Fenwick Employment Brief

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10-YEAR AGE DIFFERENCE PRESUMPTIVELY INSUBSTANTIAL IN ADEA LAWSUITS

The Ninth Circuit Court of Appeals held in *France v. Johnson* that an average age difference of less than ten years between a plaintiff and replacement employees creates a rebuttable presumption in an age discrimination claim that the age difference is "insubstantial."

John France, age 54, was employed as a border patrol agent for the U.S. Department of Homeland Security and unsuccessfully sought a promotion to a GS-15 level position. The four candidates who were selected for the position were 44, 45, 47 and 48 years old. France filed a lawsuit alleging age discrimination in violation of the ADEA.

After the trial court dismissed the age discrimination claim, France appealed the case to the Ninth Circuit. A key issue was whether France was able to assert a prima facie case of age discrimination, which includes a requirement that, among other things, France was denied a promotion in favor of a "substantially younger person." The court held that the average age difference between the plaintiff and the selected candidates in this case — 8 years — would normally be insufficient to satisfy the requirement of a substantially younger person. In so holding, the Ninth Circuit adopted the "reasonable and workable rule" that an average age difference of less than ten years is presumptively insubstantial under the ADEA.

However, the court also held that such a presumption may be rebutted with other evidence of age discrimination, which happened in this case due to statements that the employer preferred "younger, less experienced agents" and strongly urged France to retire. On this basis, the court reversed and remanded the case for further proceedings.

EMPLOYEE WHO THREATENED TO KILL SUPERVISORS NOT PROTECTED BY DISABILITY DISCRIMINATION LAW

In *Mayo v. PCC Structurals, Inc.*, the Ninth Circuit Court of Appeals confirmed that the ADA does not require that employers accommodate disabled employees who threaten violence.

Timothy Mayo suffered from major depressive disorder, and, in response to issues he and other co-workers were having with a supervisor, made several threats to his co-workers that he planned to come into work and shoot his supervisor and other management-level employees. After human resources learned of the threats and asked Mayo whether he planned to carry out his threats, Mayo was non-committal in his response. Accordingly, the company immediately suspended Mayo, barred him from the property and contacted the police. The police later took Mayo into custody and placed him under medical care. After two months of leave, a psychologist cleared Mayo to return to work but recommended a new supervisor assignment. However, instead of reinstating Mayo, the company terminated his employment.

Mayo filed a disability discrimination lawsuit under Oregon's counterpart to the ADA. The trial court dismissed the lawsuit, finding that once Mayo made his "violent threats," he was no longer "entitled to protection under the ADA and Oregon's disability discrimination statute." The Ninth Circuit agreed. The court held that Mayo could not assert a claim of disability discrimination because he was not "qualified" at the time of discharge. In so holding, the court determined that an "ability to appropriately handle stress and interact with others" is an essential function of almost every job." The court concluded that "[w]hile the ADA and Oregon disability law protect important individual rights, they do not require employers to play dice with the lives of their workforce."

TRUCK DRIVERS SUBJECT TO SIGNIFICANT CONTROL WERE EMPLOYEES, NOT CONTRACTORS

Finding that a cargo transportation employer had improperly classified its truck drivers as contractors rather than employees, a California court of appeal held in *Garcia v. Seacon Logix, Inc.* that Seacon was not legally permitted to deduct truck lease

and insurance payments from its truck drivers' compensation.

Seacon owned trucks and leased them to the truck drivers, affixed its logo to the trucks and did not allow the trucks to be taken home or used for personal purposes. Seacon also required drivers to arrive at work by 7:00 a.m. five days a week, assigned deliveries to the drivers, directed them on the proper delivery routes, required drivers to report when deliveries had been completed and disciplined drivers for missing work. Seacon deducted the trucks' lease and insurance payments from drivers on a weekly basis. Plaintiffs Romero Garcia and other former Seacon truck drivers sued Seacon under California Labor Code § 2802 for reimbursement of their paycheck deductions, contending that they should have been classified as employees and not independent contractors, such that the deductions were unlawful.

Under these circumstances, the trial and appeals court both agreed that the workers were properly classified as employees rather than contractors. The courts determined that Seacon controlled the manner and means of the work and exerted "tremendous control" over the drivers, including by threats of losing their truck delivery routes if the drivers failed to comply with Seacon's requirements. A judgment was entered and affirmed, which required Seacon to reimburse the drivers for improper deductions of the trucks' lease and insurance amounts.

EMPLOYER CANNOT WAIVE UNCONSCIONABLE PORTIONS OF ARBITRATION AGREEMENT

Finding that an employment arbitration agreement was procedurally and substantively unconscionable, a U. S. District Court for the Northern District of California, in *Capili v. The Finish Line, Inc.*, held that the employer's offer to waive the unconscionable provisions would not save it from unenforceability.

The arbitration agreement in *Capili* contained several substantially unconscionable provisions — including a forum selection clause that designated Indiana as the forum for disputes for California employees, an exemption of trade secret claims asserted by Finish Line, and an equal sharing of arbitration costs — all of which Finish Line offered to waive. The court held that the mere inclusion of the unconscionable provisions has a chilling effect that is not curable, and if an employer, when the provisions are challenged, could lawfully waive the right to enforce them, it would create a perverse incentive for employers to add unconscionable provisions to arbitration agreements. The court denied Finish Line's attempt to compel arbitration.

DOL MEMO HIGHLIGHTS CONTINUING PROBLEMS WITH WORKER MISCLASSIFICATION AND STEPPED-UP ENFORCEMENT EFFORTS

In a U.S. Department of Labor administrator interpretation dated July 15, 2015, the DOL emphasized that worker misclassification is a growing problem among employers and will receive greater scrutiny from the DOL, the Internal Revenue Service and state agencies. The DOL also opined that under the FLSA's broad definition of employee — which emphasizes how economically dependent the worker is on the employer — "most workers are employees."

The DOL memorandum suggests that many employers are intentionally misclassifying workers "as a means to cut costs and avoid compliance with labor laws" and thus denying employees important workplace protections such as overtime, unemployment insurance and workers' compensation. The DOL also notes that misclassification results in lower tax revenues for government and an uneven playing field for employers who properly classify their workers. Accordingly, the DOL has entered into agreements with the IRS and twenty-five state agencies in a "multi-pronged approach" to combat the misclassification problem (such enforcement efforts resulted in the recovery of more than $79 million in back pay for more than 109,000 workers in 2014).

CALIFORNIA'S GENDER PAY EQUALITY BILL PASSES SENATE; HEADS TO STATE ASSEMBLY FOR VOTE

Following unanimous passage by the California State Senate (38-0), the California Fair Pay Act — considered to be the toughest equal pay law in the country — will be voted on shortly by the California State Assembly. If passed and signed into law by Governor Jerry Brown, the law would strengthen existing gender pay equity protections for workers and impose stiffer penalties for gender-based wage discrimination.

Among other things, the law would: (i) prohibit employers from paying different wage rates for "substantially similar work" (rather than identical job

positions in the same establishment) except where the employer can demonstrate the difference is based on seniority, merit or work quantity or quality, (ii) prohibit retaliation against employees from discussing their wages or exercising their rights under the law; and (iii) impose a liquidated damages penalty in an amount equal to the damages suffered by an aggrieved employee.

The proposed law, which has support from state Republicans and the Chamber of Commerce, is directed at closing the pay differential between male and female employees.

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