COURT OF APPEALS AFFIRMS USE OF "TENDER BACK" RULE TO BLOCK LAWSUIT AFTER SETTLEMENT

By: Donald H. Scharg, Member, Workplace Law Practice

Employers, of all sizes, often use agreements providing severance payments to terminated employees in return for promises not to bring charges or lawsuits against the company. Even though the employer may have good grounds for terminating the employee, we often refer to the severance agreement as an insurance policy against any future litigation. The analogy to the insurance policy, however, only goes so far. When premium payments are stopped on an insurance policy, the policy is cancelled and ends. The recent unpublished Michigan Court of Appeals decision in *Yob v. Smith and Vanfossen* answers the question of what happens when severance payments prematurely stop.

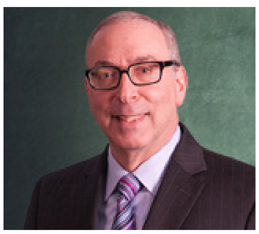
After her 2015 termination, Yob negotiated a severance agreement which included a release of all claims against the company, incorporated a non-competition clause, and provided for six months of salary continuation. Although Yob complied with the terms of the non-compete, she did not receive the full severance. The employer filed for bankruptcy before all the payments were made, and Yob only received $30,000 of the $72,000 owed to her. This meant that she did not receive her full severance, even after complying with terms of the non-competition agreement. Yob sued her former bosses, but the lawsuit ran smack into public policy concerns that settlement agreements remain binding and can only be rescinded in limited circumstances.

A party seeking to rescind a settlement agreement must overcome two hurdles: the tender back rule **and** a failure of substantial compliance with the agreement. The tender back rule prohibits a party from filing a lawsuit asserting previously released claims or repudiating a release unless all consideration received in the exchange for the release is repaid before or concurrently with the filing of the lawsuit. The only recognized exception in Michigan to the tender back rule involves "waiver of duty by the defendant" or "fraud in the execution release." This "seemingly harsh" tender back rule is "necessary in order to preserve the stability of release agreements."

The appellate court assumed the existence of a material breach of the severance agreement because Yob only received less than half of the agreed upon severance amount. This material breach would have been sufficient to justify the setting aside or rescinding of the severance agreement if Yob had been able to tender back the full consideration she received. She did not. Yob was barred from suing because she failed to tender back the $30,000 she did receive!

Yob was decided under Michigan law. The rules are different when releasing age discrimination claims under the federal Older Workers' Benefits Protection Act (OWBPA) and other federal law. According to the United States Supreme Court, employees who waive age claims under the federal Age Discrimination Employment Act are not required to tender back the consideration before filing a subsequent lawsuit or EEOC charge for age discrimination. Unsuspecting employers may immediately pay the severance before the seven day OWBPA revocation period ends, allowing the employee to keep the money, revoke the agreement, and then sue. Smart employers do not pay the severance until after the OWBPA revocation period expires.

Always remember that severance agreements are contracts. If you have any questions, contact a member of Bodman's Workplace Law Group.



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