Fenwick Employment Brief

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PROMISE OF REDUCED SALES QUOTA MAY CREATE ENFORCEABLE CONTRACT ONCE CONDITIONS SATISFIED

According to a recent California appellate opinion, a compensation plan provision promising a future reduced sales quota upon achievement of certain age and tenure requirements may result in a binding contract the employer could not alter after the requirements had been met. In *McCaskey v. California State Automobile Association* and consolidated cases, plaintiffs Charles Luke, Francis McCaskey and John Mellen ("Plaintiffs"), all former sales personnel with Defendant California State Automobile Association ("CSAA"), sued CSAA claiming their terminations breached CSAA's contractual obligations to them and constituted wrongful age discrimination and retaliation.

Plaintiffs began working for CSAA in the 1960's and 1970's. By 1973, CSAA's standard compensation plan provided that sales quotas would be reduced by 15% for sales agents who were 55 years old with 15 years of service and by a further 25% for those who were 60 years old with 20 years of service ("Reduced Quota Provision"). The plan also provided that employment was at-will and could be terminated for failing to meet sales quota, and CSAA could modify the plan at any time. The Reduced Quota Provision remained in effect through 2000, by which time Plaintiffs qualified for the reduced sales quota.

In early 2001, CSAA revised the compensation plan and omitted the Reduced Quota Provision. Plaintiffs refused to sign the revised plan. CSAA advised Plaintiffs that, although they would not be fired for the refusal, their continued employment would be subject to the revised plan terms. Mullen and Luke continued to meet their full sales quota targets; however, McCaskey did not and CSAA terminated his employment in February 2005. Effective April 2005, CSAA rolled out a new revised compensation plan that, again, omitted the Reduced Quota Provision. This time, CSAA insisted that all employees sign it. When Mullen and Luke refused, CSAA considered them as having "left [its] employ."

Plaintiffs sued CSAA alleging that CSAA violated its contractual obligations to them based on the Reduced Quota Provision, discriminated against them based on age, and retaliated against them for complaining about CSAA's conduct. At CSAA's request, the trial court found Plaintiff's claims barred by the statute of limitations. The appellate court disagreed and, based on its independent assessment of the facts presented, allowed Plaintiffs to pursue their contract and discrimination claims at trial.

The court recognized that the Reduced Quota Provision may have contractually obligated CSAA to provide a reduced quota to the Plaintiffs for some period of time into the future – notwithstanding the at-will and modification language in the compensation plan. Harmonizing the at-will language, the court recognized "the contract may permit CSAA to discharge [P]laintiffs for no reason or even for a bad reason, but it does not permit their discharge for the reason that they had invoked or insisted on the right to invoke the [Reduced Quota Provision]." Further, while CSAA had reserved the right to modify the Reduced Quota Provision, it could not do so without first permitting the Plaintiffs "to enjoy the benefits thus earned for the time contemplated by the parties, or if none can be established, for a reasonable time." Consequently, the court found Plaintiffs established a triable issue of fact on the contract claim. (For separate reasons, it also allowed the age discrimination claim to proceed while dismissing the retaliation claim.)

This decision provides a cautionary tale for employers considering revisions to benefits that have already vested or may soon vest. Reliance on at-will employment or modification provisions may not be enough to support such changes, depending on the nature of the benefit and whether impacted employees were permitted to enjoy any vested benefits.

FEHA OBLIGATION TO "CORRECT" CO-WORKER HARASSMENT REMEDIAL, NOT ANTICIPATORY

In an unpublished decision, a California appellate court recognized that, under California law, an employer is not liable for failing to *anticipate* the *risk* that harassing conduct may occur in the future. In *Blanchard v. Pier 1 Imports (U.S.), Inc.*, Carolyn Blanchard sued her former employer Pier 1 Imports (U.S.), Inc. ("Pier 1") and former co-worker Richard Clapham for sexual harassment, among other claims, after Clapham assaulted and attempted to rape Blanchard.

