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## District Court Decision Adds Further Nuance To Earlier Sixth Circuit Ruling Concerning Employee Waiver of Statutory Limitations Period

By Gretchen Fair

A January federal court decision holds that, while employees may limit by contract the statute of limitations for bringing **some** claims, employees cannot waive the period for filing **all** claims. In Wineman v. Durkee Lakes Hunting and Fishing Club Inc., Case No. 04-10206 (E.D. Mich. 2005), the United States District Court for the Eastern District of Michigan held that an employee could effectively waive the statutory limitations period for civil common law claims but could not waive the period for claims brought under the Fair Labor Standards Act ("FLSA").

The Wineman ruling builds on the recent case Thurman v. DaimlerChrysler, Inc. et al., 116 Fed. Appx. 683 (6th Cir. 2004), in which the Sixth Circuit held that, under certain circumstance, an employee could waive the statute of limitations for claims arising under anti-discrimination laws and other civil, common law claims. (R. Wesley Alexander, "Sixth Circuit Holds That Employees Can Waive Statutory Limitations Periods," *Workplace Labor Update* (Dec. 2004) at [http://www.venable.com/publication.cfm?publication\\_type\\_ID=5&publication\\_ID=1229](http://www.venable.com/publication.cfm?publication_type_ID=5&publication_ID=1229)). The Eastern District of Michigan is located in the Sixth Circuit (along with the rest of Michigan, Kentucky, Ohio and Tennessee), and as such, is bound by the higher court's earlier ruling. Interestingly, however, the district court did not rely upon or reference the higher court's Thurman ruling in its Wineman opinion.

The plaintiffs in Wineman asserted state law breach of contract claims and an FLSA claim arising from their employment as caretakers of the hunting and fishing club owned by defendant. In 2001, the parties had entered into an employment contract that provided that any controversy or claim arising under the contract was to be brought "within six (6) months of the event or occurrence complained of or termination of [the] agreement."

At the expiration of the contract, the parties agreed to a one-year extension. When the extension expired on December 31, 2002, the plaintiffs continued to work for the defendant under a verbal contract which neither party reduced to writing. In mid-December of 2003, the defendant notified the plaintiffs of its intention to terminate them on January 15, 2004.

More than six months later, the plaintiffs filed suit in federal court alleging a violation of the FLSA and state law breach of contract claims. According to the plaintiffs, the defendant failed to pay them overtime wages, refused to compensate them for unused vacation time, and denied them reimbursement for damage to their personal vehicles. The defendant

filed a motion for summary judgment based on the six-month statute of limitations clause contained in the original contract.

With regard to the state-law claims (and consistent with the Thurman ruling), the court in Wineman held that the parties could “contract around” the normal statute of limitations as long as the abbreviated period was reasonable. Finding the clause before it to be reasonable, the court rejected plaintiffs’ contention that a six-month statute of limitations was too short insofar as it might require an employee to bring suit while still employed. The court noted that employees commonly bring discrimination claims, Family Medical Leave Act, and whistleblower claims while still working for the defendant employer.

The court declined, however, to enforce the contractual waiver with regard to the FLSA claims. Relying on Supreme Court precedent, the Wineman court wrote that the FLSA creates “fundamental rights...[and] was intended to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act.” On this basis, the court reasoned that employers could not avoid the Act’s requirements, such as the mandatory minimum wage, by private agreement. To hold otherwise, the court wrote, would permit individuals to waive statutory rights intended to benefit workers as a whole and would be contrary to public policy.

It is worthy of note that the Thurman case also involved federal law claims (in that case, a discrimination claim). In that case, however, the Sixth Circuit’s decision relied upon prior cases allowing waivers *in civil rights cases* where the waiver is made knowingly and voluntarily. In addition, it is generally held that anti-discrimination statutes are designed to vindicate *individual* rights, not the group rights referenced by the district court in Wineman.

In the wake of Wineman and Thurman, the precise contours of employers and employees ability to shorten the limitations period by contract remain unclear, both inside and outside of the Sixth Circuit. What is clear, however, is that an agreement to shorten the limitations period will not provide a blanket protection against the filing of all complaints. As a result, even employers who draft reasonable waivers with the assistance of counsel must remain vigilant to potential lawsuits and should not rely solely on such a waiver.

## Civil Rights Tax Relief Act Offsets Negative Effects of Supreme Court’s Ruling Regarding Taxation of Attorneys’ Fees

By Darryl L. Franklin

The Civil Rights Tax Relief Act (the “Act”), part of the Americans Jobs Creation Act of 2004 signed into law by President Bush on October 22, 2004, provides for an above-the-line tax deduction for any attorneys’ fees and court costs paid by a plaintiff in any action involving a claim of “unlawful discrimination.” The Act is particularly important in the context of employment litigation because it preempted many of the negative effects that would have resulted from the Supreme Court’s ruling in Commissioner of Internal Revenue v. Banks, 125 S.Ct. 826 (2005).

