Fenwick Employment Brief

July 14, 2010
Victor Schachter Editor 650.335.7905
Saundra L.M. Riley Co-Editor 650.335.7170
Fenwick
FENWICK & WEST LLP

COURT REVIVES AGE DISCRIMINATION CLAIM, FINDING "ME TOO" EVIDENCE ADMISSIBLE

In an unpublished decision, a California appellate court revived a plaintiff's claim for age discrimination, finding admissible his proffered "me too" evidence of a corporate plan to drive out older managers and replace them with younger, less costly personnel. In *Chapman v. Safeway, Inc.*, plaintiff Michael Chapman claimed his employer, Vons and its parent Safeway ("Vons"), unfairly targeted him and forced him to take a demotion due to his age.

After thirty-five years of service, in 2004 Vons promoted Chapman to store manager, reporting to District Manager William Tarter. Vons consistently provided him favorable performance reviews, including as a store manager, and gave him service awards in 2004. His store ranked favorably within his district in 2005 and the first quarter of 2006. In March 2006, Tarter counseled Chapman about poor performance reviews and told him to submit a performance improvement plan for the next six months, with progress meetings every two weeks. One month later, and without any progress meetings, Tarter gave Chapman an ultimatum: step down to another position or be fired. Chapman accepted a retail food clerk position, with a significant pay reduction. Vons replaced him with a 25-year employee who was 48 years old and paid a higher rate than Chapman.

Chapman sued Vons for age discrimination, claiming the poor performance reviews and voluntary demotion were pretext for Vons' larger plan to push out older workers – specifically, store managers. In addition to his own testimony, Chapman offered testimony from other store managers, who were over the age of 50 and reported to Tarter, to prove Vons' discriminatory practice.

According to Chapman and the other store managers, after a strike ended in March 2004, new Vons employees were paid less and received fewer benefits than pre-strike employees. At a March 2004 management meeting, which Tarter helped lead, Vons allegedly instructed store managers to cut the hours of pre-strike employees and pressure them to quit or retire. Vons' focus allegedly shifted in 2005 to older store managers – driving them into "voluntarily" demotions or early retirement. Chapman and the store managers testified that, as part of the larger plan, Vons subjected them to excessive management scrutiny, increased inspections, and more frequent and intense audits; transferred them to lower volume stores; transferred key personnel out from under them; and/or subjected them to other adverse management actions, and ultimately replaced them with younger store managers – all due to their age.

The trial court refused to consider Chapman's "me too" evidence from other managers and found no triable questions as to whether the performance reviews were a pretext for discrimination. The appellate court reversed, expressly finding Chapman's "me too" evidence admissible, stating it adds "color" to the employer's decisions and influences behind its actions, and it remanded the matter for trial.

An interesting aside: The appellate court also recognized that a replacement's age being over 40 years does not immunize an employer from an age discrimination claim if the former employee otherwise provides evidence of age discrimination. While an employer may argue the replacement's age undermines the former employee's claim of age bias, it does not provide an absolute defense. Accordingly, the six-year age gap between Chapman and his over-40 replacement did not foreclose Chapman's claim.

POST-EMPLOYMENT CUSTOMER NON-SOLICITS: GOOD PRACTICE OR LAWSUIT INVITATION?

California appellate decisions over the last year, including *The Retirement Group v. Galante* (reported in the September 2009 FEB) and *Dowell v. Pacesetter* (reported in the December 2009 FEB), have raised significant questions, and caused continuing discussion among California attorneys and practitioners alike, regarding the enforceability and advisable scope (if any) of post-employment restrictive covenants, including customer non-solicitation agreements. May such non-solicits prohibit use of trade secrets? May they prohibit use of confidential information? Are they enforceable at all? Unfortunately, California courts have not squarely addressed these issues in situations where the post-employment customer non-solicit is limited to use or disclosure of confidential and/or trade secret information.

As an initial matter, through the California Uniform Trade Secrets Act ("UTSA"), unfair competition laws, and/or the typical Employee Invention Assignment and Information Agreement (or equivalent), a company typically has legal, and sometimes equitable, recourse for a former employee's unauthorized use of trade secret or confidential information to solicit customers. Thus, even absent a customer non-solicit, the company is already protected from such misconduct.

Even if such solicitation is separately disallowed, this contractual restriction may be legally problematic in California. California Business and Professions Code Section 16600 ("Section 16600") broadly prohibits all contracts in restraint of trade, including post-employment customer non-solicit provisions, and at least one court expressed "doubt" about the existence of a "trade secret exception" to Section 16600. Even were a "trade secret exception" to exist, protection of mere confidential information may not fall within such an exception. Thus, although duplicative of other legal and contractual protections, the post-employment customer non-solicit may run afoul of Section 16600.

