



Alert on Legal and Judicial Developments

for Employers in Puerto Rico

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Developments in the Law

Federal minimum wage hike silences local attempts to increase the Puerto Rico minimum wage

Many of you had been attentive to efforts by the Puerto Rico legislature to increase the local minimum wage above the federal minimum levels. Thanks to the Federal Minimum Wage Act of 2007, the local legislature has been spared the task. The new law increases the federal minimum wage to \$7.25. The increase takes place in three stages, starting with an increase to \$5.85 next July 24, following with an increase to \$6.55 on that same date in the year 2008 and ending with a final increase to \$7.25 on that date the year 2009.

The federal minimum wage applies in Puerto Rico to employers covered by the Fair Labor Standards Act. Under Law No. 180 of June 27, 1998, non-FLSA employers are subject to 70% of that minimum. The tax relief provisions of the new federal law which would soften the impact of the increase for small and medium employers do not apply in Puerto Rico. The local legislature is currently considering several measures to provide some sort of economic cushion for local business to deal with the increase.

Federal law might catch up with Puerto Rico laws that address the effects of domestic violence in the workplace

The United States Senate has introduced a bill to grant thirty (30) days of leave to victims of domestic violence, to appear in court, seek legal assistance and pursue safety measures. Victims of domestic abuse would also be protected from

employment discrimination and would not forfeit unemployment benefits should the abuse lead them to quit their jobs.

Last year Puerto Rico enacted laws to protect domestic abuse victims from employment discrimination and to require the employer to take security measures and adopt a domestic violence protocol. See *Law No. 217 of September 29, 2006 and Law No. 271 of December 17 2006*. A bill that would allow such persons to receive unemployment benefits if they quit because of the abuse is now pending (P.C. 2134). It has already been approved by the House and Senate and was sent to the governor for his signature last June 12.

United States Supreme Court

Each paycheck issued pursuant to a discriminatory pay decision does not constitute a separate violation of Title VII and thus cannot revive an expired claim to question the pay decision itself

In a five to four decision the federal Supreme Court ruled that each pay setting decision is a "discrete act". Therefore, if an adverse pay setting decision has been motivated by gender, the period for an employee to challenge before the Equal Employment Opportunity Commission as illegal under Title VII runs from the date when the pay decision was made. Ledbetter v. Year & Tire Rubber Company, decided May 29, 2007. That period is of 180 days (or 300 days in deferral jurisdictions such as Puerto Rico). The Court rejected the argument that each paycheck issued pursuant to a discriminatory pay setting decision accrues a new cause of action under Title VII that triggers the filing period anew.

In Ledbetter, the employee was prevented from questioning her lower pay in comparison to male co-workers because the alleged discriminatory decisions which affected her pay were made before the 180-day EEOC filing period. She was not allowed to question those discriminatory pay decisions on the grounds that she was suffering with each new paycheck the effects of that past act of discrimination. The court said “[c]urrent effects alone cannot breathe life into prior, uncharged discrimination.” This result protects employers from defending against claims based on decisions made long ago where pertinent evidence related to the employer’s intent fades quickly with time.

Interestingly, the court suggested that a different result might have applied had the employee not abandoned her claim under the Equal Pay Act, under which each separate paycheck might constitute a separate violation.

First Circuit Court of Appeals

If your company has related entities in other countries, take heed!: a Puerto Rico corporation may be liable for discrimination against a Puerto Rico employee committed in Mexico by a related corporation.

In Torres Negron v. Merck & Company, decided May 23, 2007, the plaintiff, a Product Manager with ten years of tenure for a Puerto Rico corporation (Merck PR), was “temporarily” assigned to a related Mexico entity (Merck Mexico). Two years later she was dismissed because on at least thirteen occasions she admittedly used the company’s courier account with DHL to send personal packages without authorization and without paying for them herself. The decision was made by Merck PR on the basis of a uniform business ethics policy issued by its parent company, Merck & Co. The decision was communicated to the plaintiff by Merck Mexico, with approval from Merck & Co, which coordinated her relocation back to Puerto Rico.

