UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12-1855

EMILIO MARTINO, Plaintiff-Appellant, v. WESTERN & SOUTHERN FINANCIAL GROUP, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Indiana Case No. 3:08-CV-308 Honorable Theresa L. Springmann United States District Judge

REPLY BRIEF OF PLAINTIFF-APPELLANT EMILIO MARTINO

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I. Martino's First Title VII Claim Should Not Be Barred by a Six-month Contractual Limitation Period Because Such a Contractual Provision Is Unreasonable, Unconscionable and Against Public Policy.

The Defendant has failed to come forward with any case law in the Seventh Circuit in which Western-Southern's six-month contractual limitation has been upheld under Indiana law to bar the filing of a Title VII lawsuit. As set forth below, this Court should find that such provisions are not enforceable.

Martino first met with Diane Moya, an investigator for the South Bend Human Rights Commission ("SBHRC"), on April 5, 2007. At that time, Martino was told he had plenty of time to file the charge of discrimination, as 300 days are allowed for the filing of a Title VII charge in Indiana, but that in any case, the charge would be filed within 180 days of termination to be sure it was timely filed. (R.18-2; Affidavit of Martino, ¶23). In addition, Moya informed Martino that he could not file a lawsuit on his Title VII claim until he received a right to sue letter from the EEOC. Moya further printed two documents from the EEOC's web site and gave these to Martino on April 5, 2007. (R.18-2; See Exhibits 2 to Martino Affidavit; also ¶22). The first document supplied to Martino, entitled "Filing a Charge of Employment Discrimination," provides the following instruction under the sub-heading, "What Are the Time Limits for Filing a Charge of Discrimination?":

> All laws enforced by EEOC, except the Equal Pay Act, require filing a charge with EEOC before a private lawsuit may be filed in court.

(See page 1 of Exhibit 2 to Martino Affidavit; R.18-2).

The second document, entitled "EEOC'S Charge Processing Procedures," provides the following response under the subheading, "When Can an Individual File an Employment Discrimination Lawsuit in Court?":

> A charging party may file a lawsuit within 90 days after receiving a notice of a "right to sue" from EEOC, as stated above.

(See page 2 of Exhibit 2 to Martino Affidavit; R.18-2). In addition, after he filed his charge, he received a form from the EEOC (Exhibit 3 to Martino Affidavit) stating that the purpose of filing the charge was to preserve his suit.

It would be unreasonable to expect a non-lawyer to understand that a contract limitation on the time required for filing a lawsuit could trump a federal law which he was made to understand prevented him from filing a lawsuit until he received a right to sue letter. Martino could not file a Title VII lawsuit without first filing the Charge with the EEOC (or its equivalent reporting agency); once he filed the Charge with the EEOC, he could not file a lawsuit until he received the right to sue letter, or so he was told and led to believe by the EEOC documents provided to him. Was he reasonably expected to ignore the law as it was explained to him and suspect that a private contract would supercede federal law? Or would it be more reasonable to expect that a non-lawyer would choose to follow filing requirements established by federal law and promoted by the EEOC?

The argument of whether Defendant's (non-mutual) six-month filing requirement is unreasonable under Indiana law with respect to Title VII is not yet decided in this circuit. In Cheek v. Western and Southern Life Insurance Company,

31 F.3d 497 (7th Cir. 1994), the Seventh Circuit did not find or rule that the six-month limitation barred the Title VII claims in that case. Rather, the Court of Appeals let stand the ruling that contract claims were barred by the six-month limitation and Title VII claims were barred because they were not part of the original charges. To be clear, neither the district court nor the Court of Appeals, in Cheek, considered whether Western-Southern's six-month limitation could bar a Title VII claim not filed in court within six-months of termination.

Likewise, in Taylor v. Western Southern Life Ins. Co., 966 F.2d 1188 (7th Cir. 1992), the Seventh Circuit did not consider whether the contractual limitation barred a Title VII claim. The Court held that under Illinois law the contractual limitation barred a §1981 claim and other contract claims, but let stand a lower ruling finding a violation of Title VII by Western-Southern. In Soltani v. Western & Southern Life Ins. Co., 258 F.3d 1038 (9th Cir. 2001), the Ninth Circuit considered whether the six-month contractual limitation was unconscionable in the context of a case that did not involve Title VII claims, and found that it did not, although it did find a ten day pre-suit notice provision in the same contract to be unconscionable.

