

Credit Union Attorney

Law Letter

A Law Letter for Credit Unions, Financial Institutions, and Attorneys

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Jury Must Decide Whether Data-Processing Service Provider Had a Right to Cancel All Services

In *First Bank & Trust v. FirStar Information Services*, No.01-1757 (7th Cir. Dec. 31, 2001), the Seventh Circuit decided that the question of whether a company that had contracted with eleven Illinois banks to provide data processing services could, under its written contracts, cancel all services upon notice to the banks.

Facts

Between 1994 and 1998, First Bank & Trust and ten other banks contracted to purchase data processing services from FirStar Corporation and its former affiliate FirStar Information Services Corporation (collectively “FirStar”). The banks’ contracts were virtually identical to one another. They all stated that the contract was for a specified number of years and could be terminated at the end of that term upon the bank’s written notice of FirStar. The contracts also authorized a non-defaulting party to terminate upon default. The termination language

that ultimately became the subject of dispute though was in a section entitled “System Modification.” It stated in pertinent part:

“FirStar may modify, amend, or replace any Service or any element of its systems at any time when FirStar deems that such is appropriate or necessary. FirStar may terminate providing any Service upon [180/270/360] days’ prior written notice to [the bank] and may terminate any Service immediately upon any action by any regulatory agency, legislative body or court having jurisdiction over FirStar or [the bank] which FirStar deems to have adverse material effect on such Service or requires termination of such Service.”

In October 1998, FirStar notified the banks that it would cease all data processing services on June 30, 2000, over a year before any of the agreements was scheduled to expire by its written terms.

Suit Over FirStar’s Termination

The banks sued FirStar arguing that early termination

was a breach of contract. Firststar responded that the above-quoted language from the “System Modification” section--specifically the words “Firststar may terminate providing any Service”--unambiguously authorized Firststar to terminate *all* services upon written notice.

A federal district court agreed with Firststar, and, without a trial, ruled that Firststar’s termination was not a breach of contract. The banks appealed.

Appeals Court Reverses Judgment for Firststar

On appeal, the Seventh Circuit disagreed with the district court’s conclusion that Firststar was entitled to a judgment without a trial. The appeals court agreed that reading the words “any Service” as equivalent to “all Services” was a reasonable reading of the contract. But, the court determined, that was not the only reasonable reading. The court explained: “When considering the contract in its entirety, a reasonable person could conclude that [the System Modification section] permits termination of some, but not all, services to the Banks.” The appeals court ruled that a jury would have to decide what the parties really intended about Firststar’s right to terminate some or all services when the parties negotiated and drafted the language in the System Modification section. The case was sent back to the district court for a trial.

Bank Not Liable Under Title VII Theories for Supervisor’s Insensitive Comments About Teller’s Religious Practices

In *Habib v. NationsBank*, No. 01-2056 (8th Cir. Dec. 28, 2001), the Eighth Circuit affirmed a lower court’s dismissal of an action against NationsBank alleging violations of Title VII, 42 U.S.C. §§ 2000e, *et seq.*, arising out of the termination of a teller who was a Pakistani Muslim. NationsBank obtained the dismissal in spite of evidence that, among other things, the teller’s supervisor had made derogatory comments about her

diet, dress, and the break privileges extended to her because of her religion.

Facts

In June 1996, Nazia Habib, a Muslim Pakistani woman, began working as a teller for NationsBank. When she was hired, she informed management that she needed to pray five times a day and that her prayers lasted from five to fifteen minutes. Habib was allowed to schedule her breaks to coincide with her prayer time. In spite of management’s accommodation of her religious practices, Habib said, her fellow employees and her direct supervisor, Sandra Tipton, made derogatory comments about her diet and dress. Tipton also publically remarked that Habib’s unique scheduling arrangements were unfair to the other tellers, and, on three separate occasions, Tipton prevented Habib from taking a break for prayer at the time required by her religion. In February 1998, Habib wrote a letter to branch manager Herman Travis complaining that Tipton’s behavior created a hostile work environment.

In June 1998, Habib took three days off to attend a funeral out of town. She was unable to return the fourth day and notified the bank she was taking a personal day. In light of this and past absences, a banking center manager, Julie Childs, issued Habib a counseling memo reprimanding her for absenteeism. The memo stated that further occurrences of absenteeism could result in termination.

Less than a week later, Habib, while at work, began to suffer from a headache, dizziness, and fatigue. She asked Tipton’s permission to go home for the rest of the day. Tipton referred the request to banking center manager Karen Allen. Allen authorized her to go if she brought a doctor’s note the next day. Habib replied that it was unreasonable to expect her to see a doctor that afternoon. Allen informed Habib that, if she left and did not bring a note, she would be terminated. Habib left. She refused to bring the doctor’s note and was fired.

Title VII Action

Habib sued under Title VII, alleging first that

NationsBank had wrongfully terminated her because of her religion, national origin, and race, and, second, that her work environment had been hostile.

On the bank's motion, the federal district court dismissed Habib's case, reasoning that she could not show termination because of religion, national origin, or race and that her evidence was insufficient to prove a hostile work environment. Habib appealed.

