UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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FRANK WARREN, et al.,

Plaintiffs,

- against -

XEROX CORPORATION,

Defendant.

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REPORT & RECOMMENDATION

01-CV-2909 (JG) (RER)

RAMON E. REYES, JR., Magistrate Judge:

Plaintiffs Frank Warren, *et al.* ("Plaintiffs"), initiated this class action against defendant Xerox Corporation ("Xerox" or "Defendant") on May 9, 2001. Plaintiffs allege that Xerox engaged in a pattern of purposeful and unlawful discrimination against class members on the basis of their race, including the systematic assigning of inferior sales territories to Black salespersons; refusal to promote or transfer Black salespersons to more lucrative territories; denial of sales commissions earned by Black salespersons; and retaliation against Black salespersons for having attempted to vindicate their civil rights.

BACKGROUND

This matter was settled prior to trial pursuant to a Consent Decree ("Decree"), which was approved by the Court through an Order and Final Judgment filed on September 22, 2008. The Decree established a Settlement Fund of $12 million from which attorneys' fees, incentive payments, and opt-out credits were first to be deducted. Thereafter, the remaining amount ("Remainder Settlement Fund") would be distributed to eligible class members for compensatory damages and/or back pay. It had been previously agreed that 51.4% of the Remainder

Settlement Fund would be dedicated to the payment of compensatory damages, while the remaining 48.6% would be earmarked for Back Pay.

At present, some forty claims for compensatory damages have been filed, scored, approved, and distributed by the court-approved claims administrator, Settlement Services, Inc. However, distribution of the Back Pay portion of the settlement has yet to occur due to a dispute as to whether Xerox is obligated to pay its employer share of payroll taxes under the Federal Insurance Contribution Act ("FICA"), Federal Unemployment Taxation Act ("FUTA"), and related state unemployment acts ("SUTA"). Plaintiffs claim that pursuant to the express terms of the Decree, Xerox is required to pay its share of payroll taxes ($471,749.19) out of its own funds - not out of the Settlement Fund. Xerox "contends that its payment of $12 million into the Settlement Fund is the entirety of its monetary obligations to, and on behalf of, the class members." (Reply in Further Support of Plaintiffs' Motion for Enforcement of Certain Consent Decree Provisions ("Pls.' Reply"), at 1).

On July 10, 2009, the parties appeared before me for a hearing, at which time I notified the parties of my preliminary recommendation in favor of plaintiffs' interpretation of the relevant provisions of the Decree. Having reviewed the parties' original submissions,[1] and in consideration of both my own review of the provisions of the Decree, as well as my discussions with counsel, I respectfully recommend that plaintiffs' motion be granted in its entirety.

[1]Although at the conclusion of the hearing on plaintiffs' motion I invited both parties to submit additional post-hearing briefing, neither party has elected to do so.

DISCUSSION

I. Legal Standard for the Interpretation of Consent Decrees

"[C]onsent decrees should be construed as contracts, although they are to be enforced as court orders." *Wilder v. Bernstein*, 153 F.R.D. 524, 527 (S.D.N.Y.)(1994). *See also, United States v. ITT Continental Baking Co.,* 420 U.S. 223 (1975); *Equal Employment Opportunity Commission v. Local 580*, 925 F.2d 588, 592 (2d Cir.1991); *Berger v. Heckler*, 771 F.2d 1556, 1567-68 (2d Cir.1985). As would occur in any case involving the construing of a contract, therefore, "a court must look to the plain meaning of the language used in the agreement when interpreting a consent decree." *Wilder*, 153 F.R.D. at 527. Indeed, where the language memorializing a settlement agreement is unambiguous, the scope of that "consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *United States v. Armour & Co.*, 402 U.S. 673, 689 (1971). For, having committed to settlement, the parties have chosen to spare themselves the risks and costs associated with litigation in the belief and expectation that the agreement they ultimately enter into will embody the entirety of their negotiated solution to their dispute.

II. Xerox Should Pay Its Employer Share of Payroll Taxes from Its Own Funds

In making their respective arguments, the parties rely on several separate provisions of the Decree. Each provision will be addressed in turn.

