BERTELSON LAW OFFICE, P.A.

Employment Law • Minneapolis, MN

Workplace News *Employment Law Litigation and Proactive Conflict Resolution Services for the Workplace* **Spring/Summer 2006**

"Just Cause" In Arbitration

Many employee advocates seek to avoid arbitration for their clients out of concerns for:

- limits to procedural protections;
- interference of civil rights; and
- a belief that it favors employers.

Nevertheless, arbitration may be a positive alternative to court in some cases.

In an arbitration case handled by Bertelson Law Office, the American Arbitration Association (AAA) held that the employer, Hubbard Broadcasting, Inc. d/b/a KSTP (KSTP), had to have "just cause" to terminate our client. Bertelson Law Office achieved a victory for our client despite a statement in our client's signed arbitration agreement that she was an "at will" employee and could be terminated at any time, for any reason, with or without cause or notice." However, because the agreement required her to resolve all disputes through arbitration, the arbitrator held that the employer had to have "just cause" to terminate her employment, stating, "To now conclude that [she] has no claim to relief in connection with her employment at the Company, absent a showing of a violation of law, would in my judgment render a portion of the arbitration clause contained in her contract, meaningless."

In its case against KSTP-TV, Bertelson Law Office relied on PaineWebber, Inc. vs. Argon, 49 F.3d 347 (8th Cir. 1995) to advocate a just cause requirement. In PaineWebber, the Eighth Circuit Court stated that when an employee is subject to mandatory arbitration by their employer, the employment relationship is no longer "at will" and the employer must have "just cause" to terminate the employee. The "just cause for termination" standard is typically more difficult for an employer to prove, particularly where the employee can show that the employer's reasons for terminating him or her are false or pretext.

Employees who are subject to mandatory arbitration agreement should remember to bring a wrongful discharge claim along with their other employment law claims.■

"In a just cause it is right to be confident." –Sophocles

Workplace News is only a general summary of the topics discussed here and is not a substitute for legal advice.

Bertelson Law Office

Over 15 years of tenacious, knowledgeable, effective and caring representation for employees.

We will be honored to work with you or your referrals.

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Findings From Unemployment Compensation Proceedings Admissible In Federal Court

Despite a state law against using testimony from unemployment hearings in, "any civil, administrative or contractual proceeding," U.S. District Court Judge Paul Magnuson ruled, it does not preclude such evidence in an action involving claims based on federal law.

In a case brought by Bertelson Law Office, U.S. District Court Judge Paul Magnuson ruled as part of a motion by the employer to limit evidence at trial that the state privilege law is only binding in actions where state law controls the merits of the claims at issue. Klyuch v. Freightmasters, Inc., Civil No. 03-6135 (PAM/RLE), memorandum and order dated February 9, 2005). The Court cited other cases which found that "a state legislature cannot purport to make binding pronouncements of law concerning what evidence may be privileged or otherwise admissible in a federal action involving claims based on federal law." Robertson v. Federal Express Corp., Filed No. 02-4161 (D.Minn. Aug. 20, 2004(Magnuson, J.)(citing Baldwin v. Rice, 144 F.R.D. 102, 106 (E.D. Cal. 1992).

Why does this matter?
Plaintiffs can use the employer's testimony from the unemployment hearing to show evidence of pretext, such as the employer's inconsistent explanations for termination.

Summary Judgment Denied
Bertelson Law Office defeated summary judgment on our client's race, religion, and national origin claims. In the case, the court ruled that Klyuch presented probative evidence to create an issue of fact that Freightmasters proffered reason for termination was pretext for discrimination based on Freightmasters' differing explanations for his termination, evidence of a discriminatory attitude against Russians and Jews, the lay-off of his son one day before his termination, and Klyuch's long tenure and favorable job performance. The court cited Erickson v. Farmland Indus., Inc., 271 F.3d 718, 727 (8th Cir. 2001), stating that "[e]vidence of pretext includes showing that the proffered explanation had no basis in fact; that it was not the employer's policy or practice to respond to such problems as it did; that similarly situated person received more favorable treatment; or that a discriminatory attitude existed in the workplace."■

Did You Know . . . ?