On appeal, the Eighth Circuit agreed with the district court that the bank could not be liable under Title VII. It stated:

“Although Habib appears to have had a history of unpleasant interactions with Tipton, her direct supervisor, [Habib] presented no evidence to suggest that Allen, the person who ultimately fired her, harbored any [discriminatory] animus towards her because she was a Pakistani Muslim woman, and has failed to come forward with any proof that ‘the [firing] decision making process [was] tainted by discrimination.’”

In fact, the court commented, the evidence shows the bank “made significant efforts to accommodate Habib's religious and cultural needs.”

Bankruptcy Trustee Not Entitled to Post-Petition Payments Chapter 7 Debtor Made to Credit Union on Loan Securing Truck

In *In re Rubia (Morris v. Vulcan Chemical Credit Union)*, No.01-3020 (10th Cir. Dec. 12, 2001), the Tenth Circuit held that a credit union did not have to relinquish \$1,136 in loan payments made by a Chapter 7 debtor after he filed his bankruptcy petition.

Bankruptcy Proceeding

Robert Rubia filed a Chapter 7 bankruptcy petition.

At the time, he owed Vulcan Chemical Credit Union, among others, \$10,440 on a purchase money loan for a 1993 Ford Ranger. The Credit Union filed a proof of claim, asserting its loan was secured, but its security interest was not actually perfected until after the beginning of the 90-day preference period established by 11 U.S.C. § 547(b)(4)(A).

Post-petition, the debtor continued to possess the Ranger, claiming it to be exempt property, and continued making loan payments. In all, the debtor made \$1,136 in post-petition payments to the Credit Union before the bankruptcy trustee moved to have the payments recovered for the bankruptcy estate. His reason, the Credit Union had not perfected its security interest before the 90-day period.

After the trustee moved for recovery of the payments to the Credit Union, the debtor began making payments to the estate.

Trustee Not Entitled to Post-Petition Payments

After a trial, a federal bankruptcy court concluded that the bankruptcy trustee had no right to the post-petition payments the debtor made to the Credit Union because the payments were made with post-petition income, which is not a part of the bankruptcy estate. The bankruptcy trustee appealed.

On appeal, the Tenth Circuit agreed with the bankruptcy court that, under the circumstances, the trustee was not entitled to the post-petition payments made to the Credit Union.

“Stay-on Bonus” Plan Was Not Covered By Employee Retirement Income Security Act

In *Crews v. General American Life Insurance Co.*, Nos. 00-3931 & 00-3963 (8th Cir. Dec. 17, 2001), the Eighth Circuit held that an alleged promise made by American General Insurance to pay benefits to employees

who stayed with the company through a fixed date was not covered by the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1001-1461.

Facts

Peggy Crews was an employee of General American. General American had a written severance pay plan covered by ERISA. It provided that, when General American terminated an employee who had worked more than two years, it could, within its discretion pay the terminated employees one week of severance pay for each completed year of service.

Sometime after this severance pay plan was established, as a result of the termination of General American’s contract with Health Care Finance Administration, General American verbally offered to pay employees who remained with the company through a specified date eight weeks of severance pay in addition to the severance pay authorized by the written severance pay plan. General American had not discretion in payment of the stay-on bonus, and it was not for terminated employees, but for those who remained through a fixed date.

The Suit

Crews stayed with General American through the date necessary to receive the eight weeks of severance pay verbally promised as a stay-on bonus, but she received no pay. She filed suit in a state court alleging breach of contract and misrepresentation.

General American responded by arguing that the alleged stay-on bonus plan was covered by ERISA, so that federal law provided Crews’s only remedy for breach, not state-law theories of breach of contract and misrepresentation. Further, federal courts, not state courts, have jurisdiction over ERISA claims. Therefore, General American removed Crews’s suit to a federal district court.

In the federal court, Crews argued that ERISA did not cover General American’s verbal stay-on bonus plan. The court disagreed, finding that the stay-on bonus plan was a verbal amendment to General American’s written severance pay plan. Crews appealed.

Appeal

On appeal, the Eighth Circuit reversed the district court and ruled in Crews’s favor. First, the appeals court ruled, the stay-on bonus plan could not be construed as a verbal amendment to the written severance pay plan because nothing in the stay-on bonus plan changed the terms of the written severance pay plan and the differences between the two plans were too significant. Principally, the court pointed out, the purpose of the severance pay plan was to compensate terminated employees while the purpose of stay-on bonus plan was to reward employees who remained with the company. For these reasons, the appeals court viewed the two plans as free standing.

The court then considered whether the stay-on bonus plan, separately, constituted an ERISA plan and concluded that it did not. The court reasoned that it was not covered by ERISA because: (1) the benefits promised were a one-time lump sum payment, not an ongoing administrative scheme; (2) General American did not have to undertake any long-term obligation to make the payment; (3) the promise was made in response to a single event, termination of the contract with the Health Care Finance Administration; and (4) payment of the benefits did not necessitate a review of each employee’s case because each employee who stayed through a specified date was qualified.

As a result of its conclusion, the appeals court ordered that Crews’s suit be sent back to state court where she could pursue her state-law theories of breach of contract and misrepresentation.