Seeking to avoid the pitfalls of Section 16600, a company might ask whether it may use a non-solicit for its deterrent effect with the intent not to enforce the provision. This strategy potentially exposes companies to serious risks. For instance, a current or prospective employee who suffers adverse employment action for refusing to sign the agreement may bring a claim for violation of public policy. *See, e.g., Walia v. Aetna, Inc.* (recognizing violation of public policy claim where the employer fired an employee for refusing to sign agreement with unlawful non-compete provision); *D'Sa v. Playhut, Inc.* (same). As a further example, although research reveals no cases on point, intentional inclusion of an unenforceable provision runs the risk that a court, depending on the circumstances surrounding the agreement (*e.g.*, the employers' conduct and intent), may refuse to enforce *the entire agreement*. Courts have already expressed concern about the very deterrent effect the company seeks to achieve absent enforcement.

Given the direction of California decisions in this area, companies should carefully consider their strategy with post-employment customer non-solicit provisions, taking into account potential enforceability challenges, the limited (if any) benefits to the company, and the risks attendant to retaining and/or the scope of the provision. While the safest course might be to refrain from using such non-solicits given the other available protections, each company should determine its strategy taking into account its unique business needs and risk tolerance.

U.S. SUPREME COURT: UNCONSCIONABILITY CHALLENGE TO BE DETERMINED BY ARBITRATOR, NOT COURT

For those employers using arbitration agreements, the United States Supreme Court recently issued an interesting decision regarding who should determine the threshold issue of whether an arbitration agreement is enforceable. In *Rent-A-Center West v. Jackson*, Antonio Jackson sued Rent-A-Center ("RAC")

for employment discrimination, and RAC petitioned the court to compel Jackson to arbitrate his claims. Jackson opposed the petition on the grounds his arbitration agreement was unconscionable. Pursuant to a provision expressly delegating enforceability challenges to the arbitrator, RAC asserted the arbitrator and not the court should determine the issue.

The United States Supreme Court recognized that Jackson's arbitration agreement required him to arbitrate his claims and delegated to the arbitrator exclusive authority to resolve challenges to the agreement's enforceability. The Court held that, where an employee challenges the validity of the specific provision the employer seeks to enforce, such questions remain the province of courts. In contrast, where an employee challenges the validity of the entire arbitration agreement ("as a whole"), the dispute remains subject to any delegation provision and must be decided by the arbitrator. Here, because Jackson challenged the arbitration agreement generally (and not the delegation provision specifically) as unconscionable, the issue of enforceability fell within the arbitrator's exclusive authority to resolve.

Employers using arbitration agreements would be well advised to review such agreements and consider revisions, if necessary, to take advantage of the Court's recognition that, in appropriate circumstances, delegation provisions are enforceable.

NEWS BITES

U.S. Supreme Court: NLRB Two-Member Panels Lacked Ruling Authority

In June, the United States Supreme Court held that the National Labor Relations Board ("NLRB"), the federal body responsible for resolving unfair labor and representation disputes, lacked authority to issue nearly 600 rulings during the 27-month period in which it had only two members (and three vacancies). *See New Process Steel, L.P. v. NLRB*. The Court concluded that the NLRB must "maintain a membership of three in order to exercise the delegated authority of the [NLRB]." As of the Court's decision, five other challenges were pending before the Court and nearly 70 such challenges were pending in federal appeals courts; seven courts have already ruled on cases since the Court's decision, with four of them being remanded to the NLRB.

In the interim, the NLRB has appointed additional members, bringing the current total to its full complement of five. It recently announced plans to seek remand of the pending cases for further consideration by a full NLRB panel.

Same-Sex Partners And Others Without Biological Or Legal Parent-Child Relationship Potentially Eligible For Child-Related FMLA Leave

The U.S. Department of Labor issued Administrator's Interpretation No. 2010-03 to clarify the rights of an otherwise eligible employee to take FMLA leave to bond with or care for a child even though the employee lacks a biological or legal relationship to the child. The FMLA provides that an employee standing "in loco parentis" (*i.e.*, responsible for day-to-day responsibilities to care for and financial support) to a child will be treated as a parent for purposes of determining eligibility to take leave to bond with or care for the child. The Administrator opined that an employee need not *both* provide day-to-day care *and* financially support a child to be eligible for leave. Specific examples of FMLA qualifying relationships include: an employee raising a same-sex partner's adopted child and an employee raising a grandchild, deceased sibling's child, or step-child. Ultimately, eligibility for leave under this theory is fact specific and depends on the employee's intent to assume the responsibilities of a parent with regard to the child.

Harassment Claim Revived, Sexual Attraction Not Prerequisite

The First Circuit Court of Appeal (based in Boston) revived plaintiff Ruth Rosario's sexual harassment claim. Her boss daily commented on her body or underwear, occasionally told others she dressed like a "woman of the streets," called other male

employees to her area to talk about her panties, and engaged in other generally hostile behavior. In *Rosario v. Department of Army*, the court rejected the view that the evidence showed only a lack of courtesy and professionalism as opposed to gender-based harassment. "[T]here is no legal requirement that hostile acts be overtly sex- or gender-specific in content, whether marked by language, by sex or gender stereotypes, or by sexual overtures." Further, it found "misdirected" the Department's argument that Rosario failed to prove the treatment was motivated by sexual desire, as such desire is not needed to support an inference of discrimination based on gender.