According to Blanchard, Clapham was a convicted and registered sex offender at the time Pier 1 hired him and, while he disclosed his status as a convicted felon, Pier 1 failed to adequately investigate his background. She further claimed that, during employment, Clapham paid her an "unusual and inappropriate" amount of attention, including date invitations, remarking on her appearance, staring at her, and standing uncomfortably close to her. Blanchard claimed she reported this behavior to her store manager in the summer of 2006 and, about the same time, a co-worker also reported that Clapham expressed a desire to be sexually intimate with Blanchard. Several months later, Blanchard worked a closing shift with Clapham and a female supervisor. As Blanchard exited the bathroom she had just cleaned, Clapham confronted her naked and with an erection, pushed her back into the bathroom, covered her mouth and attempted to keep her from leaving. Blanchard escaped and Clapham was charged with assault, assault with intent to rape, and false imprisonment. A civil suit against Clapham and Pier 1 followed.

Blanchard claimed Pier 1 failed to act to prevent or correct sexual harassment after her complaint in summer 2006 and, in all events, "knew or should have known of the risk of harm [Clapham] posed based on its knowledge of his self-admitted felony status, the nature of his previous convictions and the previous complaints lodge by [Blanchard] and a fellow co-worker . . . ." Upon Pier 1's motion, the trial court dismissed Blanchard's claims against it; Blanchard appealed.

The appellate court affirmed the trial court's ruling, finding that an employer's obligation to correct sexual harassment is remedial in nature, not anticipatory. "The question we must decide is whether an employer can be vicariously liable under [the California Fair Employment and Housing Act ("FEHA")] for sexual harassment by a nonsupervisory coworker, even in the absence of notice of any actionable misconduct by the coworker, if it fails to take 'corrective action' to prevent a risk of future actionable harassing conduct." Focusing on the substance of the employer's knowledge, the court found the employer must know, or under the circumstances be imputed with knowledge, of actual sexual harassment before the employer is obligated to correct the conduct. Prior to the attack, Pier 1 was not on notice of conduct sufficiently severe or pervasive to create a hostile work environment (and Blanchard did not challenge this determination on appeal); consequently, prior to the attack, Pier 1 was not obligated to correct any conduct. Further, Blanchard did not allege that Pier 1 failed to act appropriately after the attack. Thus, Blanchard's claim failed.

This decision, while unpublished, still provides helpful insight on an employer's obligations under California law. Legal obligations aside, employers should consider the many advantages to addressing inappropriate workplace conduct before it rises to the level of unlawful harassment – including facilitating a professional workplace culture and minimizing the opportunity for harassing situations to arise in the workplace.

NEWSBITES

Cal. Supreme Court: 3-Year Statute of Limitations on Waiting Time Penalty Claims

An employer's failure to pay all wages owed by the prescribed time following an employee's separation typically subjects the employer to a claim of up to 30 days in waiting time penalties. In *Pineda v. Bank of America*, the California Supreme Court confirmed that, even if the employer later pays the owed wages, an employee may assert a claim for the waiting time penalties up to three years after the initial failure to pay wages even though the employee no longer

has a claim for unpaid wages. While most penalty claims under the California Labor Code expire within one year, Labor Code Section 203 expressly provides a three-year statute of limitations for waiting time penalties claims. The Court also confirmed that a former employee cannot lengthen the statute of limitations to four years by attempting to recover the penalties as "restitution" under California's unfair competition law.

U.S. Supreme Court to Review Wal-Mart Class Certification

The United States Supreme Court has agreed to consider whether the monetary claims of potentially 1.5 million female current and former employees of Wal-Mart and Sams Clubs stores were properly certified for class treatment. *See Dukes v. Wal-Mart Stores*. Specifically, the Court agreed to review whether the lower courts applied the proper procedural rule and requirements to their certification assessment and, regardless, whether the ordered certification would otherwise meet the proper standard.

Plaintiffs filed a purported class action alleging Wal-Mart discriminated against women in violation of Title VII, seeking back pay and punitive damages, among other remedies. The federal district court certified the class. A majority of the Ninth Circuit *en banc* panel (reported in the May 2010 FEB) affirmed the district court's decision, finding the district court had conducted a "rigorous analysis" of the certification requirements. The dissent lamented that, among other things, "Never before has such a low bar been set for certifying such a gargantuan class."

Oral argument and a ruling on these issues are anticipated in 2011.

