The Sixth Circuit Adds a Piece to the Puzzle of Pre-Dispute Employment Agreements

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If your employment handbook or contract seeks to reduce the statute of limitations for claims under the Americans with Disabilities Act (ADA) or Age Discrimination in Employment Act (ADEA), that clause will not be enforced in the Sixth Circuit.[1] After holding that the statute of limitations for claims under Title VII of the Civil Rights Act of 1964 may not be waived in a 2019 case,[2] the Sixth Circuit extended their restriction "with equal force" to timeliness waivers under the ADA and ADEA.[3] *Thompson v. Fresh Products* prohibited such waivers because both statutes' timing procedures are also considered substantive law.[4] In the larger environment of increasingly comprehensive employment contracts,[5] these substantive versus procedural designations and the rationale behind them contribute to answering the larger question of what claims, rights, and privileges can be waived by preemptive agreement in the employment context.

The Sixth Circuit has twice chosen to distinguish three topics for discussion to determine whether the statute of limitations may be reduced for specific claims.[6] First, is the big picture regarding "the usual process and time limitations for filing a charge and bringing a suit" under the statute at issue.[7] Next, is the significance of a "self-contained limitations period" within the statute because it makes the limitation substantive law.[8] Finally, the Sixth Circuit "distinguished cases holding that contractual limitation periods were valid,"[9] ensuring this new piece fit into the larger puzzle of enforceable pre-dispute agreements. By repeatedly addressing this issue in compartmentalized discussions the Sixth Circuit has tacitly suggested that there are multiple paths to recognize substantive law.

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[1] *See* Thompson v. Fresh Products, LLC, No. 20-3060, 2021 WL 139685, at *11–12 (6th Cir. Jan. 15, 2021).

[2] Logan v. MGM Grand Detroit Casino, 939 F.3d 824, 831 (6th Cir. 2019).

[3] *Thompson*, 2021 WL 139685, at *10.

[4] *Id.* at 12.

[5] *See* Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 Ariz. L. Rev. 637, 639–41 (2007).

[6] *See Thompson*, 2021 WL 139685, at *9–10 (citing Logan v. MGM Grand Detroit Casino, 939 F.3d 824 (6th Cir. 2019)).

[7] *Id.* at *9.

[8] *Id.* at *10.

[9] *Id.*

Title VII, ADA, and ADEA claims all begin by filing a charge with the Equal Employment Opportunity Commission (EEOC).[10] This common starting point is crucial because Congress designated "'(c)ooperation and voluntary compliance . . . as the preferred means for achieving' the goal of equality of employment opportunities."[11] Importantly, cooperation and voluntary compliance with the EEOC takes time.[12] In the case of Fresh Product's "Handbook Acknowledgement," employees were required to bind themselves to a six-month statute of limitations to bring "any claim or lawsuit arising out of [an individual's] employment with Fresh Products."[13] Thus, an employee would be effectively forced to choose between following the statutorily prescribed cooperative process involving the EEOC or rush to file a claim before the shortened statute of limitations expires. This Hobson's choice could "be prospectively detrimental to [a claimant's] substantive rights under federal law and would frustrate the uniform application of Title VII,"[14] and by extension, the application of the ADA and ADEA.[15]

The second topic is treated as an outgrowth from the first,[16] but appears independently dispositive. Citing the Supreme Court, the Sixth Circuit reiterated "that where statutes that create rights and remedies contain their own limitation periods, the limitation period should be treated as a substantive right."[17] Title VII has this type of self-contained limitation period.[18] As does the ADEA.[19] And "[t]he ADA expressly incorporates Title VII's procedures, limitations period, and remedies."[20] The Sixth Circuit's decision to briefly make this point after walking through the "procedural mechanisms" that would be incompatible with a reduced limitation period is noteworthy.[21]

Finally, the Sixth Circuit emphasized how the application of the previous two considerations in Title VII, ADA, and ADEA claims are distinguishable from other claims where the statute of limitations may be altered by contract.[22] The absence of "a self-contained limitation period or an extensive procedure for bringing suit" cleared the way to contractually set the limitation period for

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[10] *Id.* at *11.

[11] Occidental Life Ins. Co. of Cal. v. E.E.O.C., 432 U.S. 355, 367–68 (1977).

[12] Depending on the jurisdiction, claimants have either 180 or 300 days to file a charge with the EEOC. Next, the EEOC is entitled to 180 days of exclusive jurisdiction before putting the claimant back on the clock with a 90-day window to file suit after receiving a right-to-sue letter. *Thompson*, 2021 WL 139685, at *11.

[13] *Id.* at *3.

[14] *Logan*, 939 F.3d at 833.

