

### Foreign Sailors Not Exempt From Arbitration Agreements

Michael Rogers and Hulya Kar filed suit in U.S. District Court (C.D. Calif.) alleging non-payment of salaries and overtime compensation against their employer, Royal Caribbean. Rogers and Kar worked on ships for their employer and signed written employment contracts that integrated the Collective Bargaining Agreement (CBA) between Royal Caribbean and The Norwegian Seafarer's Union. The aforementioned CBA provided for resolution of employment disputes through mandatory arbitration under the U.N. Conventions for Recognition and Enforcement of Foreign Arbitral Awards.

Afterwards, Royal Caribbean filed a motion to compel arbitration, which the District Court granted, therefore dismissing Rogers and Kar's complaint. The issue was later submitted by the plaintiff to the U.S. Court of Appeals.

Taking into account that the validity and scope of an arbitration agreement is subject to *de novo* review, the court had to determine whether the arbitration stipulation in the CBA was indeed enforceable.

The Court then examined the arbitration provision in the CBA and its relation to the U.N. Convention for Recognition and Enforcement of Foreign Arbitral Awards, The Federal Arbitration Act (FAA) and general maritime law. Consonant with U.S. Supreme Court precedent, the Court explained that Sailors are considered a favoured class and the Federal Courts are their guardians because of their unique position. It also made clear, that sailors isolated on ships are vulnerable to exploitation and have very little bargaining leverage when it comes to negotiating employment conditions.

The court proceeded to analyze the com-

plexities of both the FAA and the U.N. Convention. It established that the FAA provides a specific exception when it comes to employment contracts of seamen, railroad employees, or any other type of worker whose duties are involved in foreign or interstate commerce. Thus making arbitration non-mandatory for employees who fall into this category.

On the other hand the U.N. Convention allows a contracting country to declare its applicability only to legal relationships that are considered commercial. The United States made the Convention part of the U.S. Code thus validating its application for the situation at hand.

The Court held that the arbitration agreements contained in the employment contracts of the plaintiffs were covered by the U.N. Convention, and not the FAA. Hence, making the arbitration agreement of the employees in question, fully enforceable. Furthermore, the Court held that the FAA exemption for seamen did not apply.

The Court then had to decide on the plaintiffs' arguments that the arbitration agreement was unconscionable and against public policy. The Court held, regarding this last issue, that Rogers and Kar did not meet the burden required to prove unconscionability and the public policy favouring seamen did not overcome federal policy that favours arbitration as a mean to resolve labor disputes.

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## Establishment Responsibility for Selling Alcoholic Beverages to Visibly Intoxicated Persons

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*“The Supreme Court quickly established that neither public policy nor case law in Puerto Rico dealt with the issue at hand.”*

The Puerto Rico Supreme Court recently decided that selling alcoholic beverages to a visibly intoxicated person is considered a negligent action that could make up an adequate cause of a traffic accident brought about driving under the influence of alcohol. This decision comes at a time when traffic accidents caused by drunk driving are increasing at alarming rates in both the United States and Puerto Rico.

The issue resolved by the Court involved a situation where nine individuals riding in three different vehicles were involved in a fatal traffic accident after having some drinks earlier that evening at a local bar. The incident occurred when said individuals left the bar and rode their vehicles over the legal speed limit in a “street racing” manner. As a result of the accident one of the people involved was fatally injured. Subsequently, several claims were presented to the lower courts that were eventually consolidated into one unified damages suit brought by the family members of the individual who died in the accident. The claim tries to hold the local bar partially accountable for selling alcohol to the aforementioned person, knowing that he would drive a motorized vehicle at the time of his departure, resulting in the fatal accident.

The defendant requested dismissal of the suit denying that they incurred in any negligent action. According to the defendant, negligence had to be derived from the young people involved in the accident. They claimed that the individuals took a foreseeable risk by drinking and driving. The lower court subsequently dismissed the case stating that neither Puerto Rican law nor the Puerto Rico Supreme Court had recognized that an establishment that sells alcoholic beverages has a legal duty towards its clients to act with special care. Afterwards, the Court of Appeals confirmed that there was no legal framework in our judicial system for that specific cause of action.