Once in Puerto Rico the plaintiff went straight to court. She filed suit against Merck PR and others at the Puerto Rico Federal District Court, claiming that her Merck Mexico supervisor had subjected her to a hostile work environment on account of her gender and national origin. The lower court granted summary judgment in favor of Merck PR on the grounds that there was no basis on which to impose liability upon it for the conduct of Merck Mexico’s supervisor. The First Circuit Court of Appeals reversed.

The First Circuit held that the “single employer” doctrine might provide a basis to impose upon Merck PR liability for the events occurred at Mexico at the hands of Merck Mexico’s supervisor. Under that doctrine, two separate legal entities may be so interrelated that they constitute a single employer under Title VII. Employees of one of the entities are considered employees of the “single employer” entity and liability can be imposed not only on the nominal employer but on the other legal entity that comprises the “single employer”. The court used the following criteria to determine if Merck PR and Merck Mexico constituted a “single employer”:

- (1) common management,
- (2) interrelation of operations,
- (3) centralized control over labor relations and
- (4) common ownership.

The court noted that, though there was not enough evidence to analyze factor one, the remaining factors pointed towards application of the single employer doctrine. Merck PR and Merck Mexico performed the same functions, meeting factor two. The fourth factor was met because both entities were owned by Merck & Co. Finally, there was strong evidence for factor three, which the court deemed the most important. Both entities frequently interchanged employees, shared upper level human resources personnel and their employee policies were uniformly mandated by their parent company.

Further, both exercised control over the plaintiff's employment. For instance, during her Mexico assignment the plaintiff's day to day supervision was conducted almost exclusively by Merck Mexico. Yet, she kept constant contact with Merck PR. She was paid by Merck PR and had the benefits of a Merck PR employee assigned to work abroad. She came to Merck PR three times per year for sales meeting and on another occasion returned for a week for a temporary assignment. Finally, both companies used a unified expatriation system through their parent corporation.

Based on the above the First Circuit reversed the trial court's summary judgment against the discrimination claims and remanded the case for further procedures. The First Circuit acknowledged that not once did the plaintiff complain of harassment by her Mexico supervisor, even though she was aware of the company's policies against such conduct. The matter, however, was not discussed further because Merck PR never raised this as a defense and expressly limited its motion for summary judgment to the issue of whether there was a basis for employer liability.

The plaintiff had also alleged retaliation because of post-termination conduct by Merck PR, including failure to deposit her withheld federal and local income tax. The trial court dismissed that claim summarily as well, on two grounds. First, that it was based on post-termination acts by Merck PR that fell outside the scope of the laws that prohibit discrimination *in employment*. Second, that Merck PR could not be liable for this omission because it had outsourced this tax function to its accountants.

The First Circuit reversed. It directed the trial court to re-examine the first ground for dismissal in light of the recent federal Supreme Court decision in Burlington Northern & Santa Fe Railway Co. v. White, 126 S.Ct. 2405 (2006). There the higher court concluded that the anti-retaliation provisions of Title VII do not

confine the actions and harms they forbid to those related to employment or that occur at the workplace. They cover any "materially adverse" employer action, meaning one that is harmful to the point that it could dissuade a reasonable worker or applicant from making or supporting a charge of discrimination.

The First Circuit also refused to uphold summary judgment of the retaliation claim on the second ground, stating that outsourcing an employer duty does not preclude employer liability if the duty is not performed.

Employers with operations across several countries should take heed of this decision, which makes an employer in Puerto Rico potentially liable for conduct which it may not have condoned and of which it might not even be aware. It should also note that the retaliation arena has changed so that its post-termination conduct could ground a claim for Title VII retaliation.

Is a Puerto Rico court friendlier than a federal court when an employer asserts just cause for termination as a defense against a claim of discriminatory animus? The answer to this question might vary depending on whether the just cause is based on another federal law.

Anti-Union Animus v. Performance

In Miranda Ayala v. Hospital San Pablo, an unpublished decision issued March 29, 2007, the Puerto Rico Supreme Court found just cause to terminate an employee under local Law No. 80 of May 30, 1976, because he stole a case of beer forgotten by his employer (a hospital) in a storage room. The majority found it unnecessary to consider whether the theft was used as pretext to cover anti-union animus because the employee admitted to the theft, which is dishonest conduct no matter how petty.

