

Case Digests

Securities—Private Right of Action under Rule 10b-5--Reliance

In *Stoneridge Inv Partners, LLC v Scientific-Atlanta, Inc*, 2008 US LEXIS 1091, 128 S Ct 761 (2008), investors in a class action alleged losses after purchasing common stock. They sought to impose liability on entities that, acting both as customers and suppliers, agreed to arrangements that allowed the investors' company to mislead its auditor and to issue a misleading financial statement affecting the stock price. The plaintiffs alleged that, by participating in the transactions, respondents violated § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.

In a typical § 10(b) private action, a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation. The § 10(b) implied private right of action does not extend to aiders and abettors and the conduct of a secondary actor must satisfy each of the elements or preconditions for liability. With regard to reliance, respondents had no duty to disclose and their deceptive acts were not communicated to the public. No member of the investing public had knowledge, either actual or presumed, of respondents' deceptive acts during the relevant times. Therefore the petitioner could not show reliance on any of the respondents' actions except in an indirect chain that the court find too remote for liability. Thus, the court ruled that the implied right of action did not reach the customer/supplier companies because the investors did not rely on their statements or representations.

Contracts—Condition Precedent

In *Harbor Park Market, Inc v Gronda*, 277 Mich App 126 (2007), plaintiff offered to purchase defendants' fixtures and liquor license for a party store for \$55,000. The defendants accepted the offer, which was expressly conditioned on the approval of the purchase agreement by defendants' attorney. Before their counsel had the opportunity to review this purchase agreement, the defendants conditionally accepted a second offer from another party to purchase defendants' real property, along with the business, liquor license, and fixtures, for \$250,000. The second offer was also conditioned on approval of the purchase agreement by the defendants' attorney. The defendants' attorney reviewed the agreements and approved the second offer. Plaintiff then filed suit for breach of contract and requested specific performance of the contract. The trial court ruled that the defendants placed an obstacle in the way of the attorney's approval of plaintiff's offer and ordered specific performance of the first purchase agreement.

The court of appeals determined that the central issue on appeal was whether the defendants interfered with, and consequently waived, the condition precedent by si-

multaneously submitting to their attorney a second conditional agreement. Because the contract language giving the defendants' attorney complete discretion to approve or disapprove the agreement for whatever reason was clear and unambiguous, it had to be accepted and enforced as written. In addition, there was no finding by the trial court that the defendants otherwise actively interfered with their attorney's approval, such as instructing the attorney to disapprove the agreement. After reviewing the record, the court of appeals concluded that the trial court erred in holding that the defendants acted in bad faith by submitting to two conditional agreements to their attorney at the same time. The contract did not forbid the defendants from considering other offers, and it did not require them to take their property off the market while the attorney was reviewing plaintiff's offer. Considering that the second purchase agreement was not legally impermissible where the first was only conditionally accepted, it was not a bad-faith act to accept it and submit it for review.

Employment—Same Sex Sexual Harassment

In *Robinson v Ford Motor Co*, 277 Mich App 146 (2007), plaintiff alleged that a male coworker sexually harassed him while they both worked in defendant's manufacturing plant. The harassment included verbal comments of a sexual nature as well as several incidents of inappropriate touching. Defendant moved for summary disposition on plaintiff's claim, arguing that sexual horseplay by a heterosexual male directed against another male fell outside the statutory definition of sexual harassment. The trial court disagreed and denied defendant's motion with regard to the alleged violation of the Elliott-Larsen Civil Rights Act (ELCRA).

The court of appeals held that the ELCRA protects employees from sexual harassment by individuals of the same sex so long as the "because of sex" requirement is met. The court of appeals observed that *Corley v Detroit Bd of Educ*, 470 Mich 274, 681 NW2d 342 (2004), did not indicate that conduct or communication that inherently pertains to sex must also include proof of the harasser's sexual desire, and the *Robinson* court refused to read into the statutory definition of sexual harassment a requirement that is not expressly stated, i.e., a harasser's sexual desire. In *Robinson*, the alleged conduct involved direct contact with sexual organs or sexual parts of the body accompanied by either express or implied references to sexual activity, and the court concluded that plaintiff presented sufficient evidence to allow a reasonable trier of fact to conclude that the harassing person's conduct and communication inherently pertained to sex.