In certain circumstances a court may declare an otherwise valid contract unenforceable if it contravenes the public policy of Indiana. Trotter v. Nelson, 684 N.E.2d 1150, 1152-53 (Ind.1997). Indiana courts have looked to the Constitution, the legislature, and the judiciary for explicit declarations of public policy. Id. In the absence of such a declaration, the courts look to whether it can be clearly shown that the agreement has a tendency to injure the public, or is against the public good, or is

inconsistent with sound policy and good morals as to the consideration or as to the thing to be done or not to be done. Id. The supreme court further noted that whether a contract is against public policy in a particular situation would be a question of law dependent on the circumstances of the particular case. Id. The Trotter court then acknowledged that laid forth the analysis for determining if a contract violated public policy:

> We categorized three situations where courts have refused to enforce private agreements on public policy grounds: '(i) agreements that contravene statute; (ii) agreements that clearly tend to injure the public in some way; and (iii) agreements that are otherwise contrary to the declared public policy of Indiana.' We further noted that, depending on the category, we must approach the analysis in different manners. If an agreement is in direct contravention of a statute, "then the court's responsibility is to declare the contract void." If, however, the agreement falls into the more amorphous category of "otherwise contrary to the declared public policy of Indiana," then the court must balance five relevant factors: (i) the nature of the subject matter of the contract; (ii) the strength of the public policy underlying the statute; (iii) the likelihood that refusal to enforce the bargain or term will further that policy; (iv) how serious or deserved would be the forfeiture suffered by the party attempting to enforce the bargain; and (v) the parties relative bargaining power and freedom to contract.

Id.

An agreement which makes it virtually impossible to pursue a private cause of action to remedy discrimination in violation of Title VII is injurious to the public. At a basic level, such a provision allows discrimination to occur with impunity. It also thwarts the function and purpose of having an administrative agency to investigate and settle claims. It deprives a real opportunity to settle disputes through conference, conciliation, and persuasion because the leverage of a lawsuit is

lost. It could be naively supposed that there will be voluntary compliance with Title VII even if exposure to suit does not exist, but the reality is that without economic consequences of violating Title VII at risk in a lawsuit, voluntary compliance is less likely. Finally, there is the spring-gun effect on the public, which is led to believe that no Title VII lawsuit can be filed without first filing a charge with the EEOC and that filing the charge preserves the suit, only to find out that going through the EEOC results in the suit being filed too late. Such a provision is injurious to the public and should not be enforced.

Beyond that, consideration of the five factors referenced in Trotter leads to conclusion that provision is against public policy.

A. The Nature of the Subject Matter of the Contract.

The contract relates to the appointment of a sales representative and sets forth the term s of that appointment in a rather adhesive manner. At its extreme, the contract works to protect the employer against suit by its employees, and creates a situation in which most employees who are victims of discrimination in the work place do not have a chance to pursue their claims in court once they complete the administrative process through the EEOC. In short, the contract allows the employer to discriminate and when faced with a charge before the EEOC, simply ride the matter out, because once the right to sue letter is issued, it's too late to file the lawsuit.

B. The Strength of the Public Policy Underlying the Statute.

The purpose of Title VII is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on sex, race, color, religion, or national origin. H.R.Rep.No. 914, 88th Cong., 1st Sess., 26 U.S.(1963); U.S. Code Cong. & Admin.News 1964 pp. 2355, 2401. Through various amendments, Title VII has been given more teeth by Congress in allowing jury trials and the award of compensatory and punitive damages, indicating support for the private suit enforcement of Title VII. The statute also seeks to promote early resolution of the claims.

C. The Likelihood That Refusal to Enforce the Bargain or Term Will Further the Policy.

Allowing timely EEOC charges to proceed to suit after receipt of right to sue letter rather than barring such suits because of a six month contractual limitation serves purpose of Title VII. Most claimants proceed with filing an EEOC charge without benefit of counsel. The tendency that exists from having the six-month limitation in the contract is that the employer in this case will get away with violating Title VII because private claims will rarely be successful due to the fact that lay employees will not file their lawsuits before they have completed the EEOC process, and by that time it will be too late.

