Fenwick Employment Brief

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Victor Schachter Editor 650.335.7905
Allen Kato Contributor 415.875.2764
Fenwick
FENWICK & WEST LLP

COURT REFUSES TO ENFORCE INVENTION ASSIGNMENT AGREEMENT AS UNLAWFUL NONCOMPETE

In *Applied Materials v. Advanced Micro-Fabrication Equipment Company*, the federal district court for the Northern District of California refused to enforce an invention assignment clause that required former employees to assign inventions disclosed within one year of termination of employment if the invention related to work performed by the employee for the employer. In this unfair competition matter brought by Applied Materials ("Applied") against Advanced Micro-Fabrication ("Advanced"), a company based in Shanghai, China, Advanced had hired several Applied employees. Applied alleged that its former employees misappropriated trade secrets by disclosing inventions conceived by them within one year of termination of their employment with Applied. At the commencement of employment with Applied, each had signed an invention-assignment agreement stating that any invention disclosed by the employee within one year *after* terminating employment with Applied was presumed to be conceived *during* employment for Applied and "will be assigned to Applied … provided it relates to my work with Applied." Applied sought to enforce the invention assignment provision against the former employees and thereby obtain rights to the patents at issue. Granting Advanced's motion for summary judgment against Applied's attempt to enforce the agreement, the court held that the clause impermissibly required assignment of post-employment inventions (regardless of when conceived or whether based on Applied's confidential information) in violation of California's prohibition on noncompete agreements. If appealed, this decision is likely to be upheld given California's strong public policy against non-compete agreements.

NEWS BITES

Court Affirms Arbitrator Award Of Over $4 Billion To Former Marketing Officer

A California court confirmed an earlier $4 billion arbitration award in favor of a former marketing officer in *Chester v. iFreedom Communications Inc.* the arbitrator concluded that the employer breached an employment contract by discharging the employee without cause and failing to pay commissions as required by his agreement. Post-judgment interest alone is accruing at the rate of over $1 million per day until the award is paid. The arbitrator, retired Judge William F. McDonald, awarded almost $1 billion in compensatory damages and interest, and $3 billion in punitive damages, plus sanctions for the employer's failure to pay arbitration fees.

U.S. Supreme Court Rejects Pregnancy Bias Claim In Calculation of Pension

In *A.T.&T. Corp. v. Hulteen*, the U.S. Supreme Court held that the employer lawfully calculated pension benefits for employees who took pregnancy disability leave during the 1960s and 1970s. Before the passage of the federal Pregnancy Disability Act in 1979, for the purpose of calculating pension benefits, the employer gave lesser service credit for employees who took pregnancy disability leave than for other types of leave of absence. The court held that the employer's pre-1979 limitation of pension credit for pregnancy leave was lawful at the time, and that the recent Lilly Ledbetter Fair Pay Act did not apply as there was no unlawful act that affected the present pension benefits.

Starbucks Wins Appeal of $86 Million Ruling Over Tips

In *Chau v. Starbucks Corporation,* plaintiff Chau, on behalf of himself and other Starbucks "baristas," obtained an $86 million court decision against Starbucks Corporation. The court had concluded that Starbucks's policy permitting shift supervisors to share in tips that customers place in a collective tip box violated California law. Reversing the award, the California court of appeal held that state law allows shift supervisors to share in the proceeds placed in *collective tip boxes*. The court further explained that employers may not require employees to share a tip given to an individual employee.

Field Service Representatives Not Entitled To On-Call Waiting Time Pay

In *Gomez v. Lincare, Inc.*, field service representatives for a medical equipment company sued their employer for unpaid wages including overtime. Although the California court of appeal ruled that a jury trial was required to determine whether the employees were exempt from overtime as "drivers" under the motor carrier exemption, the court dismissed the employees' claim for unpaid wages during on-call waiting time. The court noted that while the employees were (1) provided pagers, (2) required to respond to a page within 30 minutes by telephone, and (3) expected to arrive at the customer site within two hours of a page, they were allowed to engage in personal activities while on call, and they could trade on-call responsibilities with a co-worker. Although plaintiffs urged that they felt constrained from engaging in personal activities, the court held that the employee's unilateral decision to avoid personal activities while on call did not change the conclusion that the waiting time was non-compensable personal time.