The Supreme Court quickly established that neither public policy nor case law in Puerto Rico dealt with the issue at hand. Therefore, they would structure their analysis in accord with the island’s civil tradition based on The Puerto Rico Civil Code. Article 1802 states that any citizen whose actions cause harm or damage to another, because of fault or negligence, is obligated to repair the damage caused. The Court also states that in order to establish that a “damage” has been caused, there has to be three very important elements present: (1) real harm, (2) a causal link between the damage made and the action or omission of the instigating party, and (3) the act or omission has to be deemed negligent. The above-mentioned, establishes the criteria for civil responsibility where every citizen is expected to act with moral diligence and carefulness.

As mentioned before, since no local case law that dealt with similar issues like the one at hand could be found, the Court turned to the present situation in the United States regarding drunk driving. Just like in the island, the growing number of traffic accidents related to drivers under the influence of alcohol is threatening the country’s well being. Therefore, as an opportunity to enrich the overall analysis the Court decided to examine recent law of precedent developed in the U.S. Taking into consideration the fact that every state incorporates their own criteria, the general view was to refuse recognition of a cause of action against commercial establishments selling alcohol. However, the general consensus is now shifting towards establishing as foreseeable that the sale of alcohol to individuals who are visibly intoxicated can lead to fatal traffic accidents. This, in direct relation with the aforementioned rising statistic of fatalities in traffic accidents where drivers were operating motorized vehicles under the influence. Therefore, there is no convincing foundation to exempt people who are authorized to sell alcohol from their duty of moral diligence and carefulness.

The Supreme Court first decided that responsibility cannot be excluded just because there is a law absent that specifically states how to deal with an intoxicated customer. Responsibility can be attributed to one who in complete disregard to public safety sells alcohol at a commercial establishment to any individual who is “visibly intoxicated”. Hence, asserting that there is indeed a cause of action against establishments who sell alcoholic beverages to people visibly intoxicated who afterwards cause damages by driving. The final decision, however, is greatly limited to the facts of the case and the questions presented. It is up to each judge to analyze case by case, if the conduct and demeanor of the client pointed towards him/her being visibly intoxicated. Finally, the Court revoked the previous decision and remanded the case back to the lower courts to be decided in its entirety.

## Elements for Hostile Work Environment and Retaliation

The United States Court of Appeals recently decided in favor of the defendant in a suit claiming harassment and retaliatory discharge. The actions described by the plaintiff did not rise to the level of an actionable hostile work environment, and the plaintiff failed to produce any evidence establishing that the defendant's decision to discharge her was mere pretext, thus confirming the ruling from the lower court.

The issue resolved by the Court involved an African-American woman who worked in a rail track department for her employer. Her claim for sex and race-based harassment arises out of her interactions with co-workers, the vast majority of whom were Caucasian males. Her second claim, this time for retaliatory discharge comes after claiming to be injured as a direct consequence of a co-worker's negligent actions. Subsequently, she reported the accident and was later discharged for filing a false report. The plaintiff also filed two claims with the Equal Employment Opportunity Commission.

The employee's hostile work environment claim is based on insulting remarks made by her co-workers. Said remarks were directed towards the plaintiff's race and gender. The Court quickly stated that in order to prove a hostile work environment claim under Title VII of the Civil Rights Act, the plaintiff needed to show: (1) that she was a member of a protected class, (2) that she was subjected to unwelcomed harassment,

(3) said harassment was based on sex or race, (4) the harassment created a hostile work environment, and (5) employer liability. In order to resolve the issue at hand, the Court established that only the "totality of the circumstances" would be taken into consideration and not isolated events or incidents. Even though the Plaintiff was able to prove that she was a member of a protected class and that she indeed had been subjected to derogatory remarks about her race and gender, the court held that in order to determine that a hostile work environment was present they had to take into serious consideration three important factors: (1) the frequency with which the discriminatory conduct occurred, (2) it's severity, in terms of it being physically threatening or humiliating, and (3) whether it unreasonably interfered with the employee's performance. Taking into account that the employee testified only one specific incident were racial and gender-based slurs were utilized in her presence and that the incident was not repeated after she complained to the employer, a hostile work environment could not be established. Furthermore, the Court established that the alleged verbal abuse did not rise to the necessary level therefore leaving the Court with an issue that was no longer actionable, especially when the plaintiff testified that said abuse never escalated to the point where she needed to complain about them.

