Monday, December 5, 2016 / Volume 108 / Number 232

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Western District case notes

By KEVIN M. HOGAN
AND SEAN C. MCPHEE
Daily Record Columnists

Recusal

In *Barnes v. Harling, et al.*, No. 10-CV-6164EAW (Oct. 12, 2016), plaintiff sought to recuse the District Judge based on allegations of bias and his disagreement with the judge's earlier decisions. The court noted first that, under 28 U.S.C. § 455, a federal judge must disqualify herself "in any proceeding in which [her] impartiality might reasonably be questioned," and/or "[where she] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . ." The court then denied the motion, ruling that plaintiff's claims of bias lacked any factual basis, and that his disagreement with the court's legal conclusions may be a proper grounds for appeal but not for recusal.

Motion to 'reconsider'

In *Davis, et al. v. 2192 Niagara Street, LLC, et al.*, No. 15-CV-429A(F) (Oct. 20, 2016), plaintiffs, who were banquet servers at defendants' restaurants, brought an action alleging violations of the Fair Labor Standards Act of 1938 and the New York Labor Law. After defendants moved to dismiss plaintiffs' first claim -- that defendants failed to disclose to their customers that certain mandatory charges were not gratuities and would not be shared with plaintiffs -- and the Magistrate Judge recommended that the motion be denied, defendants moved for reconsideration. The court began by observing that the Federal Rules do not recognize a motion for "reconsideration," and that such a motion would be construed as a motion to alter or amend the judgment under Rule 60(b).

The court then determined that defendants failed to support their motion by identifying any new evidence, intervening change of law, or need to correct any clear error or prevent manifest injustice, and therefore denied the motion. Although defendants had submitted an affidavit of a certified public accountant to support their motion, the court concluded the affidavit did not constitute new evidence, but instead concerned the correctness of the court's recommendation, which was a determination solely vested in the court.

As a result, the court struck the affidavit. The court concluded further that defendants' arguments in support of the reconsideration motion were essentially the same as their original arguments in support of their motion to dismiss. Having failed to point to any contrary law that was new or had been overlooked by the court, the motion for reconsideration was denied.

Subpoena for employment records

In *Moll v. Telesector Resources Group, Inc.*, No. 04-CV-0805S(Sr) (Oct. 19, 2016), plaintiff asserted claims against her former employer for, among other things, violations of the Equal Pay Act. Defendant later served plaintiff's current employer with a subpoena *duces tecum* seeking a copy of plaintiff's personnel file and records regarding compensation and employee benefits. Plaintiff moved to quash the subpoena on grounds that it was a fishing expedition designed to harass and intimidate her and the confidential information defendant sought was either duplicative of information already produced in discovery or irrelevant to her claims.

Defendant countered by arguing that the subpoena was necessary because plaintiff failed to produce sufficient documents to support the amount of damages she seeks for lost wages and benefits, and to evaluate whether plaintiff's potential earnings at her current employer are in fact lower than her earnings with defendant. Defendant also claimed that the absence of this information hampered the ability of its expert to formulate a reliable and accurate opinion regarding plaintiff's alleged damages, leaving it with no alternative but to seek the information from plaintiff's employer.

The court granted the motion and quashed the subpoena because, although the information was relevant to plaintiff's claim of damages, defendant could obtain the information from plaintiff through routine discovery. In the event it was requested and not provided, "the appropriate remedy is a motion to compel or preclude evidence," rather than serving a subpoena on plaintiff's employer, given "the direct negative effect that disclosure of disputes with past employers can have on present employment." Finally, the court noted that expert discovery had not yet been completed and defendant could depose plaintiff's expert regarding his or her calculation of plaintiff's damages.

Employment discrimination

In *Andrus v. Corning, Inc.*, No. 14-CV-6667-FPG (Sept. 26, 2016), plaintiff claimed that her employer subjected her to a hostile work environment based on a series of inappropriate sexual comments directed toward her by a co-worker. After discovery was completed, defendant moved for summary judgment on the ground that plaintiff failed to establish a *prima facie* case. The court first noted that, even where a work environment

Continued on next page

Continued from previous page

can properly be considered "hostile," the discriminatory conduct of a co-worker, as opposed to a supervisor, may only be imputed to the employer if the employer "either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."