"Me Too" Evidence Of Pregnancy Discrimination Allowed

In *Johnson v. United Cerebral Palsy*, a California court of appeal directed a jury to decide whether the employer discharged plaintiff on account of her pregnancy. According to plaintiff, the day after she returned from a short sick leave related to her pregnancy, her supervisor terminated plaintiff from her job as a home-care counselor without giving her a specific reason. Although the employer asserted that plaintiff had falsified her time sheets, as part of its investigation the agency did not ask plaintiff to explain her hours. Further, the employer had never told plaintiff that her job performance was unsatisfactory. Notable, and troubling, was the court's acceptance of plaintiff's "me too" declarations by other co-workers that they too were fired after they became pregnant, and evidence of other occasions where employees were cited for dishonesty but were not fired.

Employee Required To Arbitrate Vacation Pay Claim

In *Sonic-Calabasas A, Inc. v. Moreno*, a California court of appeal required an employee to arbitrate his vacation-pay claim despite the state Labor Commissioner's novel objection that the employee should first be allowed to have his claim decided by the Department of State Labor Standards Enforcement ("DLSE") and then arbitrated if the employer was dissatisfied with the DLSE decision. The court held that the federal Arbitration Act required arbitration in lieu of the administrative hearing. The court also opined that the "*Armendariz*" protections afforded to employees apply to such vacation-pay disputes (for instance, the employer must pay the arbitration forum fees and costs).

Inadequate Investigation Requires Trial Of Alleged Harasser's Wrongful Discharge Claim

In *Sassaman v. Gamache*, the federal Second Circuit Court of Appeals (covering eastern states including New York) sent to trial an employee's claim that he was constructively discharged on account of his sex. The employee in this case accused his female supervisor of sexual harassment. During an investigation, it was claimed that an employer representative allegedly told plaintiff that he would be terminated unless he resigned because "you probably did what she said you did because you're male." The plaintiff resigned and filed the lawsuit for sex discrimination. The court held that the alleged statement "you're male" was direct evidence of an "invidious sex stereotype," and the failure to conduct a thorough investigation was circumstantial evidence of discriminatory intent sufficient to require a jury trial. It was noted that the matter was never referred to the employer's EEO officer who normally investigated such claims.

Sexual Comments Within Closely Grouped Cubicles Support Sex Harassment Claim

In *Gallagher v. C.H. Robinson Worldwide, Inc.*, the federal Sixth Circuit Court of Appeals (covering Midwestern states including Ohio) held that plaintiff was entitled to a trial of her hostile environment claim. Gallagher worked on an office floor of closely grouped cubicles. After four months, she resigned and filed suit, alleging that co-workers used derogatory terms for women, described by the court as "explicitly sexual" and "patently degrading to women," viewed pornography on their computers, and left pornographic magazines open on their desks. Based upon her admission that virtually none of the comments were directed at her, and because Gallagher had not complained to upper management, the lower court dismissed the claim of sexual harassment as not sufficiently "severe or pervasive". Reversing, the appellate court held that the district court improperly ignored the office configuration of closely grouped cubicles which rendered Gallagher a "captive audience."

Wal-Mart Settles More Class Actions Involving Over 3 Million Employees For Up To $139 Million

A Nevada federal district court judge in *In re Wal-Mart Wage & Hour Employment Practices Litigation* approved a settlement between Wal-Mart Stores Inc. and plaintiffs in over 30 class action lawsuits in which Wal-Mart agreed to pay up to $85 million to cover claims by over 3 million employees. Also, in *Braun v. Wal-Mart Inc.*, a state court in Minnesota approved the settlement of a class action lawsuit covering about 100,000 employees that requires Wal-Mart to pay up to $54 million. Earlier, in December 2008, Wal-Mart reached agreements in 63 other wage and hour class action suits over off-the-clock work, failure to provide required meal and rest breaks, and failure to pay overtime. The latest group of settled cases included claims of employees in California for various alleged wage and hour violations.

Employee Allowed To Challenge Drug Test As ADA Violation

In *Bates v. Dura Auto. Systems Inc.*, a federal district court in Tennessee held that a jury must decide plaintiff's claim that the employer's random drug testing program violated the ADA. After multiple positive post-accident drug test results at an auto-parts manufacturing plant, the employer implemented a plant-wide random drug testing program. Plaintiff Bates was terminated after testing positive for oxycodone. According to Bates, the medication was prescribed by her physician for pain. The court held that the drug test was a medical examination under the ADA, and that the employer was required to establish a realistic connection between the testing and the work performed such that the screening was consistent with "business necessity." Because the employer had allegedly refused to consider medical documentation that the worker was able to safely perform the job while taking the prescribed medication, the court directed a jury trial to determine if there was a business necessity for the tests.