The Court then had to resolve the issue regarding the retaliatory discharge claim. In order for the Plaintiff to prove the validity

of the charge, she had to establish: (1) that she engaged in title VII protected activities, (2) the employer knew that she engaged in such activities, (3) that the employer subsequently took an adverse employment action against the employee, and (4) the adverse action was causally related to the protected activity. The Court did not address whether or not the plaintiff established her prima facie case given that she failed to show that her discharge was mere pretext. The employer later testified that the decision to discharge was non-discriminatory and that was solely based on the plaintiff's filing of a false injury report.

Finally, even though the employee testified that said report was indeed legitimate, the Court held that the evidence presented suggested otherwise. According to the plaintiff, the injury was caused purposefully by a co-worker who was never disciplined after the incident. This is where the employee tried to prove that her discharge was retaliatory. However the Court held that it is within the employer's business judgment to treat differently-situated parties differently. Without establishing similarity in the parties involved in the dispute at hand, the court could not establish retaliation.

*"The Court established that only the "totality of the circumstances" would be taken into consideration"*

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## Exhaustion of Administrative Remedies Before EEOC for Retaliation and Age Discrimination

The United States Court of Appeals recently decided that an employee's retaliatory discharge claim was improperly dismissed by the district court for failing to exhaust the proper administrative remedies. Furthermore, the plaintiff was excused from exhausting her retaliation claim. Said claims alleged ongoing retaliation for the filing of an EEOC claim, stating that her discharge was a foreseeable culmination of the employer's alleged retaliatory conduct.

The issue resolved by the Court involved an African-American woman over 50 years old who worked as a computer operator and technical analyst for

her employer. The plaintiff had worked for the employer for more than 15 years and according to her evaluations, worked successfully at all times. In 2003 the employee filed a complaint of age sex and race discrimination, alleging that the employer chose a white male under the age of 40 for an open position for which she was qualified. The complaint was resolved and the plaintiff reached a deal with the employer. Shortly after, she received her first negative performance evaluation. She then filed a second formal discrimination charge alleging that, in retaliation for filing the first charge, management had scrutinized her performance unjustifiably and she had received a nega-

tive performance review. Less than a year later the employer discharged the plaintiff, allegedly for "not taking 'ownership' of her work assignments." The plaintiff later filed suit in federal district court alleging that she was terminated because of her race and sex and in retaliation for engaging in protected activity under Title VII, and that she was terminated on the basis of her age in violation of the Age Discrimination in Employment Act (ADEA).

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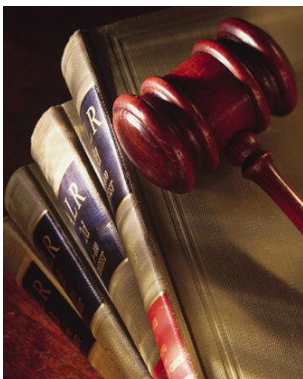
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### Exhaustion of Administrative Remedies Before EEOC for Retaliation and Age Discrimination



The defendant then moved to dismiss the complaint for failure to state a claim. Furthermore, the employer states that the plaintiff failed to exhaust administrative remedies concerning Title VII and ADEA claims. The District Court agreed, and proceeded to dismiss the complaint. Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice" to "discharge any individual . . . because of such individual's race, color, religion, sex, or national origin." The ADEA makes it "unlawful for an employer . . . to discharge any individual . . . because of such individual's age." Before a plaintiff may file suit under Title VII or the ADEA, he/she is

required to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). When the plaintiff filed her only EEOC charge she denounced retaliation for filing a discrimination complaint. The defendant suggests that the employee did not exhaust her administrative remedies because her case refers only to that incident and has nothing to do with her being discharged. According to the District Court, in order to exhaust administrative remedies the employee should have filed an EEOC claim in direct consequence of her termination.

The Court of Appeals emphatically established that it

was imperative to excuse the plaintiff from filing an additional EEOC charge when the claimed retaliation was a continuation of the action alleged in the charge before the court. Furthermore, the Court stated that plaintiff's failure to exhaust administrative remedies concerning a Title VII and ADEA claim, deprives the federal courts of subject matter jurisdiction over the claim. Furthermore, even when the plaintiff failed to exhaust her administrative remedies regarding her claim, the district court erred in entering judgment against her on the merits. Therefore, vacating judgment against the plaintiff and remanding the case to the District Court for further proceedings.