More than half of American office workers take 30 minutes or less for lunch eat day.
– USA Today, October 28, 2005

82% of Americans say they experience work-related stress.
– Dallas News.com, November 16, 2004

Women's participation in the labor force more than tripled over the past century.
– U.S. Department of Labor

In the last four years, workers' health premiums increased 50%, about $1,000 per family, three times the average increase in income.
– Families USA, September 2004.

Resources

You can learn more information about employment related issues by going to the websites www.workplacefairness.org and National Employment Lawyers Association Website, www.nela.org

Apply for unemployment compensation benefits online at www.uimn.org

U.S. Social Security Administration website at www.socialsecurity.gov.

For more information about workers' compensation benefits, go to the Minnesota Department of Labor and Industry website at www.doli.state.mn.us

Bertelson Law Office Offers New Services

In addition to offering proactive conflict resolution services for the workplace and employment law litigation services, we are now offering help with claims involving with workers compensation; unemployment; short- and long-term disability; and social security disability.

Over 15 years experience for employees
Bertelson Law Office is proud to celebrate over fifteen years of advocacy for employee rights. We genuinely care about our clients and appreciate the opportunity to work with you or someone you might refer.

Beth E. Bertelson, an 18 year practitioner with 15 years of employment law advocacy and recognized in *Law & Politics* and *Minneapolis St. Paul* Magazine as a "Super Lawyer" and Andrea Gesellchen, a can-do attorney with 4 years of employment law advocacy, are both ready to serve you.

At Bertelson Law Office we understand employment disputes, and we are committed to protecting our client's legal rights. We provide our clients with a combination of strong advocacy, extensive experience in employment law, and a commitment to preserving their integrity while pursuing legal goals.

As legal advocates practicing exclusively in employment law, we understand that employment conflicts can impact people physically, emotionally and financially.

We also understand that for companies, unresolved disputes generally fester into costly litigation, affecting employee morale and profits. In addition to assisting employees, we will partner with businesses to maintain a healthy and productive workplace through Mediation and Proactive Conflict Resolution Services.■

If you would like to subscribe to our newsletter, please sign up at our website:

http://www.bertelsonlaw.com.

The website www.workplacefairness.org provides more information related to employment issues.

Bertelson Law Office has always provided individuals with legal advice and representation in the following areas:

- **Harassment and discrimination**
- **Retaliation**
- **Accommodations for disabilities**
- **Veteran's Preference**
- **Employment contracts**
- **Non-compete agreements**
- **Separation and severance agreements**
- **Waivers and releases**
- **Non-payment of wages or commissions**
- **Unemployment claims**
- **Employment references**
- **Leaves of absences**
- **Unfair discipline, hiring and termination claims**
- **Workers compensation**

We will also provide services to help businesses maintain a healthy and productive workplace:

- **Mediation and proactive conflict resolution services**
- **Training: harassment, discrimination and recognition of conflict**
- **Audits: a universal review of policies, procedures and their effectiveness**
- **Investigations**
- **Job coaching**
- **Creation of policies and procedures**

An Employee's Right To File A Charge With The EEOC Cannot Be Prohibited

An employer cannot condition the receipt of severance payments on a former employee's agreement to waive his or her right to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). See EEOC v. Sundance Rehabilitation Corp., 328 F. Supp.2d 826 (N.D. Ohio 2004).

The court looked at other cases which distinguished between an individual waiving his or her right to take legal action versus the right to file a charge. The court reasoned that the two are not the same because the purpose of filing a charge is not to seek recovery from the employer but to inform the EEOC of possible discrimination.

What this means for employees

If you are an individual who lost your job and believe you were discriminated or retaliated against you can file a charge of discrimination with the EEOC even if you are receiving severance payments. If you file a charge, your employer cannot discontinue your payments or require you to pay back the payments it made to you. Please note that your agreement will likely restrict you from receiving any additional money if discrimination is found by the EEOC.

What this means for employers

If you are an employer, you cannot offer an individual a severance agreement with language prohibiting an employee from filing a charge with the EEOC. An employer cannot have any type of waiver agreement that would affect the EEOC's rights and responsibilities to enforce anti-discrimination laws. You can, however, require an employee to agree to waive his or her right to file a lawsuit as a condition to receiving severance benefits.■

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