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Ah, Winning Argument! How Did I Lose Thee? The Many Ways to Waive Claims or Defenses.

In the course of reading several thousand published appellate decisions in Federal courts for fifteen volumes of Equal Employment Law Update, published by the Bureau of National Affairs (now Bloomberg BNA) for the American Bar Association Section of Labor and Employment Law from 1996 to 2007, and in the course of reading many hundreds more decisions for the annual updates on employment law I've done for several State Bars and for the National Employment Lawyers Association, I have bene struck by the number of ways to lose a case besides, well, having a losing case.

Waivers happen. I am not speaking of the waivers associated with releases, which are generally protected by the "knowing and voluntary" standard, or the waiver on a ticket stub that may or may not be enforceable, but the unknowing and unintended waivers that arise in litigation, the kind that bar a winning argument or defense because it was raised too late. The following recent labor and employment law examples show that waivers by both sides *do* happen, when an argument:

- was stipulated to be inapplicable;[1]
- was appealed by the wrong person, such as when a sanction running only against an attorney is appealed only by a party and not by counsel;[2]
- was raised on appeal, but only by incorporating a submission to the district court;[3]
- was raised at the proper time, but was not adequately developed;[4]

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[1] *E.g.*, *Holder v. Illinois Dept. of Corrections*, 751 F.3d 486, 493 (7th Cir. 2014) (FMLA) (defendant's waiver) ("Once the State and Holder entered into a stipulation about the sixtieth day, that issue had been removed from the jury. The State could have appealed the summary judgment holding on this matter (more on this below), but instead made the tactical decision to argue that its agreement to pay rendered the issue moot. When a party selects among arguments as a matter of strategy, he also waives those arguments he decided not to present."); *Connelly v. Metropolitan Atlanta Rapid Transit Authority*, 764 F.3d 1358, 1365 (11th Cir. 2014) (Title VII and § 1981; plaintiff's argument that defendant waived attorney-client privilege was itself waived) ("Connelly stipulated before trial that O'Neill would testify about a narrow set of issues and that Connelly would not seek to elicit any privileged communications from O'Neill at trial.").

[2] *E.g.*, *Kleehammer v. Monroe County*, 583 Fed.Appx. 18, 20 (2d Cir. 2014) (Title VII) ("Kleehammer's timely filed notice of appeal also expressed an intent to appeal from the Rule 11 sanction imposed on counsel. Because the district court did not sanction Kleehammer, there is no case or controversy with respect to her. 'Where an award of sanctions runs only against the attorney, the attorney is the party in interest and must appeal in his or her name.'").

[3] *E.g.*, *Weatherly v. Alabama State University*, 728 F.3d 1263, 1273 (11th Cir. 2013) (Title VII; defendant's waiver) ("ASU does not, however, make any arguments on this point, but rather, incorporates by reference the arguments it made before the district court. . . . Incorporating by reference to earlier filings is not a permissible way to present arguments to this court. . . . ("By attempting to 'incorporate' all of the arguments it made below, and thus exhorting this panel to conduct a complete review of its district court brief, [the party] ... makes a mockery of our rules governing page limitations and length[.]"). ASU has therefore waived this argument as well.") (citation omitted).

[4] *E.g.*, *Lydon v. Local 103, Int'l Bhd. of Elec. Workers*, 770 F.3d 48, 53 (1st Cir. 2014) (LMRA, LMRDA) (" The problem for Lydon is that his initial brief never specifically identifies the "numerous" papers that the judge should have pondered but did not. And it never explains how these unnamed documents fit . . . let alone explain how they could have pushed his complaint across the plausibility threshold. Given these circumstances, we hold the argument waived."); *Medina-Velazquez v. Hernandez-Gregorat*, 767 F.3d 103, 109 n.6 (1st Cir. 2014) (First Amendment political discrimination) (defendants' waiver) ("Appellees have not developed, and thereby waive, any argument regarding the first element"); *Willis v. Cleco Corp.*, 749 F.3d 314, 319 (5th Cir. 2014) (Title VII and § 1981) ("This claim is waived because it is inadequately briefed."); *Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1063 (6th Cir. 2014)

- involved an erroneous jury instruction that was not objected to below and can now be reviewed only for plain or clear error, to prevent manifest injustice;[5]
- was not briefed at all;[6]
- was raised for the first time in oral argument on appeal;[7]
- was raised for the first time in a Federal Rules of Appellate Procedure Rule 28(j) letter after briefing was completed;[8]
- was raised for the first time in a reply brief on appeal, meaning that the opponent has not been given a fair opportunity to respond to it before the argument;[9]