Under the Act, “unlawful discrimination” is defined broadly and includes claims brought under civil rights and employment statutes, including Title VII, the NLRA, the ADA, the ADEA, the FMLA, 42 U.S.C. §§ 1981, 1983, or 1985, USERRA, and the Fair Housing Act. In addition, the definition of “unlawful discrimination” includes a catch-all provision, which states that “unlawful discrimination” includes “[a]ny provision of Federal, State, or local law, or common law claims permitted under Federal, State, or local law (i) providing for the enforcement of civil rights, or (ii) regulating any aspect of the employment relationship . . . .” Because “unlawful discrimination” is broadly defined, it appears that the Act will cover attorneys’ fees and court costs paid by a plaintiff in many or most matters arising from or out of an employment relationship.

In Banks, the Supreme Court upheld an IRS ruling requiring plaintiffs to include all money received as part of a settlement or judgment in their gross income, notwithstanding the fact that a large portion of the settlement or judgment was paid to their attorney pursuant to a contingent fee agreement entered into between the plaintiff and attorney. Without the enactment the Act, the Supreme Court’s ruling in Banks would have had a significant impact on employer’s ability to settle employment discrimination claims. It is likely that plaintiffs in employment matters would have demanded substantially higher settlements to offset the tax consequences associated with the Banks ruling.

However, because the Act provides an above-the-line deduction to plaintiffs for attorneys’ fees and court costs paid in employment matters involving “unlawful discrimination,” the Supreme Court’s ruling in Banks should not have any effect

on the settlement of future matters arising from employment relationships. The Banks ruling will only apply to settlements reached or judgments rendered in discrimination cases **prior to** the Act's passage.

The Act is also significant because it now allows employers engaged in negotiations with current or former employees to have a better understanding of what the employee will receive as a net gain from any settlement. As a result, employers will be able to adjust their negotiating strategies accordingly.

## FCRA Issues Revised Notices and Summaries of Rights

By Darryl L. Franklin

The Federal Trade Commission recently published new summaries of rights and notices and duties under the Fair Credit Reporting Act ("FCRA"), as required by the Fair and Accurate Credit Transactions Act of 2003 (the "FACT" Act). (See Lesley A. Pate, "New Legislation Eases Fair Credit Reporting Act Restrictions On Employer Investigations of Employee Wrongdoing," *Workplace Labor Update* (Feb. 2004) at [http://www.venable.com/publication.cfm?publication\\_type\\_ID=5&publication\\_ID=1110](http://www.venable.com/publication.cfm?publication_type_ID=5&publication_ID=1110).) The notices, which became effective on January 31, 2005, explain to consumers and businesses their rights and duties under FCRA.

Employers who wish to conduct covered pre-employment or pre-promotion background checks – including credit and criminal background checks – of their employees are required to provide the notices prior to taking adverse action as a result of the background check and after the adverse action has been taken. In addition, FCRA and the FACT Act require that employers procure a specific release from employees prior to undertaking any covered background check

The new notices are *interim* notices. As such, the old summaries of rights and notices and duties are now obsolete, and the interim notices may be used until the final regulations are published by the FTC.

Copies of the new notices can be found on the Commission's website at <http://www.ftc.gov>. Employers who need assistance in customizing the notices or advice in when to implement them should contact a Venable labor and employment attorney.

## From the Editor's Desk

Long-time readers of the WLU will remember our former editor and the chair of Venable LLP's Labor and Employment Group, A. Samuel Cook. They will remember his excellence as a labor and employee relations attorney, his skill an editor, and his wit and humor in his regular feature for this publication, *Cook's Cupboard*. Now, the WLU is pleased to announce that Mr. Cook will add yet another to his long list of accomplishments with the publication of *Freedom in the Workplace: The Untold Story of the Merit Shop Crusade Against Compulsory Trade Union Membership In America's Construction Industry*.

Mr. Cook, who also served as general counsel for Associated Builders and Contractors (ABC) from 1970 to 1986, drew on that experience in writing *Freedom in the Workplace*. The book recounts the development of the merit shop in the 1950s; an examination of tactics employed by the building trades unions against the ABC membership in the following two decades; and finally, a description of ABC's strategic response to the building trades unions using a combination of economic, political and legal tools. As Mr. Cook told *Construction Executive* magazine in December 2004, "The book describes the blood, sweat and tears with which we fought coercive union organizational tactics on behalf of ABC merit shop contractors."

*Freedom in the Workplace*, published by Regnery Publishing Inc. of Washington, DC, is now available in book stores.