D. How Serious or Deserved Would Be the Forfeiture Suffered by Party Attempting to Enforce the Bargain.

Whether the employer has to defend itself six months after termination or two years after termination, its defense will presumably be the same. The employer has

all the advantage in defending itself; it has access to personnel files, witnesses still in its employment, and decision makers. In addition, the employer is put on notice of the claim because of the Title VII charge. The forfeiture for the employer is not serious, but the bar to the employee is. And if the employer has engaged in unlawful discrimination, then the forfeiture is deserved.

E. The Parties Relative Bargaining Power and Freedom to Contract.

The contract is between an individual on the one hand and a large insurance company on the other. Martino was presented with a form document and was directed to sign it. There was no negotiating the contract. There was no give and take in formulating the terms of the agreement. There was no opportunity to obtain an attorney's counsel prior to execution of the agreement. Martino had already started working when he was told to sign the agreement. This factor thus weighs in favor of finding the contract limitation void as against public policy.

Given the vast number of at-will employees who depend on Title VII for their only protection against discrimination in the workplace, the broad impact the clause in question could have (and may already have occurred) and given the fact the provision undercuts the purpose of Title VII, and the desire to eliminate unlawful discrimination in the work place, this court should conclude that the provision violates public policy.

II. The Plaintiff Has Not Reinvented His Claim; the Claim Has Been Consistent from Title VII Filing Through the Pleadings and Filings in the Case.

In his first charge of discrimination, Martino recounted how he had notified his employer of his service as a pastor, and that his pastoral duties would not pose a conflict; that he was asked to terminate this "business venture" immediately; and that he inquired as to how being a pastor disqualified him from employment. R.18-2, Charge of Discrimination, Exhibit 1 to Affidavit of Martino. The email messages exchanged between Sobol, Martino's immediate supervisor, and Erin Miller, show that accommodation was being sought for Martino's pastoral position: "I believe that if we allowed Emilio to keep this position, that he would probably do it for free." R.18-2, Exhibit 4 to Martino Affidavit. The Second Amended Complaint alleges, in part, that Western Southern discriminated against Martino when, among other things, it directed him to quit as a pastor, amounting to religious discrimination, and retaliated against him by looking for a reason to terminate him when he indicated he would not quit as a pastor. R.22, Second Amended Complaint, ¶22. The Plaintiff's Memorandum in Opposition to the Motion to Dismiss the Second Amended Complaint has a section entitled, "Martino seek accommodation for pastor's position." R.28, Memorandum in Opposition to Motion to Dismiss at p.3.

It has always been one of plaintiff's key contentions that he was treated differently because he sought accommodation for his position as a pastor. Martino claims he was treated differently for seeking such accommodation, which amounts to

discrimination on the basis of religion. He has always alleged that he was treated differently than Bacon, who did not seek accommodation as a pastor.

Bacon's religion was never an issue in his employment. Thus, the defendant's argument that Martino's religious discrimination fails because both he and Bacon are Christian, is flawed. Bacon sought no accommodation for his religious practice or position; hence, he was given greater leeway on his I-9 documentation. Martino, however, sought accommodation–keeping his position as a pastor–leading to a prompt curtailment of his employment.

III. The Defendant's Brief Fails to Respond to the Impact of Applying the Coleman v. Donahoe Analysis to the Facts of this Case as it Relates to the Matter of Bacon as an Appropriate Comparator.

Western-Southern argues at length that Michael Bacon is not an appropriate comparator. Br. of Appellant, pp.27-32. In doing so, Western-Southern focuses on factors that are immaterial to this case, in light of Coleman v. Donahoe, 667 F.3d 835 (7th Cir. 2011). The application of Coleman to the present case was discussed in the opening brief. As previously established, the same decision makers were involved in Martino's and Bacon's employment situation. The same I-9 rule applied to all employees in all departments and of all ranks. And the compliance issues for both Bacon and Martino were of comparable seriousness (although Bacon's also involved a more serious commission of perjury). Consequently, discussion focused on Bacon's longevity, his lying, and interference by other officers, means nothing.

Defendant also argues different decision makers were involved in these cases. Going down this path, however, sheds light on the fact that there are genuine issues of material fact on this point, because Corlett and Johnson have giving conflicting testimony, as explained in the next section of this reply brief.