Plaintiffs argue that Articles XVII.A.1 and XVII.T.4, when read in tandem, clearly establish that Xerox's payroll tax obligations must not be satisfied out of the Settlement Fund. Article XVII.A.1, entitled "Establishment of the Settlement Fund," provides that:

> No later that fourteen (14) days after the Effective Date of this Decree, Xerox shall deposit the sum of Twelve Million Dollars ($12,000,000.00), less the

> amount of dollars to be deducted therefrom pursuant to Section E hereof, into a Qualified Settlement Fund (in accordance with Internal Revenue Code Section 468B) ("Settlement Fund"), an interest-bearing account. *This payment is made in order to satisfy and finally settle the claims of the Class Representative Plaintiffs, Testifying Parties and eligible Settlement Class Members* in accordance with the provisions of this Article XVII.

(Consent Decree, at 16 (emphasis added)). In turn, Article XVII.T.4 provides:

> Xerox shall have no obligation to pay attorneys' fees, costs, expenses or incentive awards to other attorneys or other plaintiffs within the scope of this release, it being the express agreement that Twelve Million Dollars ($12 Million) *plus* administrative costs and *any FICA, FUTA obligations* is the total maximum liability of Xerox under this Consent Decree in connection with the settlement and resolution of any lawsuits or claims within the scope of this consent decree.

(Consent Decree, at 37).

By the express language of Article XVII.A.1, Xerox's payment of $12 million into the Settlement Fund was to "satisfy and finally settle *the claims* of the Class Representative Plaintiffs, Testifying Parties and eligible Settlement Class Members." (Emphasis added). As a matter of law, the Plaintiffs' "claims" do not include Xerox's employer share of payroll taxes. FICA taxes have two distinct components - an employee's share, pursuant to 26 U.S.C. §§ 3101 and 3102(a), and an employer's share, pursuant to 26 U.S.C. § 3111. Although both taxes are calculated on the basis of an employee's wages, and remitted directly to the federal government, they are nevertheless separate and distinct. Section 3101(a) of Title 26 of the United States Code provides that there shall be "imposed on the income of every individual a tax" equal to certain percentages that vary in function of the years in which the wages, as defined in § 3121(a), were earned. This is more commonly known as the *employee* portion of the FICA tax. An employee's portion of FICA is ordinarily never considered the property of the employer. *In re Rodriguez*, 50 B.R. 576, 581 (Bankr. E.D.N.Y. 1985). Rather, the FICA tax is collected by the

employer by deducting the appropriate amount directly from the employee's wages when disbursed and remitting the same to the federal government.

Pursuant to Section 3111 of Title 26 of the United States Code, employers have an equal, yet separate, obligation to pay a FICA tax. 26 U.S.C. § 3111 provides that "[i]n addition to other taxes, there is hereby imposed on every employer an *excise tax*, with respect to having individuals in his employ," equal to certain percentages of the wages paid by the employer with respect to employment. (Emphasis added). Thus, operating as an excise tax, the employer's share of FICA is not "imposed" on the employee's wages, is not considered the property of the employee, and is not deducted directly from the employee's wages. Rather, it is an independent obligation of the employer owed directly to the government, and therefore the employee has no "claim" to, or liability for, the employer's portion of FICA. The same is true for Xerox's obligations under FUTA and SUTA. *United States v. Lee*, 455 U.S. 252, 254 n.1 (1982) ("FUTA tax is an excise tax imposed only on employers."); New York Labor Law § 560 (McKinney's 2009) ("Any employer shall become liable for contributions under this article if he has paid remuneration of three hundred dollars or more in any calendar quarter . . ."). Accordingly, when the Decree speaks in terms of $12 million being paid "in order to satisfy and finally settle *the claims*" of the Plaintiffs, it necessarily and unambiguously excludes Xerox's payroll tax obligations under FICA, FUTA or SUTA.

Article XVII.A.1's requirement that Xerox pay its share of the payroll taxes from its own funds is further buttressed by another provision in the Decree, not referenced by either party. Article XVII, sub-section P.3 provides that:

> The payments designated as lost wages shall be subject to FICA, required income tax withholdings and any other deductions required of wage

> payments, and shall be reported to the IRS as wages. The Claims Administrator shall calculate and withhold from each gross payment to a Class Representative Plaintiff, Testifying Parties and eligible Settlement Class Members, the amounts due for applicable federal, state, and local taxes; the amount of the *employee's share of FICA*; and any other *tax withholdings*.