Wells Fargo Posed To Settle Two Overtime Actions For Over $7.9 Million

Wells Fargo has negotiated settlements totally over $7.9 million in two overtime class and/or collective actions pending in California federal courts. In the first action, *Russell v. Wells Fargo and Co.*, plaintiff computer engineers claim Wells Fargo misclassified them as exempt employees and failed to pay them overtime. Wells Fargo agreed to settle the class and collective actions with approximately 110 employees for $1.37 million, and a California federal district court has given final approval to the settlement terms.

In the second action, *In re Wells Fargo Overtime Pay Litigation*, plaintiff loan processers (loan specialists, mortgage sales assistants, and loan document specialists) claimed Wells Fargo paid them for 86.67 hours every semi-monthly payperiod, regardless of the hours each actually worked, and managers sometimes failed to approve overtime recorded in the electronic payroll system resulting in failure to pay overtime. They also alleged meal and rest period violations and other claims under California law. Wells Fargo agreed to settle the consolidated actions with over 3,000 class members for $6.6 million. A California federal district court preliminarily approved the settlement, and a hearing for final approval is set for November.

Depressed Dispatcher Unfit For Duty, Lacked Disability Or FMLA Claim

In *Wisbey v. Lincoln*, a city employer lawfully (a) required a depressed emergency services dispatcher to submit to a fitness-for-duty exam and (b) fired her when she failed the exam. The dispatcher had submitted medication certification in support of a Family and Medical Leave Act ("FMLA") leave request indicating her medical condition interfered with her concentration. In response, the city required her to submit to a fitness-for-duty exam, which the employee failed. The Eight Circuit Court of Appeals (based in St. Louis) upheld the exam requirement and the termination. Recognizing that "people's lives are often at risk and a dispatcher's ability to focus and concentrate at all times is essential to adequate job performance," the court found that the fitness exam was appropriate and did not violate the Americans with Disabilities Act. In upholding the termination, the court recognized the FMLA does not provide a depressed employee "a right to unscheduled and unpredictable, but cumulatively substantial, absences or a right to take unscheduled leave at a moment's notice for the rest of her career."

Third-Party Retaliation Claim Captures Spot On U.S. Supreme Court Docket

The United States Supreme Court has agreed to review a plaintiff's claim that he was terminated in retaliation for his fiancée's sexual discrimination complaint to their mutual employer. *See Thompson v. N. Am. Stainless LP*, U.S. No. 09-291, *cert. granted* 06/29/10. The federal district court granted summary judgment for the employer, holding plaintiff lacked a retaliation claim. A full panel of the Sixth Circuit Court of Appeal (based in Cincinnati) agreed with the district court that the plaintiff lacked a retaliation claim since he had neither complained about discrimination nor participated in the employer's investigation of his fiancée's complaint. While no conclusions can be drawn as to the Supreme Court's intentions in granting

review, the presence of yet another employment retaliation case on the Court's docket underscores the prevalence of such claims and reinforces the importance of ensuring an environment which allows employees to report unlawful conduct without reprisal.

Court Erred In Failing To Certify Overtime Claim Challenging Regular Rate Calculation

A recent California appellate court ruling in *Falkinbury v. Boyd & Associates* provides employers an important reminder about properly computing an employee's regular rate (the base hour rate used to calculate overtime). There, the court held an employee's claim of systemic overtime underpayment, due to improper calculation of employee's regular rate of pay, was amenable to class treatment. The employee specifically challenged the employer's alleged practice of excluding from the regular rate of pay year-end bonus payments and uniform maintenance and gasoline reimbursements when determining employees' regular rates. This case highlights an oft-overlooked area of wage and hour obligations – taking into account all legally required components of an employee's regular rate – and the legal and financial exposure attendant to non-compliance.

Total Annual Representation Elections Down Since 1997, But Unions More Successful

As one of its principal functions, the NLRB determines, through secret-ballot elections, whether employees wish to unionize and, if so, which union affiliation they prefer. According to a recent report of the Bureau of Labor Statistics, the total number of annual union representation elections declined by 60% from 1997 to 2009. During this same period, unions increased their success from 51% to 66% in the elections actually held. Thus, while the trend is downward that a representation election will occur, when such elections do occur, it is more likely than not that a union will be successful in its representation bid.

Fenwick & West To Hold A Breakfast Briefing On Social Networking – September 16

On September 16, 2010, the Fenwick & West Employment Practices Group will present an interactive Breakfast Briefing: **"Posts, Tweets, Texts, and Pokes: Emerging Social Media Issues In The Workplace – Avoiding Liability, Best Practices & Policies."** The seminar will include a live demonstration of popular social networking tools; address the cross-section of social media and the law on key concepts such as privacy, lawful off-duty conduct, on-line activity monitoring, harassment, and discrimination; and identify best practices to avoid legal and practical pitfalls. If you wish to register for the event, please contact Randall Johnson at rjohnson@fenwick.com.