The First Circuit Court of Appeals just issued a decision that seems to trump the local court's

analysis in Miranda. In Hospital Cristo Redentor, Inc. v. National Labor Relations Board, May 30, 2007, the employer (another hospital) terminated a registered nurse after a prolonged pattern of progressive discipline. The hospital hoped this evident pattern would provide just cause under Law No. 80 and thus negate a claim of anti-union discrimination under the federal National Labor Relations Act. The federal court cut these hopes short. It made it clear that “supposed” compliance with Law No. 80 is not a defense against enforcement of an unfair labor practice decision and order by the National Labor Relations Board.

The disciplinary history was long, but the court found quarrel with the hospital’s assessment of the disciplinary implications of most of the incidents. For instance, the court found:

- that the hospital’s first attempts to discipline the plaintiff for “attitude problems” suspiciously began right after he was named union delegate;
- that the hospital’s objections to the plaintiff’s tendency to complain about working conditions in front of patients and co-workers was greater because he was a union “leader”;
- that though the hospital found fault with the plaintiff when he twice left the emergency room with the key to the narcotics cabinet (resulting in delayed emergency treatment to two patients) it was a minor fault justified by the hospital’s serious understaffing;
- that in telling a mother at the emergency room that her unconscious daughter had likely tried to commit suicide the plaintiff (who is not a doctor and cannot diagnose) did not disclose any confidential information which justified the hospital’s claim that his conduct violated its privacy policy;
- that the plaintiff’s use of the emergency room’s speaker system to say “there is a lot of work, I am the only one working

and nobody is helping me” was not an insult to co-workers (or an alarming note for patients) but simply excusable frustration at the severely understaffed emergency room;

- that the hospital could not try to justify the plaintiff’s discharge on his admitted failure to follow formal procedures for correcting a mistake in a patient’s record (which mistake resulted in the administration of the incorrect dosage of medication to a patient by a nurse which the plaintiff supervised) because that was an “after the fact justification” for his termination which, even though it had been the subject of formal discipline when it happened, was not one of the three incidents listed in the termination letter...

In spite of this record (and more) the court disbelieved that the hospital would have terminated the plaintiff absent his union activities:

- because of the timing of the first incident of discipline,
- because the plaintiff’s supervisor stated to him once that he was always in trouble and would never be a supervisor because of his union activities,
- because the plaintiff’s supervisor compared the union to a Satanic sect,
- because on one occasion the hospital tried to dismiss the plaintiff on false grounds (the alleged incident occurred on a date when the plaintiff was absent) and
- because the hospital’s human resources director stated that the plaintiff’s attitude could not be tolerated, especially because he was the union delegate...

The result in Hospital Cristo Redentor suggests that employer’s should be careful when drafting termination letters. In this case the hospital listed only three reasons for termination in its letter, even though it had a long history of disciplinary

incidents to choose from. The court bound the employer to that list, excluding from its analysis the other incidents as an after-call. Finally, the case suggests that management should be careful about having heightened expectations from a union delegate. It is common sense that leaders are expected to preach by example so that misconduct is deemed more serious when it comes from a leader, such as a union delegate. The court, however, found said heightened expectations to be proof that this employee would not have been terminated but for his union activities.

The seemingly disparate results in Miranda and Hospital Cristo Redentor suggest that the local court *might* be a more favorable forum to the employer who asserts just cause as the absolute defense against a charge of discriminatory termination. Local court *might* be more likely to determine first whether there was just cause for termination and only if it answers that question in the negative go into the illegal animus question. Nevertheless, if the just cause defense rests on another federally protected interest (rather than simply on performance), a federal court might not be a bad forum after all, as shown by the next case.

Gender discrimination v. sexual harassment

In Hoyos v. Telecorp Communications, Decided May 18, 2007, a subordinate filed an internal sexual harassment complaint against her supervisor, the plaintiff. The employer did everything it could to remove the subordinate from the plaintiff's direct supervision, including restructuring the area and instructing the supervisor to remain away from the subordinate during a sales and marketing convention held at a local hotel held three months after her accusations. Six months after the accusations, however, there was another convention. The plaintiff approached the subordinate's booth, making her feel very uncomfortable and provoking a written complaint from her. The company terminated the plaintiff immediately,

for creating a situation of vulnerability both for the company and himself and for exercising bad judgment. The plaintiff sued, alleging he was terminated because of his gender (Title VII) and without just cause (PR Law No. 80). He alleged that he was never instructed to remain away from the subordinate at the second convention.