Employee Lacked Reasonable Belief That Re-Hire Efforts Would Be "Futile"

The Ninth Circuit Court of Appeals affirmed the dismissal of a former employee's claims of failure to rehire due to disability discrimination and retaliation because the employee failed to prove that he applied for re-hire or that efforts to do so would have been futile. In *Stiefel v. Bechtel Corporation*, after being laid off as an ironworker for Bechtel Corporation ("Bechtel"), former employee James Stiefel delayed several months before adding his name to his union's out-of-work list, and then failed to attend roll call meetings, which was necessary to move up the list from which Bechtel hired. Stiefel argued that such efforts would have been "futile" because he believed Bechtel's discrimination and retaliation would have prevented him from being re-hired anyway. However, during deposition, Stiefel admitted that Bechtel accommodated other disabled employees and testified he missed roll call meetings due to medical appointments and personal obligations, not due to a belief his efforts would be futile. Under the circumstances, the court agreed that Stiefel had failed to take the steps necessary to be re-hired by Bechtel and any belief that such efforts would have been futile was not reasonable.

eBay Arbitration Agreement Enforced After Severing Unconscionable Costs Provision

Applying California law, the Tenth Circuit Court of Appeals (covering Utah and other states) upheld an employer's arbitration agreement after severing a provision that allowed the arbitrator to award the "costs of arbitration" to a prevailing party. *See Kepas v. eBay*. Taking into account the American Arbitration Association's ("AAA") rules which defined such costs to include arbitrator and AAA expenses, the two-judge majority found the provision unconscionable because, under *Armendariz*, such costs cannot be shifted to employees through mandatory employment agreements in which employees waive their statutory rights. Nevertheless, the court found that this offensive provision could be severed and the remainder of the arbitration agreement enforced.

The third judge dissented, finding unconscionable for lack of mutuality a second provision that allowed litigation of claims related to a confidentiality and invention assignment agreement and advocating unenforceability of the entire contract. This particular issue remains a hot topic in the courts and, as demonstrated by this judicial split, can expose an arbitration agreement to challenge.

Notwithstanding eBay's favorable outcome, the decision serves as an important reminder that "take it or leave it" arbitration provisions must be carefully crafted to meet minimum requirements for enforceability. As part of that drafting (or later review), employers should also consult their chosen forum's rules to ensure consistency between the documents

and legal requirements.

Ninth Circuit Again Approves Cost-Neutral Pay Shift for Alternative Work Arrangement

The Ninth Circuit Court of Appeals recently issued revisions to its 2009 opinion in *Parth v. Pomona Valley Medical Center* (reported in the November 2009 FEB), again recognizing that employers may establish the regular (non-overtime) rate of pay in any manner they see fit so long as statutory minimum wage rates are respected and reaffirming the principle that employees may be paid different rates for different shifts. Pomona had implemented, at its nurses' request and through the collective bargaining process, an alternative work schedule with 12-hour shifts paid a reduced rate that, when accounting for overtime, resulted in the same overall pay as the regular 8-hour shifts.

In the revised opinion, the Ninth Circuit denied the employee's request for *en banc* review. Further, in assessing the nurse's challenge that the reduced rate was an artifice to avoid paying overtime, the court applied a standard advocated by the Department of Labor and concluded the reduced rate was bona fide: the rate (i) was agreed to by the nurses after they requested an option for 12-hour shifts and implemented through a collective bargaining agreement; (ii) had been in place for years; and (iii) "far" exceeded the Federal Labor Standards Act's minimum wage.

This revised decision continues to provide welcome clarity about the permissibility of adjusting base pay rates in connection with alternative work schedules.

EEOC – Record-Breaking Year for Private Sector Discrimination Complaints

In its newly released Performance and Accountability Report for Fiscal Year 2010, the Equal Employment Opportunity Commission ("EEOC") reported it received a record 99,922 private-sector discrimination claims during fiscal year 2010 (as compared to 93,277 in fiscal year 2009). The EEOC also reported that it recovered a record $319 million in monetary relief for private sector discrimination claims, a $25 million increase over fiscal year 2009. Further, it filed 250 lawsuits and resolved 285 lawsuits for $85 million, including 16 systemic claims.

Save the Date: Annual Update Breakfast Briefing – January 12

On January 12, 2011, the Fenwick & West Employment Practices Group will present its annual update Breakfast Briefing: **"The Most Important Employment Law Developments from 2010: What They Mean for Your Business in 2011."** If you wish to register for the event, please contact Randall Johnson at rjohnson@fenwick.com.