Employment—Age Discrimination—Retaliation

In *Fox v Eagle Distrib Co*, 510 F3d 587 (6th Cir 2007), plaintiff worked for defendant for 11 years and received good evaluations and regular promotions. Approximately 30 days after his 40th birthday, his supervisor informed plaintiff that he was being demoted and that he could accept

this position or be terminated. After he was denied a promotion in favor of a younger man who had less experience with defendant, plaintiff filed an EEOC charge with the Tennessee Human Rights Commission, alleging age discrimination. He then filed a lawsuit in Tennessee state court in February 2003, alleging age discrimination in violation of state law (this action was later dismissed without prejudice). Plaintiff was vocal about his displeasure with defendant and admitted that he discussed his pending lawsuit with co-workers and defendant's customers. After customer complaints regarding plaintiff, he was discharged by the defendant and brought a claim against defendant, alleging, among other things, retaliation under the federal Age Discrimination in Employment Act (ADEA).

To state a retaliation claim under the ADEA, a plaintiff must show that he or she engaged in protected activity, that the employer had knowledge of the protected conduct, that the employer took an adverse employment action towards the plaintiff, and that there was a causal connection between the protected activity and the adverse employment action. The ADEA's antiretaliation provision is similar to Title VII's, and it is appropriate to look to cases construing Title VII as authority for interpreting the ADEA's antiretaliation provision. Also, an employee need not file a formal EEOC complaint to engage in protected activity. Instead, it is the assertion of statutory rights that triggers protection under the ADEA. Because plaintiff's discussion with one of defendant's customers did not concern alleged acts of age discrimination, he failed to show that he engaged in protected activity under the ADEA, and the court affirmed the trial court's grant of summary judgment for the employer.

Employment—Arbitration Agreement

In *Seawright v Am Gen Fin, Inc*, 507 F3d 967 (6th Cir 2007), the employer had a longstanding Employee Dispute Resolution (EDR) program that was the sole means of resolving employment-related disputes. Plaintiff was discharged and brought suit against the employer, alleging that the employer discharged her in violation of state anti-discrimination law and the Family and Medical Leave Act. The employer moved to compel arbitration, proffering an arbitration agreement to which plaintiff had previously agreed while plaintiff denied that she agreed to arbitrate.

The Sixth Circuit rejected a number of challenges under state law to the mandatory arbitration agreement, ruling, among other things, that plaintiff's continued employment after the effective date of the arbitration program constituted acceptance of a valid and enforceable contract to arbitrate employment-related disputes. Also, the FAA requires arbitration agreements to be written, but they do not have to be signed.

Michigan Single Business Tax—Interest on Refunds

In *NSK Corp v Department of Treasury*, No 274633 (Mich Ct App Jan 29, 2008), the Department of Treasury in 2004 per-

formed a single business tax audit of plaintiff for the tax period of July 1, 1997 to December 31, 2002. The Department determined that plaintiff had over-calculated its tax liability on returns it had submitted, and had therefore overpaid its single business tax liability, concluding that plaintiff was entitled to a refund of \$1,444,298.00. The Department sent plaintiff an audit determination letter, informing it of the overpayment. Plaintiff responded by agreeing with the amount of the overpayment, but asserting that it was entitled to interest on the overpayment pursuant to MCL 205.30. The Department disagreed, and this action followed. On plaintiff's later motion for summary disposition, the trial court held that interest was due on the overpayment, commencing 45 days after the due date of the return for each of the years in issue. The trial court further granted plaintiff additional statutory interest on the interest defendant was ordered to pay, accruing from November 23, 2005 until paid in full.

The court of appeals found that the plain language of MCL 205.30 requires the Department of Treasury to pay interest on refunds of overpayments at the same rate as would be required for a taxpayer when making a late payment of taxes to defendant. The case was remanded for a determination of the exact date in March 2005 when defendant became aware that a refund was due and for entry of an order incorporating its finding on that issue and the resulting interest owed.

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