FENWICK & WEST LLP

Weekly Employment Brief

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Failures In Sexual Harassment Reporting Process Render Employer Liable

A recent decision confirms that companies are well advised to ensure they have effective grievance systems for resolving workplace harassment, to include identifying a specific company official to receive harassment complaints. In *Gentry v. Export Packaging Co.*, the Seventh Circuit found that although the defendant company had a clear policy against sexual harassment, a breakdown in the system hindered an employee from properly reporting an alleged harassment. The U.S. Supreme Court previously held that an employer has an affirmative defense to a sexual harassment claim if it shows: (1) it took both preventive and corrective steps to address sexual harassment; and (2) the employee failed to take advantage of available preventive or corrective measures. Despite some efforts to implement a plan, the court found that defendants failed to properly inform its employees who they should complain to about harassment. Accordingly the Seventh Circuit found the Supreme Court's affirmative defense inapplicable.

Out-Of-State Employers Should Be Wary Of Insisting On Non-Competes

If Thomas Kovanic has his way in a California court later this month, his former New Jersey employer may wish it never required him to sign a non-compete clause, which forbade him from working for competing companies. In a case currently pending before the U.S. District Court in Sacramento, a California worker recently won an injunction compelling his New Jersey-based former employer to release him and thirteen other California workers from a non-competition clause. Importantly, even though the former employer specifically disclaimed any intent to enforce such agreements in California, the former employee has been allowed to proceed with an unfair competition action and to seek restitution, punitive damages, a guarantee the company will not include non-competition clauses in contracts with its California employees and attorneys' fees. If Kovanic recovers damages from his former employer, it will be a wakeup call to other out-of-state companies that require California employees to sign non-compete agreements as condition of employment. Moreover, the case illustrates that by winning the race to a California courthouse, an employee newly transferred to California will stand a better chance to defeat non-compete clauses signed while employed in other states. By suing first, Kovanic kept the case in California where the law is in his favor.

One Attempt At Accommodation Of Disabled Is Not Enough

Once an employer becomes aware of the need to accommodate a disabled employee, the duty to accommodate continues even after a failed attempt at accommodation until all such reasonable efforts have been exhausted. Carolyn Humphrey, an employee at Memorial Hospitals Association, suffered from obsessive-compulsive disorder ("OCD"), which caused excessive tardiness and absenteeism at work. Once her disability was brought to her employer's attention, they accommodated her by putting her on a flexible start-time arrangement. However, this accommodation proved ineffective as Humphrey continued her excessive absenteeism. Subsequently, she requested an at home position, but her employer denied

the request without discussing other reasonable alternatives, such as a leave of absence. Ultimately, the company terminated Humphrey's employment. The Ninth Circuit held that the company violated the ADA's reasonable accommodation requirement because it was under a continuing duty to offer an alternative reasonable accommodation even after prior attempts to accommodate failed.

EEOC Files Charges Against Railroad For Genetic Testing

Genetically test at your own risk. The EEOC recently filed a lawsuit against Burlington Northern Santa Fe Railroad because of the company's policy of requiring genetic testing of employees who file worker's compensation claims for carpal tunnel syndrome. The EEOC alleged that the policy violated the Americans with Disabilities Act ("ADA") because Burlington Northern threatened to terminate employees who refused to provide blood samples after filing claims. The blood tests would reveal if they carried a particular genetic trait, which some studies suggest is linked to the development of some forms of carpal tunnel syndrome. As a result of the lawsuit, Burlington Northern agreed to terminate the policy. California employers should be aware that the FEHA also prohibits discrimination against employees due to genetic characteristics or conditions.

Qualcomm May Recoup Legal Costs Against Employees

Plaintiffs beware. Qualcomm is trying to recover $573,527 in costs from former employees who sued the company in a class action suit claiming that, in exchange for stock options, Qualcomm forced them under duress to sign releases. The court excluded 800 workers from the class action, saying those who signed releases ratified the deal by failing to return any of the money Qualcomm paid them. We hasten to note the EEOC recently issued guidance that, for a valid release of federal age discrimination claims, an employer may not require an employee to return money paid for a release as a precondition to bringing suit to challenge the validity of the release agreement.