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THE FESTIVAL OF NINE LESSONS AND QUESTIONS[1]
Kruchowski v. Weyerhaeuser Co.,
___ F.3d ___, 2006 U.S. App. LEXIS 10887 (10th Cir. 2006)

Prepared for May 25, 2006 Meeting of the CBA Labor and Employment Law Section
Last Rev. May 22, 2006

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1. The courts apply the OWBPA's requirements strictly. 29 U.S.C. 626; 29 CFR 1625.22; *Green v. Sears, Roebuck & Co.*, 298 F.Supp.2d 1102 (D. Colo. 2003); *Thomforde v. International Business Machines Corp.*, 406 F.3d 500 (8th Cir. 2005); *Thiessen v. General Electric Capital Corp.,* 232 F.Supp.2d 1230 (D. Kan. 2002). *Cf., Mesaros v. FirstEnergy Corp.*, 2005 U.S.Dist.LEXIS 22558 (N.D. Ohio 2005).
   - The Eighth Circuit's decision in *Thomforde v. International Business Machines Corp.*, has received a substantial amount of media coverage. There, the court struck IBM's release for failure to have been written in a manner calculated to be understood by the employee signing the release.
   - Interestingly, just before this luncheon, the Eighth Circuit issued a decision in a case where the plaintiff made the same argument. *Parsons v. Pioneer Seed Hi-Bred International, Inc.*, ___ F.3d ___, 2006 U.S. App. LEXIS 12245 (8th Cir. 2006). But in *Parsons,* the Eighth Circuit rejected the analogy to *Thomforde* and found the release used by Pioneer Seed to have been clear enough. The Eighth Circuit quoted Pioneer Seed's release at length in *Parsons*.
2. In *Kruchowski*, the Tenth Circuit held that Weyerhaeuser had failed to inform the affected employees of the required information regarding the "decisional unit," quoting 29 CFR 1625.22(f)(3)(i)(B). "A 'decisional unit' is that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver," quoting *Kruchowski*, at *9, which in turn was quoting 29 CFR 1625.22(f)(3)(i)(B).

[1] The Festival of Nine Lessons and Carols was first held in 1918 by King's College, Cambridge, England. The annual event continues to be celebrated each Christmas Eve and can be heard in America on public radio. See, http://www.kings.cam.ac.uk/chapel/ninelessons/index.html.

- In reaching that ruling, the Tenth Circuit emphasized that Weyerhaeuser had told the employees one thing, but then in the lawsuit, said another.

  > "Defendant's Group Termination Notice notified plaintiffs that the 'decisional unit' was all salaried employees of defendant employed at the Valliant Containerboard [*10] Mill. Aplt. App. at 58. Defendant later, in responding to interrogatories, indicated the 'decisional unit' actually consisted of those salaried employees reporting to the Mill manager. Id. at 26-27. Fifteen employees at the Mill, who worked in human resources, information technology, and accounting/purchasing, did not report to the Mill manager. Thus, those fifteen employees, over ten percent of the employees at the Mill, were not part of the actual 'decisional unit,' although the Group Termination Notice indicated that they were included."

  Kruchowski, 2006 U.S. App. LEXIS 10887, at *9-*10.

  > <u>"Even defendant recognizes that there is a difference between the 'decisional unit' it identified to plaintiffs and the intended "decisional unit."</u> See Aplee. Supp. App. at 265 (stating that its interrogatory response was "only a slight clarification or slightly more detailed response" to what it characterized as clear information). Defendant, however, presented no evidence that plaintiffs either knew or should have known that the "decisional unit" was other than that specified in the information provided. The fact that the RIF notice came from the Mill manager is insufficient [*12] to prove plaintiffs knew that fifteen employees were not part of the 'decisional unit.'"

  Kruchowski, 2006 U.S. App. LEXIS 10887, at *11-*12 (emphasis added).

- Is *Kruchowski* limited by those facts? As the Tenth Circuit has emphasized in a number of prior cases on various topics, including pretext, it will strictly scrutinize a case when an employer materially changes its reasoning during litigation. Should *Kruchowski* be seen as an extension of that approach?

3. The concept of a *de minimis* violation of the OWBPA.

   - The *amici curiae* argued that the error, if any, was *de minimis* because the information had been provided elsewhere in the OWBPA packet. The Tenth Circuit rejected that argument.

     > "Two of the amici curiae characterize defendant's error in identifying the 'decisional unit' as de minimis, because the list of job titles and ages defendant appended to the Group Termination Notice actually represented the 'decisional unit.' An employer's responsibility to provide information regarding the 'decisional unit' and job titles and ages are two separate requirements. See 29 U.S.C. § 626(f)(1)(H)(i) & (ii). Defendant, a large company that should have been familiar with the OWBPA requirements, simply gave plaintiffs the wrong "decisional unit" information. <u>Under the circumstances</u>, we cannot say that that error was de minimis."

Kruchowski, 2006 U.S. App. LEXIS 10887, at *13 (emphasis added).

- Is that also limited by the facts in *Kruchowski*?

