Fenwick Employment Brief

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EEOC CONCILIATION EFFORTS SUBJECT TO LIMITED JUDICIAL REVIEW

In *Mach Mining, LLC v. EEOC*, the United States Supreme Court held that the conciliation efforts of the Equal Employment Opportunity Commission (EEOC) are subject to judicial review, although such review is limited to ensure that the EEOC has satisfied its statutory obligation to provide an employer the opportunity to discuss the dispute in an effort to achieve voluntary compliance.

Mach Mining arose from a charge that the employer failed to hire a coal miner on account of the female applicant's sex. The EEOC investigated the charge and determined that reasonable cause existed to believe that unlawful discrimination occurred. The EEOC then notified Mach Mining by letter of its finding, and promised that an EEOC representative would "contact [Mach Mining] to begin the conciliation process." There was no evidence that any such contact or conciliation efforts occurred. About a year later, the EEOC sent Mach Mining a second letter, informing the company that "conciliation efforts as are required by law have occurred and have been unsuccessful." The EEOC then filed a sex discrimination lawsuit against Mach Mining. Mach Mining asserted in its answer to the EEOC's complaint that the EEOC failed to conciliate in good faith prior to filing suit, and the EEOC asked the court to determine that its conciliation efforts are not subject to judicial review.

The trial court initially determined that it should review whether the EEOC's efforts at conciliation were "sincere and reasonable," but on appeal, a Court of Appeals determined that the EEOC's conciliation efforts are not subject to any judicial review. The United States Supreme Court granted review and held that judicial review of the EEOC's conciliation efforts—a statutory prerequisite to filing a discrimination lawsuit—was necessary to ensure that the EEOC fulfilled its obligation to "provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance."

However, to respect the discretion of the EEOC in such conciliation efforts and the confidentiality of the process, the Court further determined that the scope of the review must be limited to confirming that the EEOC provided the employer with notice of the alleged improprieties and attempted to engage in discussion (oral or written) to allow the employer a chance to remedy the alleged discriminatory practice. Conversely, the adequacy of the conciliation efforts are not be subject to judicial review.

The Court explained that a sworn affidavit from the EEOC that it has performed its conciliation obligations would normally suffice to establish EEOC compliance. However, should the employer present credible evidence that the EEOC failed to provide the requisite information about the claim or did not attempt to engage in a conciliation discussion, a trial court must conduct fact-finding to decide that limited dispute. And if the trial court finds in favor of the employer, the EEOC should be ordered to engage in appropriate conciliation efforts.

The Court found that the EEOC letters in the *Mach Mining* case—which established only that the EEOC informed the employer that the conciliation process would begin soon and that the process concluded—were not sufficient to satisfy the EEOC's obligation, and remanded the case for further proceedings consistent with its opinion.

PREVAILING FEHA DEFENDANT NOT ENTITLED TO LITIGATION COSTS UNLESS PLAINTIFF'S LAWSUIT LACKED OBJECTIVE BASIS

The California Supreme Court in *Williams v. Chino Valley Independent Fire District* affirmed the asymmetrical nature of litigation costs awards in discrimination lawsuits under the California Fair Employment and Housing Act (FEHA), finding that a prevailing defendant is not entitled to an award of litigation-related costs as a matter of right, unlike a prevailing plaintiff. Such an award is within the discretion of the trial court, and must be based on the

court's finding that the plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit.

Loring Winn Williams, a firefighter, sued his employer for alleged disability discrimination under the FEHA. The trial court awarded judgment to the employer, finding that no genuine issues of material fact existed regarding the merit of the claim. After the defendant moved for an award of costs (but not attorneys' fees), the trial court — without making any findings that the lawsuit was frivolous, unreasonable or groundless — awarded defendant $5,368.88 in costs. A California Court of Appeal affirmed the ruling, holding that an award of costs is mandatory under general court rules rather than discretionary under the FEHA statute.

The California Supreme Court reviewed the case to determine the appropriate standard for an award of costs to a prevailing defendant in a FEHA action, and whether the "frivolous, unreasonable or groundless" standard applicable to an award of attorneys' fees also applies to an award of litigation costs. (Litigation costs typically consist of filing, motion and jury fees, costs of deposition transcripts, costs of service of process and expert witness fees, and are usually much smaller than the amount of attorneys' fees incurred in defending a lawsuit.)

The Court determined that an award of costs, like an award of fees, is within the discretion of the trial court. The Court further noted that the risk of bearing an award of litigation costs would chill potential plaintiffs from attempting to vindicate their statutory right against workplace discrimination, and therefore should be subject to the same standard as an award of attorneys' fees. Accordingly, costs should not be awarded to a prevailing FEHA defendant unless the trial court determines that the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so.