IV. Corlett's and Johnson's Conflicting Testimony Creates a Genuine Issue of Material Fact Regarding Pretext.

The defendant seeks to downplay the role of Corlett and Johnson, despite their deposition testimony to the contrary. Corlett and Johnson were both aware of the I-9 situation with respect to Bacon. And both were aware of the I-9 situation for Martino. Despite being aware of the Martino I-9 situation from the onset of his employment, this did not become an issue until Martino took a stand on being a pastor. At that point, the company's approach to Martino changed.

Johnson testified in his deposition that he had the ultimate authority to approve outside positions, and that Corlett kept him apprised of developments relating to Martino. Johnson was also involved in the work authorization issues for Martino, as well as Bacon. Johnson also confirmed that Corlett was involved in the Bacon I-9 verification issues. The involvement of Johnson and Corlett are detailed in the opening brief, pp.12-14. The defendant ignores the deposition testimony of both Johnson and Corlett in favor of more self-serving affidavits. At the summary judgment stage, however, the court must resolve conflicting fact issues in favor of the non-movant; in addition, reasonable inferences are likewise to be drawn in favor

of the non-movant. Doing that in this case leads to the conclusion that Corlett and Johnson were both involved in a significant manner with respect to both Bacon and Martino.

Johnson is the one who terminated Martino, as demonstrated by the letter of termination and his deposition testimony:

> Q: So both Martino and Mr. Bacon were governed by the requirement to complete the form?
>
> A: That's correct.
>
> Q: Now in Mr. Martino's case, were you aware that – or did you review his application or the actual I-9 form before terminating him?
>
> A: I don't recall.
>
> Q: You made a determination to proceed with termination though, is that correct?
>
> A: That's correct.

R.59-8; Johnson Dep. at pp.119-120. Johnson was also the person with authority to go through with a termination of Bacon, but he did not.

> Q: The fact is you terminate Martino, you do not terminate Bacon?
>
> A: That's correct.

R.59-8; Johnson Dep. at 144.

Discrepancy in reasoning for a termination can give rise to credibility issues, supporting a finding of pretext. DeLesstine v. Fort Wayne State Hospital and Training Center, 682 F.2d 130, 136 (7th Cir. 1982). The inability to explain objectively why a compliance issue may lead to the termination of one employee but

not another is evidence from which a jury could conclude that the employer is attempting to camouflage discrimination. Perfetti v. First National Bank of Chicago, 950 F.2d 449, 457 (7th Cir. 1992). This is particularly so in a case in which the employer claims if follows a policy for enforcing I-9 compliance, but it really does not, and has no credible explanation for doing so. Id., citing, Tye v. Board of Education of Polaris Joint Vocational School District, 811 F.2d 315, 320 (6th Cir. 1987) (plaintiff may be able to prove pretext where employer gives evasive and contradictory testimony regarding choice).

In this case, Corlett's inability to explain why Bacon received more favorable treatment than Martino, given her position and familiarity with the company's policy and the application of I-9 rules to Western Southern employees, is evidence from which a jury can conclude pretext is present. The contradictions between Johnson's affidavit and his deposition testimony, as well as Corlett's contradictions between affidavit and deposition testimony likewise support a finding of pre-text.

V. The Cat's Paw Theory Should Be Applied to this Case, Thus Linking Corlett and Johnson with the Ultimate Decision to Terminate.

Corlett specifically knew about Martino's attempt to seek accommodation for his position as a pastor, as she had been copied on email correspondence regarding this issue. In fact, it was on the heels of an October 4, 2006, email from Martino to Erin Miller, in which Martino inquired as to whether he was being terminated as a result of not giving up his pastor's position, that Corlett issued a letter to Martino

bringing to a head the I-9 issue. Johnson was kept abreast of Martino's situation by Corlett. Corlett testified as to the normal procedure of allowing three days to submit I-9 verification evidence. As this Court has previously noted:

> We agree that, under this circuit's established case law, such a closely related sequence of events is sufficient to present a prima facie case. "Generally, a plaintiff may establish such a link through evidence that the discharge took place on the heels of protected activity." Dey v. Colt Constr. & Dev. Co., 28 F.3d 1146, 1458 (7th Cir. 1994); accord Hunt-Golliday v. Metropolitan Water Reclamation Dist., 104 F.3d 1004, 1014-15 (7th Cir. 1997). A close temporal connection between the two events "is generally enough to satisfy the third element of the prima facie test." Rabinovitz, 89 F.3d at 489.