And, although the record revealed approximately eight undisputed instances of discriminatory conduct directed at plaintiff by her co-worker, the court held that the conduct could not be imputed to defendant because it also was undisputed that the co-worker was not a supervisor, and defendant took prompt remedial action in response to plaintiff's complaints, including investigating the complaints, interviewing witnesses and terminating the co-worker's employment all within a period of 16 days. *As a result, plaintiff failed to establish a prima facie* case of hostile work environment and defendant's motion for summary judgment was granted.

Patent infringement

In *Steuben Foods, Inc. v. Nestle U.S.A., Inc.*, No. 13-CV-892EAW(JJM) (Oct. 7, 2016), plaintiff brought a patent infringement claim to which defendant raised the defense that it possessed certain statutory intervening rights under 35 U.S.C. § 307 that permitted it to continue to use the accused machine free and clear of plaintiffs' patents. Defendant argued that it purchased the machine before plaintiff added the subject claims to a prior patent through a re-examination application.

The court answered two questions that the parties had jointly submitted for determination in connection with defendant's motion for partial summary judgment on the statutory intervening right defense. First, the court concluded that a machine that is purchased before the re-examined claims are issued does not also have to be in existence before that issuance in order to establish a party's absolute intervening rights. A more recent Federal Circuit decision may have been to the contrary, but the court concluded that an earlier decision of the same court constituted binding precedent unless and until it was overturned *en banc* and, therefore, a binding purchase order for a product was sufficient to create absolute intervening rights at that time even if the product had not yet been produced.

On the other hand, the court also concluded that a purchased machine that was in existence before the re-examined claims issued, but was not present in the United States, was not sufficient to establish a party's absolute intervening rights under 35 U.S.C. § 307. Rather, the triggering act that gives rise to the intervening rights, whether a purchase agreement or the existence of a product, must take place within the United States.

Discovery sanctions

In *Scott-Iverson v. Independent Health Assoc., Inc.*, No. 13-CV-451V(F) (Oct. 12, 2016), an employment discrimination claim, the plaintiff moved to compel discovery from defendant. After the court denied that motion, it directed plaintiff to show cause why an award of defendant's attorneys' fees and costs in opposing the motion should not be awarded under Rule 37(a)(5)(B), having concluded that the prevailing party on a motion to compel may be entitled to an award of expenses, whether they were the moving party or the opposing party.

The court determined the plaintiff had not demonstrated that her motion was based on a genuine dispute or substantially justified, or that an award of defendant's expenses would be unjust, and observed that the test for "substantial justification" is objective reasonableness and not whether the party believed it was acting in good faith. Moreover, the court found that the reasons for its determination arose exclusively from decisions made by plaintiff's counsel, which required it to allocate those expenses solely to plaintiff's attorney as opposed to his client.

Class action attorneys' fees

In *In re Eastman Kodak ERISA Litigation*, No. 12-CV-6051L (Oct. 4, 2016), a class action that consolidated seven separately-filed ERISA cases, plaintiffs claimed that defendants breached their statutorily-mandated duties by imprudently managing and administering the Employees' Savings and Investment Plan. After the court denied defendants' motions to dismiss the complaint, the parties agreed to formal mediation and, following just one day of mediation, they reached an agreement to settle the case in its entirety. Thereafter, plaintiffs' counsel sought an award of attorneys' fees equal to 30 percent of the settlement's common fund.

In reviewing that request, the court first noted that ERISA provides the court with discretion to award attorneys' fees to either party, and found that an award of attorneys' fees in favor of the plaintiffs was appropriate. The court then turned to the question of whether the amount requested was reasonable, but determined it was "excessive" given the fact that the litigation activities were "relatively modest."

In addition, the expenditure of more than 2,200 hours of attorney time by counsel at six different firms with billing rates ranging up to $950 per hour exceeded what is reasonable, especially when considering the "troublingly 'top-heavy' distribution of labor" that "might better have been assigned to associates or paralegals." To address its concerns, the court ultimately imposed a "modest across-the-board reduction" and awarded plaintiffs' counsel attorneys' fees in the amount of 25 percentage of the common fund, or $2,425,000.

This article originally appeared in The Bulletin, the official publication of the Bar Association of Erie County. It is reprinted here with permission.

Kevin M. Hogan is a partner with Phillips Lytle LLP where he concentrates his practice in litigation, intellectual property and environmental law. He can be reached at khogan@phillipslytle.com. Sean C. McPhee is a partner with Phillips Lytle LLP where he focuses his practice on civil litigation, primarily in the area of commercial litigation. He can be reached at smcphee@phillipslytle.com.