By Trent A. Howell

The EEOC for some time has viewed an employee's agreement to refrain from filing a charge of discrimination as void and, if sought by the employer, a discrete act of retaliation. The Supreme Court recently broadened the definition of "retaliation" to include any "materially adverse" action by an employer that would "dissuade a reasonable employee from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Railway v. White*, 126 S. Ct. 2405 (2006). A subsequent decision by the Sixth Circuit may shed light on whether *Burlington* elevates a charge waiver to actionable retaliation, and warrants attention of counsel drafting severance agreements. *See EEOC v. Sundance Rehabilitation Corp.*, 466 F.3d 490, 499 (6th Cir. 2006).

The EEOC stance that charge-waiver agreements are retaliatory emanates from its view that these agreements violate public policy. *See* Enforcement Guidance on Non-Waivable Employee Rights, EEOC Notice 915.002 (Apr. 10, 1997). The rationale is that private litigants may compromise their own "claims," or private rights of recovery, but not the law enforcement agency's ability to learn of and investigate violations of law. As more than a pre-litigation step in the employee's private remedy, the purpose of a "charge" (the EEOC urges, its "primary purpose") is to notify the agency of potential violations, so that it may assess where broader action is necessary to "vindicate the public interest in preventing employment discrimination." Thus, a charge waiver undermines the public goal, as expressed in the discrimination statutes, of not only remedying but *eliminating* discrimination.

In this view, the EEOC is not alone. Its Guidance issued in reliance upon court decisions that the right to file a charge is non-waivable. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (individual who signs an agreement to submit an employment discrimination claim to arbitration remains free to file a charge with EEOC); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987) (invalidating former employee's promise not to file a charge with EEOC because it "could impede EEOC enforcement of the civil rights laws" and is void as against public policy); *EEOC v. U.S. Steel Corp.*, 671 F. Supp. 351, 357-59 (W.D. Pa. 1987) (invalidating as contrary to public policy a retirement plan provision that conditioned higher benefits on retiree's promise not to file charges with EEOC). And many circuits have followed on this narrow issue.

But the Guidance had further asserted: "Agreements extracting such promises from employees may also amount to *separate and discrete violations of the anti-retaliation provisions of the civil rights statutes.*" As grounds, the EEOC cited the above, general policy arguments, as well as *EEOC v. Board of Governors*, 957 F.2d 424 (7th Cir.), *cert. denied*, 506 U.S. 906 (1992), for a finding of unlawful retaliation in a collective bargaining agreement that allowed termination of an administrative grievance proceeding upon the filing of a charge with EEOC. Thus, even before *Burlington*, the EEOC had instructed field personnel that "a cause determination should be issued" if a

charging party has been required to relinquish his or her right to file a charge … in a commission investigation, hearing, or proceeding."

In *EEOC v. Sundance Rehabilitation Corp.*, the Sixth Circuit rejected at least one extension of this logic. In *Sundance*, the employer initiated a reduction in force. While not otherwise owed, severance was offered to an employee, Salsbury, in a written agreement that she not "institute, commence, prosecute or otherwise pursue any proceeding, action, complaint, claim, charge, or grievance against the Company…" *Id.* at 493. Salsbury rejected the agreement and filed a charge of discrimination/retaliation.

The EEOC filed suit on Salsbury's behalf, arguing that the provision was "facially retaliatory" as a "preemptive strike against future protected activity." *Id.* at 497. Reiterating the above concerns, the Sixth Circuit hinted it might agree with other courts that prohibitions on filing a charge with the EEOC are void and unenforceable as against public policy. *Id.* at 498. And, "[i]f so, SunDance would be unable to recover if it attempted to sue under the Separation Agreement after paying severance to a former employee who had signed the Agreement and then filed a charge with the EEOC." *Id*. at 499. However, as the agreement was never entered, the court declined to rule on its enforceability. (On this basis, the Sixth Circuit also distinguished *EEOC v. Board of Governors*, *supra*, which it noted had involved an implemented and enforced agreement, rather than a proposal.) Instead, the narrow issue was whether proposal of the agreement was, alone, retaliation. And this the Court denied, observing as to the "facial retaliation" challenge, "the employees have not been deprived of anything by the offering of the Separation Agreement." *Id*. at 501. Likewise under a burden shifting analysis, the court found Salsbury suffered no adverse employment action when, after she objected to the charge-waiver clause, SunDance did not pay her severance benefits. *Id*. at 501-502 ("several courts have found that declining to pay severance or settlement amounts (not otherwise due) when an employee refuses to sign a waiver or release does not amount to an adverse employment action in the retaliation context.").

The quality of win this decision presents for employers remains to be seen. While *Burlington* was decided before *Sundance*, the latter had already been argued. And while the decision in *Sundance* may not have required expansive treatment of the Supreme Court's intervening decision, the Sixth Circuit, in fact, limited its comments on *Burlington* to the proceedings in the lower appellate courts. These factors, together with the limitations of ruling stated within *Sundance*, itself, suggest more test cases await to settle the question of whether a charge-barring agreement is actionable as retaliatory. Until then, employers' counsel will want to evaluate these and local authorities before drafting, entering or seeking to enforce severance and release agreements.

Trent A. Howell
Holland & Hart, LLP
Santa Fe, New Mexico
tahowell@hollandhart.com