(whistleblower under Energy Reorganization Act and False Claims Act) ("Second, regarding the FLSA, Vander Boegh fails to fully develop this argument and therefore has abandoned it."); *Matthews v. Waukesha County*, 759 F.3d 821, 826 (7th Cir. 2014) (Title VII and § 1981) ("It is not the province of the appellate court to search the record in order to discover the factual underpinnings of an argument, and we will not consider arguments that are not supported by relevant law. . . . This argument is waived.").

[5] *E.g.*, *Kroshnyi v. U.S. Pack Courier Services, Inc.*, 771 F.3d 93, 106 n.23 (2d Cir. 2014) (FLSA, FUTA, New York Labor Law, etc.) ("Because plaintiffs failed to object to the jury instructions in the court below, however, they have waived this argument on appeal . . . and we perceive no manifest injustice that would warrant reaching this waived argument here.").

[6] *E.g.*, *Kleehammer v. Monroe County*, 583 Fed.Appx. 18, 20 (2d Cir. 2014) (Title VII) ("On appeal, she also waived any argument that defendants punished her rather than her coworkers, as she did not address this issue in her appellate brief."); *Reveles v. Napolitano*, __ Fed.Appx. __, 2014 WL 7004789 (5th Cir. Dec. 12, 2014) (No. 13-51203) (Title VII) ("Because Reveles did not brief the defenses of equitable tolling and estoppel, such arguments have been waived.FN19" and "FN19. 'Although we liberally construe the briefs of pro se appellants, we also require that arguments must be briefed to be preserved.'").

[7] *E.g.*, *Maloy v. Ballori-Lage*, 744 F.3d 250, 254 (1st Cir. 2014) (First Amendment) ("We also reject Maloy's claim, presented at oral argument, that Díaz Ogando retaliated against her by telling her that the application required materials that Maloy argues were not in fact required. Maloy did not so argue in opposing the motion to dismiss or in her brief on appeal. *See, e.g.*, *Ortiz v. Gaston Cnty. Dyeing Mach. Co.*, 277 F.3d 594, 598 (1st Cir. 2002) ("[F]ailure to brief an argument will result in waiver for purposes of appeal.").); *Holland v. Gee*, 677 F.3d 1047, 1065-66 (11th Cir. 2012) (Title VII and Florida Civil Rights Act) (court will not consider issue first raised at oral argument).

[8] *Ross v. Gilhuly*, 755 F.3d 185, 192 n. 11 (3d Cir. 2014) (FMLA) ("In an April 17, 2014, letter filed pursuant to Rule 28j of the Federal Rules of Appellate Procedure, Ross recasts his interference claim to assert that he had somehow been discouraged from taking FMLA leave. In addition to Ross having waived that argument by failing to advance it in briefing . . . .").

- was raised for the first time in a petition for rehearing of the panel decision;[10]
- was not addressed in appellant's reply brief on appeal, where the appellee raised the issue in its brief;[11]
- was raised for the first time on appeal, meaning that the lower court has been sandbagged;[12]

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[9] *E.g.*, *Emory v. United Air Lines, Inc.*, 720 F.3d 915, (D.C.Cir. 2013), *cert. denied*, 134 S.Ct. 1520 (2014) and *sub nom. Adams v. United States*, 134 S.Ct. 1540 (2014) (Fair Treatment for Experienced Pilots Act, Due Process Clause, and DFR) ("We accordingly find that the Emory plaintiffs waived their BFOQ arguments on appeal, having raised them for the first time in their reply brief."); *KLB Industries, Inc. v. N.L.R.B.*, 700 F.3d 551, 558-59 (D.C.Cir. 2012) (NLRA) ("To the extent KLB now contends the dividing line between *Nielsen*'s "open your books" disclosure obligation and the instant information request is arbitrary and capricious, that argument is waived because it first appeared in the company's reply brief."); *Rives v. Whiteside School Dist. No. 115*, 575 Fed.Appx. 678, 680 (7th Cir. 2014) (Title VII and § 1981) ("In her reply brief Rives challenges for the first time the dismissal of her claims of sexual harassment and retaliation, but she waived these arguments by not mentioning them in her opening brief."); *Johnson v. Orkin, LLC*, 556 Fed.Appx. 543, 545 (7th Cir. 2014) (Tile VII and Illinois law) ("In any case, Johnson waived this argument on appeal by raising it for the first time in his reply brief, giving Orkin no chance to respond."); *Ridgell-Boltz v. Colvin*, 565 Fed.Appx. 680, 683 n.3 (10th Cir. 2014) (ADEA and Title VII) ("This argument is waived, however, because it was not advanced in the district court, nor does it appear in Plaintiff's opening brief.").