The *Williams* decision highlights the asymmetry between prevailing plaintiffs and prevailing defendants in FEHA lawsuits. Prevailing plaintiffs are ordinarily entitled to receive his or her costs and attorneys' fees unless special circumstances would render such an award unjust. On the other hand, a prevailing defendant will not be awarded fees and costs unless the trial court finds that the action was objectively without foundation.

While the *Williams* decision imposes a higher standard for prevailing defendants in FEHA actions who seek recovery of costs, the case does not appear to affect the ability of defendants to seek an award of costs under California Code of Civil Procedure § 998. C.C.P. § 998 allows a defendant to recover costs where the plaintiff failed to obtain a more favorable judgment or award than a settlement or judgment formally offered by the defendant during litigation.

LINKEDIN REFERENCE SEARCH NOT SUBJECT TO FAIR CREDIT REPORTING ACT

Finding that LinkedIn's "Reference Search" function was not subject to the Fair Credit Reporting Act (FCRA), a Northern California federal district court dismissed a putative class action filed on behalf of job applicants who allegedly lost job opportunities as a result of information learned by employers through LinkedIn.

In *Sweet v. LinkedIn Corporation*, the plaintiff was initially informed that she was to be hired by a hospitality employer, but later learned that the employer changed its mind after checking the plaintiff's references. The plaintiff believed that the employer learned of these references through LinkedIn's "Reference Search" function, which allows paid subscribers to obtain information about an applicant's prior employers and other LinkedIn members who worked at the same company at the same time as an applicant. LinkedIn marketed the "Reference Search" function as a way for employers to obtain "trusted references," to "get the real story on any candidate," and to find references "who can give real, honest feedback" on job candidates. Plaintiff, representing a class of purportedly similar individuals, alleged that LinkedIn violated her rights under the FCRA by furnishing Reference Search results for employment purposes without complying with the terms of the FCRA. The FCRA generally imposes procedural and substantive obligations on "consumer reporting agencies" to ensure that information gathered in "consumer reports" is accurate.

The federal district court held that the LinkedIn's Reference Search was not subject to the FCRA for several reasons. First, the information contained in

the Reference Search came solely from LinkedIn's transactions with its customers, rather than through a third party resource. A report containing information relating solely to transactions between a consumer and the person making the report is excluded from the FCRA's definition of "consumer report." Second, the court determined that LinkedIn is not a "consumer reporting agency," i.e., an agency that regularly engaged in assembling consumer information for third parties, but rather is a conduit for members to carry out their objectives of voluntarily sharing their information. Third, the court also found that the information obtained from the searches — which included information about the references rather than the plaintiffs — did not bear on the plaintiffs' character, general reputation or mode of living. And finally, the court held that the Reference Search results are not used for employment purposes, but rather provide information from which the employer can obtain employment-related information regarding job candidates. Accordingly, the court determined that the plaintiffs failed to state a cause of action against LinkedIn under the FCRA and dismissed the lawsuit.

Notwithstanding the outcome in *Sweet*, the decision is a reminder that evolving methods of obtaining reference and background information on candidates may implicate the FCRA and similar state laws regarding background checks.

NEWS BITES:

Discrimination Plaintiff Bound By Oral Release Of Claims Despite Later Changing Mind

In *Aki v. University of California Lawrence Berkeley National Laboratory*, the plaintiff agreed to resolve his disability discrimination and failure to accommodate claims against his former employer following a court settlement conference. In open court, the plaintiff's attorney recited that the plaintiff agreed to a $45,000 payment in exchange for a general release of claims and the plaintiff confirmed his understanding and acceptance of those terms to the judge.

After defense counsel reduced the settlement terms to writing and requested that the plaintiff execute the settlement agreement, the plaintiff refused. The plaintiff asserted that he intended only to release the disability discrimination and failure to accommodate claims against his former employer, and not to enter into a general release of claims. Defendant sent the plaintiff a $45,000 check and moved the federal district court to enforce the settlement agreement. The federal district court in California held that the settlement was enforceable, notwithstanding the lack of a written settlement agreement, because the terms were agreed upon and consented to, the agreement had a lawful objective and it was supported by lawful consideration.

Reminder: California Paid Sick Leave Law Takes Effect July 1

The new California paid sick leave law — which requires that all employees, including part-time employees, receive a minimum of paid sick leave per year and requires employers to track sick leave accrual and use — takes effect on July 1. Employers should review their existing leave, notice and tracking policies and procedures to ensure that they are in compliance with the new law, particularly with regard to part-time or other workers not traditionally eligible for employment benefits. Employers who maintain non-accrual, discretionary time off policies should also review their policies and practices for compliance with the tracking requirements of the new law. For more information, see our January 2015 and September 2014 editions of the FEB.

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