(Consent Decree, at 34) (emphasis added). The United States Supreme Court, in explaining the distinction between the employer and employee portions of the FICA tax, explained that "the FICA tax is a tax paid in part by employees through *withholding*, and in part by employers through an *excise tax*." *United States v. Lee*, 455 U.S. at 254, n.1 (emphasis added). Accordingly, two things become apparent. First, although the provision refers to the claims administrator's obligation to calculate and withhold from each gross payment to a claimant the *employee's share* of FICA and other payroll taxes, the seemingly conspicuous omission of language giving rise to a similar duty with regard to the *employer*'s share suggests that this payment obligation is to be borne by Xerox alone. (Consent Decree, at 34). Second, under *Lee*, only the employee portion of the FICA tax is considered a "*withholding*"; the employer portion of FICA is an *excise tax*. Therefore, the language of sub-section XVII.P.3 authorizing the claims administrator to *withhold* "any other applicable tax withholdings," could not possibly be found to refer to the employer portion of the FICA tax.

Any uncertainty as to the parties' intentions in this regard - and there does not appear to be any - is clarified by Article XVII.T.4, which clearly and unambiguously states that Xerox's total maximum liability under the Decree is "Twelve Million Dollars ($12 Million) *plus* administrative costs *and any* FICA, FUTA obligations." (Emphasis added). If the parties intended that Xerox's share of FICA would be paid out of the Settlement Fund, they would not have used the word "plus" in that sentence. Further, inclusion of the word "any" does not, as

Xerox contends, suggest "a possible, not definitive, [payroll tax] obligation" (Response in Opposition to Plaintiffs' Motion ("Def's Opp'n") at 4), or somehow render the provision vague. Simply put, there is nothing speculative about Xerox's payroll tax obligations - if Back Pay is awarded, Xerox will have payroll tax obligations. The meaning of Articles XVII.A.1 and T.4 are plain and unambiguous, and Xerox's strained arguments should be rejected.

Nor is the Court convinced by Xerox's argument that Article XVII.T.4's placement within a section of the Decree seemingly dedicated to the issue of attorneys' fees renders it somehow less controlling on the issue of Xerox's payment obligations than those sections cited by Xerox itself, which are examined below. (Def's Opp'n Mem. at 2). Notwithstanding its appearance within this sub-section, the provision falls beneath the umbrella of Article XVII, entitled "MONETARY RELIEF," which sets forth the framework governing the parties' payment obligations, as well as the mechanisms by which settlement funds are to be allocated among class members. Article XVII.T.4, therefore, is clearly relevant to the determination of the source of funds from which Xerox's portion of the FICA and other payroll taxes are to be paid.

III. The Provisions of The Decree Upon Which Xerox Relies Do Not Demand A Different Result

Xerox contends that when read together, Articles XVII.A.2 and Q.1 establish that its portion of payroll taxes are to be deducted from the $12 million Settlement Fund. (Def's Opp'n at 2).[2] Article XVII.A.2 provides that:

> "The Settlement Fund shall constitute monies to be paid by Xerox in connection with the resolution of the Litigation and is inclusive of (a) all awards to Class Representative Plaintiffs, Testifying Parties and Settlement Class Members; (b) all attorneys' fees, costs and expenses; and (c) all taxes imposed on the Settlement Fund subsequent to the date of its creation."

(Consent Decree, at 17). It is this final clause on which Xerox principally relies. Specifically, Xerox contends that because Back Pay awards are to be apportioned through the claims process from the $12 million, *once deposited* into the Settlement Fund, the "'imposition' of taxes in connection with" those awards must necessarily occur subsequent to the creation of the Settlement Fund, thereby relieving the defendant of its obligation to pay the employer portion of the payroll tax. (Def.'s Opp. at 2-3). This argument must be rejected.

