Fenwick Employment Brief

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DISCRIMINATORY PAY CLAIM BARRED BY U.S. SUPREME COURT'S STRICT APPLICATION OF STATUTE OF LIMITATIONS

In a favorable decision for employers, the U.S. Supreme Court held that an employee's Title VII claim for sex discrimination – based on allegations of unequal pay compared to her male peers - was untimely because she waited several years following the allegedly discriminatory acts to bring her claim. In *Ledbetter v. Goodyear Tire & Rubber Company*, the employee, Ms. Ledbetter, worked from 1979 until 1998 when she retired and brought suit. Ledbetter alleged that, several years prior to her separation, Goodyear supervisors gave her poor performance evaluations because of her sex. Purportedly as a result, Goodyear did not increase her pay as much as it would have if supervisors had evaluated her in a nondiscriminatory manner. By the time of her retirement, Ledbetter's compensation differed substantially from her male coworkers.

To bring a viable Title VII claim in the courts, Ledbetter was first required to file an EEOC charge of discrimination within 180 days of the applicable discriminatory acts. There was no dispute that Ledbetter filed her EEOC Charge more than 180 days after the allegedly discriminatory performance decisions by her supervisors; indeed, she filed her charge several years after those decisions. However, Ledbetter urged that each pay check during the last year of her employment gave present effect to past discrimination and was therefore actionable discrimination. A jury agreed and awarded her back pay and other damages. On appeal, the court rejected Ledbetter's argument, holding that because Title VII requires a showing of intentional discrimination, an employee is required to bring suit within the statutory period immediately after the intentional discriminatory act. As Ledbetter presented no evidence of intentional discriminatory actions within the limitations period, her claim arising out of past discriminatory acts was untimely.

The court noted that a different outcome may occur with federal Equal Pay Act ("EPA") claims arising from the same fact pattern. The EPA, which prohibits compensation discrimination based on gender, does not require proof of an intent to discriminate.

EMPLOYER PROPERLY INVESTIGATED AND TERMINATED EMPLOYEE FOR OPERATING PERSONAL BUSINESS

In another favorable decision for employers, a California court of appeal ruled that Kaiser Permanente properly investigated and terminated an employee who operated a personal business on company time using company resources. In *Loggins v. Kaiser Permanente*, Kaiser received an anonymous tip that one of its employees, Ms. Loggins, was using company resources for her personal home business. Kaiser policy allowed occasional and limited personal use of company electronic assets if such usage did not interfere with work. But the policy expressly prohibited such personal use to conduct an outside business.

Although Loggins denied working on her home business at work, Kaiser's investigation (including the interview of 13 witnesses, and an extensive review of electronic and time records) revealed that: (1) a substantial portion of her use of her work computer and of Kaiser's email, fax and printer systems was related to her home business; (2) Loggins publicized her Kaiser phone line as the number for her home business; and (3) Loggins spent a week attending a seminar related to her home business while being paid by Kaiser.

As a result, Kaiser terminated Loggins, an African-American woman employee of 24 years. She sued, alleging race discrimination and retaliation for complaining about discrimination. Loggins asserted that other non-African American employees used Kaiser facilities and electronic resources to sell Girl Scout cookies, Little League candy, Avon and Tupperware products, etc. However, the investigation showed that such activities were *de minimis* compared to Loggins' substantial misuse of company resources. Further, the court held that the close proximity in time between Loggins' discrimination complaint and her termination was, standing alone, insufficient to avoid dismissal, and that she failed to present other evidence to rebut Kaiser's extensive evidence of a non-discriminatory, non-retaliatory basis for her termination.

COURTS REJECT AND ENFORCE ARBITRATION AGREEMENTS

In a pair of recent decisions with opposite results, courts scrutinized mandatory employer-employee arbitration agreements under California law. In *Davis v. O'Melveny & Myers*, the federal Ninth Circuit Court of Appeals refused to enforce an agreement between a California paralegal and her prominent law firm employer. In rejecting the firm's attempt to compel arbitration of Ms. Davis claim for overtime compensation, the court ruled that the arbitration agreement was unconscionable (and therefore unenforceable) because of four frailties: (1) it shortened the statute of limitations applicable to Ms. Davis' claim; (2) it contained an overbroad confidentiality provision (such that it unfairly restricted Ms. Davis' ability to, for example, contact potential witnesses); (3) it allowed the law firm, but not Ms. Davis, to seek certain injunctive relief in court; and (4) it prohibited Ms. Davis from filing claims with the federal Department of Labor or the California Labor Commissioner.

In contrast, a California court of appeal enforced an arbitration agreement in *Giuliano v. Inland Empire Personnel, Inc*. There, a former CFO sued his employer for breach of contract alleging that he was owed several million dollars in contractual bonuses and severance. The court held that mandatory arbitration was appropriate because the rules restricting the employer's right to mandate arbitration of statutory discrimination and public policy claims - derived principally from the California Supreme Court's *Armendariz* decision - did not apply. Specifically, through his breach of contract claim, Mr. Giuliano sought to recover contractual bonuses and severance, not statutory wage entitlements (*e.g.* minimum wage and overtime compensation).

NEWS BITES

Employee Wrongfully Terminated for Complaining About Threats of Violence

An "at will" employee may nevertheless state a claim for wrongful termination where the termination violates a fundamental public policy. In *Franklin v. The Monadnock Company*, a California court of appeal applied this exception to revive a wrongful termination claim dismissed by a trial court. Franklin alleged that a coworker, Ventura, threatened to kill him and other employees of the Monadnock Group. Franklin complained to Human Resources about the threat, yet the employer allegedly took no action. A week after Franklin's initial complaint, Ventura allegedly attacked Franklin. After Franklin complained, both internally and to law enforcement, Monadnock terminated his employment. Reversing an order dismissing the case, the court of appeal held that Franklin could pursue a claim for wrongful termination in violation of the fundamental public policy requiring employers to provide a safe workplace.

Leave Policy Violates Anti-Discrimination Provisions of State Workers' Compensation Laws

In *Andersen v. WCAB*, a California court of appeal held that the City of Santa Barbara's sick leave policy discriminated against injured workers in violation of Labor Code Section 132a. The City's policy required employees who sustained on-the-job injuries to use accrued vacation rather than sick leave when attending medical appointments related to the industrial injuries. The same City policy allowed non-industrially injured employees to use accrued sick leave when attending medical appointments, and thereby preserve their accrued vacation time. We urge California employers to examine their workers' compensation policies and practices to ensure they do not suffer from similar frailties.

Employee Allowed to Sue for "Reverse" Religious Discrimination

In a novel case, the federal Ninth Circuit Court of Appeals held that an employee may state a claim for reverse religious discrimination. In *Noyes v. Kelly Services*, the employee alleged she applied for a managerial promotion. According to Noyes, the supervisor falsely told the selection committee that Noyes was no longer interested in the opening, resulting in the rejection of Noyes' application. Ultimately, a candidate who adhered to the supervisor's religion received the promotion. A trial court dismissed Noyes' claim of religious discrimination, but the court of appeal reversed, holding that Noyes offered sufficient evidence to allow a jury to assess the merits of her claim.

Cadence Sued for Unpaid Overtime

Cadence Design Systems, a prominent Electronic Design Automation company, is the latest high technology target of a class action for overtime compensation. In the lawsuit, filed in the federal district court for Northern California, the named plaintiff alleges that Cadence misclassified current and former employees in various high tech positions, including system engineers and system administrators, as exempt from overtime compensation.