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Chrysler Can't Force Workers To Arbitrate Age Bias Claims

By **Shayna Posses**

Law360, New York (December 18, 2017, 7:12 PM EST) -- A Michigan federal judge concluded Friday that Fiat Chrysler Automobiles can't force several current and former employees to arbitrate claims that an employee evaluation policy disparately impacted older individuals, handing down an order that also axed class allegations and pointed to other issues requiring the workers to revamp their suit.

U.S. District Judge Laurie J. Michelson wasn't swayed by FCA US LLC's contention that the employees have to arbitrate their discrimination claims stemming from the way the company evaluates job performance, saying the workers didn't agree to arbitration by continuing to work for the company after receiving notice of a new policy requiring non-union employees to arbitrate most employment-related disputes.

The judge held that the language in the brochure announcing the employment dispute resolution process implemented in 1995 told existing employees that the policy applied to them, but didn't explain how, nor indicate that continuing to work for the company constituted agreeing to the process.

"In the absence of any signed agreement or any FCA-distributed materials expressly telling plaintiffs that they would accept the terms of the [employment dispute resolution process] by continuing their employment, the court cannot find that there was an agreement to arbitrate," Judge Michelson said.

However, FCA had a bit more luck with its bid to dismiss and strike the class actions. Judge Michelson granted the request in part, noting, for instance, that the employees concede that Age Discrimination in Employment Act claims can't be brought as a class action and the workers need to instead plead a collective action.

The judge asked the employees to submit an amended complaint to make the switch, as well as to address other pleading deficiencies, among them the fact that the workers didn't let enough time pass after former employee Dan Cerjanec filed his discrimination charge with the U.S. Equal Employment Opportunity Commission before filing suit.

While the suit was clearly filed prematurely and is thus subject to dismissal, the 60-day time period is long past and at least one other court in a similar situation allowed the plaintiff to amend the complaint, Judge Michelson noted.

Judge Michelson also agreed with FCA's contention that Cerjanec's claims are subject to a six-month statute of limitations based on a provision in his employment application. The plaintiffs, however, raised several arguments as to why the claims are still timely even though he challenges performance scores beyond that timeframe, and the judge said it's too early to make a decision.

Cerjanec, 59, first filed suit in February, less than a week after he was fired from FCA, where he had been working since 1994, upon receiving a low evaluation score. The next month, three other long-term FCA employees joined his suit, challenging the auto giant's two-part process for evaluating job performance.

First, an employee's supervisor rates his or her performance as "high," "medium" or "low." Then, in a so-called "calibration process," management provides a numerical score that is adjusted pursuant to a distribution curve. During the second step, management often looks at photos of the employees, who they typically don't work closely with, and has access to employee numbers, which reflects how long someone has been with the company, according to the plaintiffs.

Employees with low scores can be placed on an improvement plan or be terminated, while workers that do well are eligible for bonuses, additional pay and advancement, according to the plaintiffs.

However, the workers alleged, the evaluation process disproportionately leads to employees 55 and older receiving lower scores than their younger colleagues. In fact, Cerjanec contended that he was fired because of his low 2016 score and another plaintiff, Mark Modlin, said his score contributed to him leaving the company.

The March amended complaint alleged disparate impact in violation of the ADEA and state law, as well as a wrongful termination claim brought by Cerjanec and a constructive discharge allegation by Modlin.

FCA then moved to compel arbitration, dismiss the suit or strike the class allegations in June. The auto giant argued that the workers had all agreed to a binding arbitration agreement, but if the court found otherwise, the litigation suffered from other fatal deficiencies.

Michael L. Pitt, who represents the workers, told Law360 on Monday that he has been litigating these sorts of cases against auto companies since the 1990s.

"Over and over, these forced ranking cases have revealed widespread discrimination against older employees. But rather than change the policies, the companies have decided to pay the claims and continue to do what they're going to do," Pitt said. "This is a regular feature of human resources administration for the auto companies here in Michigan, and we're going to pursue this one, and I suspect we'll get a favorable outcome at the end of the day."

Representatives for FCA didn't immediately return a request for comment Monday.

The workers are represented by Shereef H. Akeel and Hasan Kaakarli of Akeel & Valentine PLC and Michael L. Pitt, Megan A. Bonanni, Robert W. Palmer, Carey S. McGehee and Beth M. Rivers of Pitt McGehee Palmer & Rivers PC.

FCA is represented by Jerome R. Watson and M. Misbah Shahid of Miller Canfield Paddock & Stone PLC and Daniel E. Turner, Jacqueline Phipps Polito and Tasha K. Inegbenebor of Littler Mendelson PC.

The suit is Cerjanec et al. v. FCA US LLC, suit number 2:17-cv-10619, in the U.S. District Court for the Eastern District of Michigan.

--Editing by Kelly Duncan.