McClendon v. Indiana Sugars, Inc., 108 F.3d 789, 796-97 (7th Cir. 1997).

Now, defendant claims she decided to do something because of an October 6 letter from the social security administration. Competing inferences arise from these facts, and the inference favoring the non-movant is the one to be drawn. Thus, while defendant may argue one interpretation of the facts, that interpretation cannot carry the day at the summary judgment phase when there is a competing interpretation. The improper motive for Corlett's actions can be inferred from the timing, the context, and the conduct, plus the fact that her credibility is at issue based on her own conflicting, sworn testimony.

VI. Defamation.

A statement is defamatory per se if it imputes (1) criminal conduct; (2) a loathsome disease; (3) misconduct in a person's trade, profession, office, or

occupation; or (4) sexual misconduct, and statement also constitutes a serious charge of incapacity or misconduct in words so obviously and naturally harmful that proof of their injurious character can be dispensed with. In re Indiana Newspapers Inc., 963 N.E.2d 534, Ind.App.,2012.

In this case, the only reasonable interpretation from the filing of the termination letter with the notice to the Indiana Department of Insurance is the suggestion that criminal conduct or misconduct in a professional or occupation occurred. And this is exactly the impact on the Department of Insurance, as the Department then notified Martino of "a complaint received by this Department, regarding your activities as an insurance agent." R.22, Ex.3 to Second Amended Complaint.

I.C. §27-1-15.6-15 regulated the notification of termination to the Indiana Department of Insurance, which required an insurer to notify the commissioner of the reason for termination if the reason is described in Section 12 of that statute, or the insurer had knowledge that the producer was found by a court, a government body, or a self-regulatory organization authorized by law to have engaged in any of the activities described in Section 12 of the Chapter.

I.C. §27-1-15.6-12 describes conduct which constitutes a violation which triggers a reporting under Section 15 of the Chapter. By reporting Martino to the Indiana Insurance Commissioner, Western Southern implicated him as having violated I.C. §27-1-15.6-12, even though he had not violated said statute and that is exactly how the State reacted to the report. A review of the statutes shows that

Martino is falsely accused of either having engaged in criminal conduct or misconduct in his profession or occupation, both of which are per se categories of defamation.

The Seventh Circuit has held that if a statement falls into a recognized category, including words that prejudice a party in his trade, profession or business, "it will not be actionable per se if the statement may reasonably be innocently interpreted." Muzikowski v. Paramount Pictures Corp., SFX, 322 F.3d 918, 924 (7th Cir. 2003). In this case, the statement cannot reasonably be innocently interpreted. The interpretation of a statement is dependent on the person to whom the statement is published. In this case, the statement, the notice of termination, was published to the Indiana Department of Insurance. To a random person, this might require extrinsic evidence, but with the Indiana Department of Insurance, a notice of termination is only sent to the Indiana Department of Insurance if misconduct is being alleged. Therefore, the Indiana Department of Insurance would not and could not reasonably, innocently interpret the notice of termination. The Department of Insurance laws make the notice of termination function as "a serious charge of incapacity or misconduct in words so obviously and naturally harmful that proof of their injurious character can be dispensed with." Moore v. University of Notre Dame, 968 F.Supp.1330, 1334 (N.D. Ind. 1997).

VII. Conclusion.

For the reasons set forth herein and in Martino's principal brief, the Court should reverse the grant of summary judgment by the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,960 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In submitting this certificate, I relied upon the word count of the word processing system (WordPerfect) that was used to prepare this brief.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 12 in 12-point, Century font.

/s/ Peter J. Agostino

PROOF OF FILING AND SERVICE

I certify that, on July 19, 2012, the original and fifteen (15) copies of the foregoing Reply Brief of Plaintiff-Appellant, Emilio Martino, were sent via FedEx (f/k/a Federal Express) to the Clerk of the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Room 2722, Chicago, Illinois 60604, and that two copies each were served on the following counsel of record by United States Mail, postage prepaid:

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