[10] *E.g.*, *Shields v. Illinois Dept. of Corrections*, 746 F.3d 782, 800-01 (7th Cir. 2014), *petition for cert. filed*, 83 USLW 3306 (Oct. 13, 2014) (Nos. 14-476, 14A23) (§ 1983 claim for denial of medical care) (Tinder, J., concurring: "Our sister circuits that have spoken on this question agree with our determination on this matter: in general, new issues raised in petitions for rehearing are not eligible for review. Numerous circuits hold that an issue raised for the first time in a petition for rehearing has been waived and cannot be reviewed. Some hold that this practice constitutes forfeiture rather than waiver. At least two circuits opt for a flexible waiver principle, where the court occasionally chooses to consider arguments raised for the first time in a petition for rehearing, in extraordinary cases. But no case—in our circuit or elsewhere—allows for a party to freely raise a new theory of its case in a petition for rehearing, one that it has repeatedly declined to raise in the district court or in its briefs before us.") (footnotes omitted).

[11] *E.g.*, *Velazquez-Perez v. Developers Diversified Realty Corp.*, 753 F.3d 265, 278-79 (1st Cir. 2014) (Title VII) ("Velázquez files no reply brief responding to this argument. Nor does Velázquez's opening brief develop or even suggest any counter-argument. Our task is not to go through a record and see if a losing party may have developed an argument that it did not raise on appeal.").

[12] *E.g.*, *Ray v. United Parcel Service*, 587 Fed.Appx. 182, (5th Cir. 2014) (FMLA) (defendant's waiver) at p. *5 ("Turning to the third element, UPS challenges Ray's prima facie showing of causation for the first time on appeal. Since UPS did not assert any argument against

- was raised below for the first time in a motion to reconsider summary judgment;[13]
- was raised below for the first time in oral argument;[14]

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prima facie causation before the district court, UPS has waived this challenge on appeal. UPS acknowledges that the lower court did not specifically discuss causation in its analysis, but attempts to justify our consideration of its causation challenge by relying on the principle that we may affirm summary judgment 'for any reason supported by the record.' Equally well-settled, however, is the principle that the scope of appellate review on a summary judgment order is limited to matters that the parties presented to the district court, such that the district court has an opportunity to rule on the challenge. Though the district court necessarily and generally addressed Ray's causation showing as part of the later stages of the mixed-motive analysis, a point advanced by UPS, the district court made no such ruling at the prima facie stage because UPS did not make prima facie causation an issue, an omission which was expressly noted by the district court. Of UPS's arguments on appeal, only UPS's arguments against comparators were presented to the district court, but then only as rebuttal to Ray's pretext showing. Based on the principle that a party "*must press and not merely intimate* the argument during the proceedings before the district court," we will not re-cast these elsewhere-asserted, comparator references as arguments against prima facie causation. Accordingly, UPS has waived any argument on appeal that Ray cannot establish prima facie causation.") (emphasis supplied; footnotes omitted); *Tank v. T-Mobile USA, Inc.*, 758 F.3d 800, 803 (7th Cir. 2014) (§ 1981) ("this argument is waived because it was not raised below."); *Nichols v. Michigan City Plant Planning Dept.*, 755 F.3d 594, 600 (7th Cir. 2014) (Title VII) ("The non-moving party waives any arguments that were not raised in its response to the moving party's motion for summary judgment.") (*dictum*); *Dalpiaz v. Carbon County*, 760 F.3d 1126, 1131-32 (10th Cir. 2014) (FMLA) (Plaintiff waived FMLA retaliation claim by raising only an FMLA interference claim below); *Ridgell-Boltz v. Colvin*, 565 Fed.Appx. 680, 683 n.3 (10th Cir. 2014) (ADEA and Title VII) ("This argument is waived, however, because it was not advanced in the district court, nor does it appear in Plaintiff's opening brief.").