4. The "eligibility factors" issue.
    - An OWBPA packet must advise the employee of the "eligibility factors" for the severance program. 29 USC 626(f)(1)(H)(i).
    - The plaintiffs in *Kruchowski* argued, and the Tenth Circuit initially agreed in its original opinion, that means an employer must tell employees how it selected the employees for layoff.
        - On the other hand, one can argue it means that an employer must tell employees how it selected the employees, within those to be laid off, to receive a severance offer.
    - Upon rehearing, the Tenth Circuit entirely withdrew that portion of its decision. See, the final decision, cited above, and the Tenth Circuit's Order of May 2, 2006 ("The revised opinion omits any discussion of the eligibility factors issue.").
5. Reminder: The OWBPA's requirements are a threshold set of requirements for age releases. Failure to meet them renders the age-component of a release invalid. However, meeting them does not ensure that the age-component of a release is enforceable. The Tenth Circuit also imposes a "totality of the circumstances" test to gauge whether the release was knowing and voluntary. *Bennett v. Coors Brewing Co*., 189 F.3d 1221 (10th Cir. 1999); *Torrez v. Public Service Company of New Mexico, Inc.,* 908 F.2d 687 (10th Cir. 1990); *Anderson v. Lifeco Services Corp*., 881 F.Supp. 1500 (D.Colo. 1995).
    - In addition, the Tenth Circuit has said it will consider the affirmative defenses of fraud, duress, and mutual mistake of fact. See, *Bennett.*
6. Reminder: The issue in these cases is only whether the age-related component of a release is enforceable. The other components of a release are enforceable even if the release does not satisfy the OWBPA. If the plaintiff succeeds in having the age-related component invalidated, the rest of his or her claims are still barred (assuming the release is otherwise enforceable), and if the release provides for attorney fees, the employer is entitled to attorney fees incurred in successfully challenging those non-age components. *See, e.g., Bennett, supra.*
    - Tip: Plaintiffs should carefully consider their exposure before challenging employment releases. In addition to possible attorney fees, tender-back clauses are enforceable as to all but the age component of a release. *Oubre v. Entergy Operations, Inc.,* 522 U.S. 422 (1998); *Bennett*. The combination of being required to tender back severance plus exposure for attorney fees as to the non-age components should be carefully weighed before a plaintiff decides to expand its challenge to the non-age components of a release.
7. Failure to satisfy the OWBPA only renders the age-related component of a release unenforceable; it does not constitute a separate violation of the ADEA. *Whitehead v. Oklahoma Gas & Electric Co.*, 187 F.3d 1184 (10th Cir. 1999).
8. Appellate procedure: Panel rehearings versus rehearings *en banc* .

- Panel rehearings – Fed. R. App. 40 and 10th Cir. LR 40.
    - Panel rehearings are disfavored and available “only if a significant issue has been overlooked or misconstrued by the court.” 10th Cir. LR 40.1(A).
    - Caution: Do not ask for a panel hearing as a routine matter. 10th Cir. LR 40.1(B) provides that a request for panel hearing that is found to be “frivolous, vexatious, or filed for delay” may trigger sanctions, including sanctions personally against counsel, “up to $500.”
    - In *Kruchowski*, the Tenth Circuit did not delineate the reasons for its decision to grant a panel rehearing. But it appears from the court’s May 2, 2006 Order that the following factors played a part in its decision:
        - Two *amici curiae* joined in the petition.
        - The Tenth Circuit had reached an issue (the eligibility factors) that was highly controversial, strongly objected to by both Weyerhaeuser and the *amici,* and not necessary for its ultimate holding.
        - As explained, the Tenth Circuit ultimately withdrew all discussion of that issue (the eligibility factors) from its final decision. Although having done so, it still ruled against Weyerhaeuser.
- Rehearings *en banc* -- Fed. R. App. 35 and 10th Cir. LR 35
    - Rehearings *en banc* are disfavored and available only if (1) “necessary to secure or maintain uniformity of the court’s decisions” or (2) “the proceeding involves a question of exceptional importance.” 35(a)(1)-(2).
    - An example of the first is if the panel decision “conflicts with” Supreme Court precedent or even Tenth Circuit precedent. An example of the second is if the panel decision “conflicts with the authoritative decisions” of other Circuits. Fed. R. App. 35(b)(1)(A)-(B).
    - If a petition for rehearing *en banc* is granted, the judgment is automatically vacated, the mandate is stayed, and the case is restored to the docket, but “the panel decision is not vacated unless the court so orders.” 10th Cir. LR 35.6.
    - Rehearings *en banc* occur only upon vote of the “majority of the circuit judges who are in regular active service and who are not disqualified.” Fed. R. App.35(a).
        - The vote is triggered only if “a judge calls for a vote.” Fed. R. App.35(f).
        - In *Kruchowski*, the Tenth Circuit noted in its Order, dated May 2, 2006 (reproduced at the end of its final decision), that the petition for rehearing *en banc* was circulated to all of the active judges, none of whom voted for rehearing *en banc*.

9. Procedural question: Does an employer have to wait all the way through discovery before asserting a release in a motion for summary judgment?
    - FRCP 12(b) permits the trial court to consider matters outside of the complaint, by converting a motion to dismiss into a motion for summary judgment. See, *e.g.*, *Bradley v. TIAA-CREF,* 2005 U.S. Dist. LEXIS 24455 (S.D.N.Y. 2005).

- However, if a motion is converted, the trial court should permit all parties a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56," quoting FRCP 12(b).
    - And, under FRCP 56(f), the trial court may defer ruling on the motion until discovery is completed on the issues involved.