The First Circuit upheld summary judgment in favor of the employer. Applying local Law No. 100,¹ the First Circuit held that the plaintiff failed to show lack of just cause² or to prove discriminatory animus. It stated: "Hoyos was not a child requiring explicit instructions to stay away from [the subordinate] on specific occasions." Even if he disagreed that he was to stay away from the subordinate he was required to abide by the company's decision or face termination. The court further stated that "separating a low level employee from a supervisor she has accused of sexual harassment is a legitimate business related action."

Release granted in exchange for increased severance benefits is valid even if it was executed in a hostile work environment

In Caban Hernandez v. Philip Morris USA, decided May 10, 2007 the Federal Circuit Court of Appeals for the First Circuit analyzed the factors that make a release of discrimination claims valid under federal and local law. Three employees were laid off when a corporate reorganization eliminated their jobs and they failed to qualify for new available position because of deficient English language skills. They accepted severance benefits in exchange of a release from all claims in favor of their employer. Eleven months later they filed suit in Puerto Rico federal court alleging national origin discrimination and hostile work environment against Spanish speaking employees. The

¹ The plaintiff did not invoke federal Title VII and the court did not make the corresponding analysis.

² To trigger the local law's presumption of discrimination a plaintiff has to prove lack of just cause.

court granted summary judgment in favor of the employer on the grounds that the release prevented the lawsuit. The plaintiffs appealed, alleging that the release was confusing and that they signed under coercion resulting from the discriminatory environment. The First Circuit Court of Appeals rejected both arguments and affirmed the dismissal.

The First Circuit reiterated that releases of Title VII claims are valid as long as they are “knowing and voluntary”. This is determined in light of six non-exclusive criteria known as “*Smart* factors” (from the name of the case which originally listed them):

- (1) The plaintiff’s education, business experience and sophistication,
- (2) the parties’ roles in deciding the final terms of the agreement,
- (3) the agreement’s clarity,
- (4) the amount of time available for the plaintiff to study the release before acting on it,
- (5) whether the plaintiff had independent advise when signing it and
- (6) the nature of the consideration.

According to the First Circuit, only factor two (2) weighed against the validity of the release, because it had been unilaterally prepared by the employer, but all the others weighed in its favor: (1) the plaintiffs all had long work experiences (thirty, twenty five and fifteen years respectively), held supervisory positions and had “some” educational instruction beyond high school, (3) the release was provided in both Spanish and English and was direct and to the point, waiving “any claims, known or unknown, promises, causes of action or similar rights” arising “under any guise of many different laws...”; (4) the employees were given forty five days to consider it and none exercised its seven-day revocation right; (5) all employees consulted with counsel before signing the release and (6) all were given what the court deemed to be

“substantial” consideration (three months of salary as well as other benefits including career transition services).

Applying Article 1217 of the Puerto Rico Civil Code and its case law, the First Circuit upheld on similar grounds the validity of the release of local claims.

The First Circuit court rejected the argument that the alleged hostile work environment that allegedly prevailed when the plaintiffs signed the release constituted coercion that invalidated their consent. The court reasoned that the plaintiffs were going to lose their jobs regardless of whether they signed the release or not. The issue might have been different if they were to choose between remaining in their jobs in a hostile work environment or leaving with a release.

The First Circuit also dismissed the claims by the employees’ wives because they were “derivative” from their husbands’. That is, the wives’ claims could only survive if their husbands’ did, which was not the case here. This is good news because oftentimes employers fail to ask spouses to sign the employee’s release. In those cases, the release will still protect the employer against a claim by a spouse as long as it is valid against the employee.

Closing Remarks

I hope that the information provided in this bulletin will be of interest to you. This bulletin is not intended as legal advice but as an alert for situations when seeking such advice might be to your business advantage. Please feel free to contact us should you wish to discuss these or any other employment matters further.