[13] *E.g.*, *Rivera-Diaz v. Humana Insurance of Puerto Rico, Inc.*, 748 F.3d 387, 390 (1st Cir. 2014) (ADA and Puerto Rican law) ("While it is true that matters that are raised for the first time in a motion for reconsideration are usually deemed waived . . . everything depends on context."); *Smith v. Aegon Companies Pension Plan*, 769 F.3d 922, 933 (6th Cir. 2014) (ERISA benefits) ("But Smith did not raise this argument until his . . . Rule . . . 59 motion to alter, vacate, or amend the district court's judgment, and he has waived it.") (footnote omitted).

[14] *E.g.*, *In re Community Bank of Northern Virginia*, 622 F.3d 275, 288 n. 12 (3d Cir. 2010) (home equity lending case) ("Because the Objectors did not challenge the appointment until oral argument before Judge Ziegler—and despite having six weeks between receiving notice of the appointment and the argument—they have waived this challenge, and we decline to address it. *See, e.g.*, *Fajardo Shopping Ctr., S.E. v. Sun Alliance Ins. Co. of P.R.*, 167 F.3d 1, 6 (1st Cir.1999).").

- was raised for the first time in objections to a Magistrate Judge's recommendation for the grant of summary judgment, meaning that the Magistrate Judge has been sandbagged;[15] or

- was not raised in objections to a Magistrate Judge's recommendation for the grant of summary judgment.[16]

Sometimes, a court will excuse a waiver. That will be the subject of a later blog posting.

This topic has teeth even in advance of the waiver. When I am acting as a mediator, I cannot ethically tell the plaintiff that she or he is overlooking a powerful additional claim or way of shaping the existing claim, and cannot tell the defendant that it is overlooking a major flaw in the plaintiff's case or a powerful defense. What I can do for each side is to point out the risks of continued litigation. My most persuasive tool with a recalcitrant party, where the opportunity exists, is to point out that the other side has not yet realized something that would greatly strengthen the position of the other side, but still has time to realize the error and correct it if the case does not settle. This tends to lead to a stronger interest in settling.

For now, the take-away is that it is important for attorneys on both sides of a case to do some serious thinking about the issues in the beginning of the case, and not wait until it is too

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[15] *E.g.*, *Garayalde-Rijos v. Municipality of Carolina*, 747 F.3d 15, 22 (1st Cir. 2014) (Title VII and Puerto Rican law) ("Similarly, Garayalde–Rijos's failure to object specifically to the magistrate judge's recommendation that her post-hire Title VII discrimination claim against Carolina be dismissed for lack of exhaustion of administrative remedies waives her right to this court's review of that claim."); *Self v. I Have A Dream Foundation-Colorado*, 552 Fed.Appx. 782, 784-85 (10th Cir. 2013) (ADA) ("The Plaintiff bases her first argument largely on the cover page to the Foundation's "Form 990," which purported to list 26 employees of the Foundation. But Ms. Self did not submit this page in response to the summary judgment motion; instead, she submitted it in her objection to the magistrate judge's report. R. at 1136. As a result, the district judge declined to consider the form. That ruling was permissible. See Fed.R.Civ.P. 72(b)(3).").

[16] *E.g.*, *E.E.O.C. v. Memphis Health Center, Inc.*, 526 Fed.Appx. 607, 611 n. 1 (6th Cir. 2013) (ADEA and Equal Access to Justice Act claim by employer for attorneys' fees award against EEOC) (employer's waiver) ("MHC has waived any argument that the age discrimination claim was not substantially justified because it failed to object to the magistrate judge's findings on this point."); *Self v. I Have A Dream Foundation-Colorado*, 552 Fed.Appx. 782, 787 (10th Cir. 2013) (ADA) ("'We have adopted a firm waiver rule when a party fails to object to the findings and recommendations of the magistrate [judge]. The failure to timely object to a magistrate [judge]'s recommendations waives appellate review of both factual and legal questions.' *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir.2008) (citation, brackets, and internal quotation marks omitted). Exceptions exist when: (1) the district court does not notify a pro se litigant of the time period for objection and the consequences of a failure to object, and (2) review is required in the interests of justice. *Id.*").

late. Few things are more dangerous than concluding, too early, that a claim or defense is a surefire "slam dunk."

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I represent the dispossessed of the Earth, and executives recently shown the door. I also act as a case mechanic for other attorneys or law firms, and serve as a neutral mediator and arbitrator.

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