[15] *See Thompson*, 2021 WL 139685, at *10.

[16] *See id.* at *11.

[17] *Logan*, 939 F.3d at 833 (citing *Davis v. Mills*, 194 U.S. 451, 454 (1904)).

[18] *See* 42 U.S.C. § 2000e-5(e).

[19] *See* 29 U.S.C. § 626(d).

[20] *Thompson*, 2021 WL 139685, at *10 (citing 42 U.S.C. § 12117(a)).

[21] *See id.* at *10–11.

[22] *See id.* at *10.

claims under 42 U.S.C. § 1981.[23] Similarly, the Employment Retirement Income Security Act of 1974 (ERISA) does not contain explicit limitation periods creating substantive rights that would limit the ability of employers and employees to contractually alter them.[24] Thus, a recursive pattern emerges in the application of the Sixth Circuit's considerations for determining whether the statute of limitations may be reduced for specific claims.

However, in connecting this holding to the larger debate over the enforceability of a range of pre-dispute agreements, and arbitration agreements in particular, both sides may claim a victory. Employees can focus on the Sixth Circuit's policy discussion to highlight its willingness to see timing specifications as policy decisions that preserve cooperative and voluntary resolutions of claims. Conversely, employers can argue that unless a statute adopts explicit timing rules, pre-dispute agreements are free to modify the statute of limitations for future claims.[25]

For employees, this holding is just a small piece of the larger policy argument against pre-dispute agreements and mandatory arbitration in particular.[26] Having the Sixth Circuit uphold substantive rights created under federal statutes is not a surprising victory,[27] but a win is a win. Employees can seize upon the structure of this opinion to argue that substantive rights can be inferred from the "procedural mechanisms" embedded in statutes.[28] Additionally, the favorable treatment of specific language in the ADEA establishing that "[a] waiver may not be 'knowing and voluntary' if it includes waiver of 'rights or claims that may arise after the date the waiver is executed,'"[29] should be noted by labor lobbyists. Little victories like this are probably the best employees can hope for without legislative action.

Employers on the other hand, did not lose ground but instead have one more precedent suggesting that substantive rights are the only true limitation to pre-dispute agreements in the employment context.[30] This view stresses that substantive rights must be found in the text of the statute and would dismiss the Sixth Circuit's other considerations as surplusage.[31] To bolster this assertion, employers can point to the Sixth Circuit summarily upholding a contractually

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[23] *Id.* (quoting Logan v. MGM Grand Detroit Casino, 939 F.3d 824, 830 (6th Cir. 2019) (distinguishing Thurman v. DaimlerChrysler, 397 F.3d 352 (6th Cir. 2004))).

[24] *Id.* (quoting Logan v. MGM Grand Detroit Casino, 939 F.3d 824, 830 (6th Cir. 2019) (distinguishing Heimeshoff v. Hartford Life & Accident Ins. Co., 571 U.S. 99 (2013))).

[25] *See Thompson*, 2021 WL 139685, at *12.

[26] *See, e.g.*, Christine Neylon O'Brien, *Will the Supreme Court Agree with the NLRB That Pre-Dispute Employment Arbitration Provisions Containing Class and Collective Action Waivers in Both Judicial and Arbitral Forums Violate the National Labor Relations Act – Whether There Is an Opt-Out or Not?*, 19 U. PA. J. Bus. L. 515 (2017).

[27] *See Thompson*, 2021 WL 139685, at *12.

[28] *See id.* at *9–12.

[29] *Id.* at *12.

[30] *See id.*

[31] *See id.* at *8–12; Logan v. MGM Grand Detroit Casino, 939 F.3d 824, 827–34 (6th Cir. 2019).

reduced statute of limitation for a state law claim without a self-contained statute of limitations because "federal courts have upheld contractual limitations periods on employment-discrimination claims brought under Ohio law, and we find no reason not to do so here."[32] Thus, the biggest takeaway for employers is to continue to reduce the statute of limitations for claims arising from employment but realize that when a statute explicitly includes a statute of limitations, it is part of the substantive law and cannot be altered.

On balance, the Sixth Circuit's opinion in *Thompson* is unlikely to significantly move the needle in the debate over pre-dispute agreements in the employment context. Nevertheless, it is unusual for this type of dispute to be litigated all the way to a circuit court, so the Sixth Circuit's foray into this debate is noteworthy. Especially, as the balance of power shifts in the federal government and legislative action on this issue may be reinvigorated.[33]

[32] *Thompson*, 2021 WL 139685, at *12–13 (citing Terry v. Cent. Trans., Inc., No 1:09 CV 2432, 2011 WL 3296852, at *5 (N.D. Ohio July 29, 2011)).

[33] *See* Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019).