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Lack of Specificity in Pleading and Failure to Follow a Grievance Procedure in A Collective Bargaining Agreement May Lead to the Dismissal of Claims

Gary Westberry v. State Operated School District of Newark and Superintendent Cami Anderson, United States District Court, District of New Jersey, Civ. Action No. 15-07998(JMV), U.S.D.J., May 19, 2017

By: Marie-Laurence Fabian

In a recent decision, the U.S. District Court dismissed certain claims brought by Gary Westberry ("Westberry"), an employee of the Newark School District (the "District") against the District based, in part, upon the Collective Bargaining Agreement ("CBA") to which Westberry was subject. Westberry's 10-count complaint arose out of decisions to reassign him to certain teaching and administrative positions in the District during a time when the then-superintendent was attempting to implement various education reforms. Westberry, who served as both a teacher and an administrator, alleged violations of the First Amendment, the Conscientious Employee Protection Act (CEPA), the Law Against Discrimination (LAD), and also brought breach of contract, breach of the covenant of good faith and fair dealing, promissory estoppel and civil conspiracy claims.

Claims of Discrimination Under the LAD

Westberry's claims of discrimination under the LAD were based primarily on race, sex and age. Although the court found he had plausibly pled the first three elements of a prima facie cause of action, i.e., he was in a protected class,

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he was otherwise qualified and performing the essential functions of the position, and he was terminated, he did not meet the fourth requirement that the employer sought similarly qualified individuals for the position. Although Westberry had alleged he "was replaced with a much younger Caucasian female," the Court held that he "failed to plausibly plead that he was replaced with a similarly qualified person and for which position he was allegedly replaced." *Gary Westberry v. State Operated School District of Newark and Superintendent Cami Anderson*, No. 15-07998(JMV), slip opinion at 12, May 19, 2017. Therefore, due to that lack of specificity, the court dismissed his claims under the LAD.

Although the court noted that Westberry could amend his complaint to address that deficiency, this was still a significant win for the employer early in the litigation.

The Grievance Procedure in the Collective Bargaining Agreement

The most significant aspect of the court's decision was the portion in which it dismissed four other counts because Westberry failed to arbitrate the claims as required by the grievance procedure in the CBA. Westberry conceded that although he was subject to the CBA, which set forth a grievance procedure that included arbitration as the last step, he had brought no grievances to arbitration. *Id.* at 14. However, he argued that he did not have to arbitrate his grievances "as a prerequisite to filing a lawsuit." *Id.*

The pertinent provision of the CBA stated:

In the event a grievance is unresolved under the provision of Step 2, Article III, the grievant or CASA [City Association of Supervisors and Administrators] may have the grievance submitted to final and binding arbitration within seven (7) days of receipt of the decision of the Superintendent, or his/her designee.

Id. The court determined that the word "may" in this provision meant that "the grievant is not required to go forward with the grievance process, but if he does, he must arbitrate." *Id.* In so holding, the court cited to law from around the country supporting that interpretation. Although Westberry argued that arbitration was merely a permissive step of the grievance procedure, the court held that "if that were the case, the arbitration clause would serve no real purpose because the parties could always voluntarily submit their dispute to arbitration." *Id.* at 16, (citing to *Owens-Brockway Glass Container*, 78 F. 3rd 875, 879 (4th Cir. 1996)). Rather, the only options for a grievant subject to the CBA were to submit the grievance to arbitration or to abandon it. As Westberry had not submitted a grievance to arbitration, the court dismissed his claims of breach of contract, breach of the covenant of good faith and fair dealing, promissory estoppel and civil conspiracy "for failing to exhaust the CBA's grievance procedure." *Id.* Although these claims were also dismissed "without prejudice," grievance procedures typically have tight time restrictions for filing claims and moving through the steps, which may have expired, thereby precluding these claims from going forward.

Takeaways

Employers who are in the process of collective bargaining should make sure to negotiate a grievance procedure with tight timelines for bringing claims and a provision like the one in *Westberry*, which requires a grievant to either submit a claim to arbitration or abandon it. Employers who already have a CBA, should review the grievance procedures carefully. If faced with a multi-count complaint from an employee subject to a CBA, a well-crafted

grievance clause might provide a good defense because if the employee did not utilize the procedure as required, they may have missed the boat for those claims. Care should likewise be taken in drafting individual contracts as well as employee handbooks, should employers opt to include grievance procedures in either.

Allegations of discrimination that do not include sufficient detail about the characteristics of the person who allegedly replaced the plaintiff can lead to an early dismissal of the claims.

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