## Cook's Cupboard

### How to Encourage a Union Organizational Campaign

By A. Samuel Cook

*Editor's Note: In honor of the recent publication by A. Samuel Cook, Freedom in the Workplace, the WLU is proud to present a classic "Cook's Cupboard." This column originally appeared in the WLU's July 1996 issue.*

Organized labor represents only 10% of America's private sector workforce today, down from 35% in the 1960s. But there still are many creative ways that you, as an employer, can invite a union into your firm. This list will do for starters. The odds are that if you follow most of these 28 people-practices diligently, you can count on a professional representative of militant President John Sweeney's "born again" AFL-CIO knocking at your door.

1. Be sure to criticize your employees in front of their peers. (That keeps everybody "on their toes").
2. Bend company rules whenever you feel like it for your favorite workers, but hold the line rigidly on others. (This encourages total loyalty to you).
3. Ignore complaints and don't provide employees with an impartial and systematic way to air their grievances. (Tell them you're too busy to listen and maybe they'll forget about their problems).
4. Don't worry about making promises you can't keep. (Everybody slips up on this).
5. When employees ask "Why?," tell them it's none of their business but to just do it because you said so, and you're The Boss. (Strong leadership is the key to success).
6. Never train your personnel so that they can move up in the corporate hierarchy. (Let them sink or swim on their own – that's what you had to do).
7. When you're contemplating a change in a work rule or shift schedule, keep it to yourself and surprise everybody with some new edict at the last minute. (This makes work life more exciting).
8. Remain cool, aloof and arrogant. The last thing you want to do is show that you care about your employees or "rap" with them at their work stations. (It's beneath your status).
9. Never praise an employee for a job well done. (Take the credit yourself whenever possible).
10. Tighten up workplace security with start and stop buzzers, alarms, bells, mirrors, time clocks and TV surveillance cameras. (Nobody is trustworthy these days).
11. Don't bother to post fair and progressive disciplinary rules. In fact, don't even bother to write them down. (It's a free country and you can fire anybody any time for any reason).
12. If an employee offers a suggestion, forget it. (Or better yet, if it's a good idea, keep the thought to yourself and claim credit for it later on).
13. Allow gossip and rumors to replace official statements from management. (Float a few trial balloons yourself, just to stir things up).
14. Don't teach your management team how to motivate workers to improve their skills, self-esteem, and productivity. (That behavioral psychology stuff is "for the birds").
15. Be sure your subordinates agree 100% with your opinions because you're always right. (This is called "MBMO" – management by my objectives).
16. Don't communicate with workers in group meetings or through bulletin boards, newsletters and an employee handbook. (Let them get their information through the "grapevine" – it's always accurate).
17. Never worry about giving employees any constructive suggestions on improving their job performance. (They should be grateful that they have the privilege of working for you).

18. Make all overtime work compulsory – and schedule it at the last minute. (People usually don't have anything important to do at night or on weekends).
19. Don't bother to explain to your personnel what their medical and retirement benefits are and how much they are worth. (You don't understand them, so why should your workers?).
20. Never allow employees to have a feeling of job security. (They'll work harder if they think there is a chance of getting laid off or fired).
21. Don't ever give any credit to length of service (seniority) in your company at the time of a promotion, layoff or recall to work. (Those old-timers are out of touch with today's real world).
22. Avoid disclosing bad news and tell employees only what you want them to know about the company. (Little white lies never hurt anyone).
23. Never hire an experienced human resources specialist as your non-union "shop steward" to represent and explain the views of your workforce to top management. (The golden rule is "my way or the highway").
24. Discourage employee questions about their career goals. (It pays to keep workers guessing and uneasy).
25. Don't plan a company picnic or any other firm-wide recreational events. (They're boring, expensive, and don't improve "the bottom line").
26. Give yourself a big salary increase plus a fancy year-end bonus, but freeze the pay and benefits of rank-and-file workers. (It's their fault that the company had a bad year and "downsized" or "out-sourced").
27. Don't set an example for your employees by exhibiting your own leadership, empathy, integrity, personal responsibility, community support and love of country. (If people just do whatever makes them "feel good," the government will solve all their problems).
28. Remember, above all, that most of today's workers are lazy, stupid, and hostile. (You, of course, are perfect in every way).

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**Chair, Labor Department:** Robert G. Ames

**Co-Chair, Labor Department:** Ronald W. Taylor

**Editor:** Karen L. Vossler

**Executive Editor:** Patrick L. Clancy

**Questions and Comments** concerning materials in this newsletter should be directed to Karen L. Vossler, Venable LLP, 575 7<sup>th</sup> Street, NW, Washington, DC 20004. Telephone 202.344.4064 or email [kvossler@venable.com](mailto:kvossler@venable.com).

**Address Changes** should be directed to Tracy L. Rudd, Venable LLP, 575 7<sup>th</sup> Street, NW, Washington, DC 20004. Telephone 202.344.4946 or email [trudd@venable.com](mailto:trudd@venable.com).