By the express language of Section 3101(a) of Title 26 of the United States Code, the employee portion of the FICA tax is "*imposed* on the income of every individual" according to percentages that vary on the basis of the number of years in which wages were earned. Conversely, pursuant to Section 3111 the employer's portion of FICA is an excise tax "imposed on every employer." 26 U.S.C. § 3111(a). At no time is the employer's portion of FICA "imposed" directly on employee wages. Therefore, inasmuch as Back Pay awards disbursed

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[2] Curiously, Xerox also argues that Article XVII.A.1 supports its interpretation of the Decree as requiring that its payroll tax obligations be paid out of the Settlement Fund. For the reasons expressed above, that interpretation is rejected.

from the Settlement Fund constitute "wages" under the Consent Decree (Consent Decree, at 34), Xerox's argument that the employer portion of the FICA and other payroll taxes constitutes a tax "imposed on the Settlement Fund subsequent to its creation" under Article XVII.A.2 of the Decree is predicated on a fundamental misunderstanding as to the manner in which payroll taxes operate.

In further support of its argument, Xerox points to Article XVII sub-section Q.1, which details the manner in which the distribution of monetary awards is to be effectuated by the claims administrator:

> Included with the check will be a statement showing the gross amount of the payment and an itemized statement of all deductions made for federal and state income taxes, the employee's and employer's share of Social Security and Medicare taxes, and any local income or payroll taxes that apply.

(Consent Decree, at 35). Xerox argues that, because the "audit" of deductions required of the claims administrator includes the "employer's share of Social Security and Medicare taxes," it must have been the parties' intent that the employer portion of the payroll tax come from the monies deposited by Xerox into the Settlement Fund. (7/10/2009 Tr. at 8-9). Indeed, according to Xerox, that this information is being provided exclusively to class members, and not to Xerox, further confirms that it was never envisioned that Xerox would be responsible for the employer share of the payroll tax. (7/10/2009 Tr. at 9:1-4). I find this argument unavailing.

Although a cursory and somewhat superficial reading of this provision would seem to confirm Xerox's contention, a closer examination of the language and its context belie an unambiguous assignment to plaintiffs of the *employer* payment obligation under FICA. Indeed, the plain language of the provision itself is susceptible to competing interpretations. Perhaps

more importantly, however, were the Court to interpret this provision in the manner advocated by the defendant, it would flatly contradict the plain meaning of Articles XVII.A.1, T.4 and P.3, thereby undermining what this Court has already determined to be the unambiguous intent of the Decree itself. Moreover, unlike Article XVII.Q.1, those emphasized by plaintiffs and the Court more directly address the specific scope and nature of the parties' payment obligations under the Decree, relying less upon inference and speculation in arriving at the final result. Therefore, inasmuch as Article XVII.Q.1 appears to contradict Article XVII, sub-sections A.1, T.4 and P.3, the Court finds it insufficient to render those provisions of the Decree ambiguous or subject them to any other reasonable interpretation.

Finally, Xerox contends that Article XVII.B.1(q)'s requirement that the claims administrator remit "all taxes and other payments due with respect to disbursements from the Settlement Fund" effectively relieves it of the obligation to pay the employer share of the payroll tax. The Court disagrees. As discussed above, unlike the employee share of the payroll tax, the employer portion is not "imposed" on wages paid employees. Rather, it is an "excise tax" imposed directly on an employer, albeit in relation to the wages the employer pays its employees. Back Pay disbursements from the Settlement Fund are deemed wages under the Decree (Consent Decree, at 34). Therefore, while the employee portion of the FICA tax must be deducted from the Back Pay awards by the claims administrator, the same is not true with regard to the employer portion. Translated into the language of the Decree itself, the employer share of the payroll tax is not among those "taxes and other payments due with respect to disbursements from the Settlement Fund." Consequently, the Court will not contradict the plain meaning of the Decree by shifting to plaintiffs Xerox's obligation to pay the employer portion of the FICA tax.

CONCLUSION

For the foregoing reasons, I respectfully recommend that the plaintiffs' motion be granted in its entirety.

Any objections to this Report and Recommendation ("R&R") must be filed with the Clerk of the Court and the Honorable John Gleeson within fourteen (14) days of receiving this R&R. Failure to file timely objections may waive the right to appeal the District Court's Order. *See* 28 U.S.C. § 636(b) (1); Fed. R. Civ. P. 6(a), 6(e), 72; *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989).

Dated: Brooklyn, New York
December 8, 2009

Ramon E. Reyes, Jr.
Ramon E. Reyes, Jr.
United States Magistrate Judge