Fenwick Employment Brief

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CALIFORNIA APPELLATE COURT REJECTS OVERLY BROAD NON-COMPETITION AGREEMENT AND CASTS DOUBT AS TO CONTINUING VIABILITY OF TRADE SECRETS EXCEPTION

Although California has a long-standing prohibition on noncompetition agreements, as codified in Business and Professions Code Section 16600, courts have historically allowed such agreements where necessary to protect an employer's trade secrets. A recent California appellate decision, however, has called into question the continuing validity of the so-called "trade secrets" exception. In *Dowell v. Pacesetter, Inc.*, the court refused to recognize an employer's overly broad non-compete and non-solicitation covenants and further expressed doubt as to whether *any* non-compete covenant, no matter how narrowly tethered to the protection of trade secrets and confidential information, could be enforceable under California law.

The agreement in dispute in *Dowell* prohibited employees, for 18 months after leaving the employer, from using the employer's "confidential information" to compete against the employer and from soliciting any customer with whom the employees had contact in the year before termination. When several employees left to join a competitor, the new (hiring) employer filed a lawsuit against the former employer seeking a court declaration that the covenants were unenforceable. In response, the former employer argued that the restrictions were valid because they were narrowly tailored to protect trade secrets and confidential information.

The California Court of Appeal affirmed the trial court's ruling that the restrictions were void as a matter of law. In responding to the defendant's argument that a "trade secret exception" applied to the covenants, the court expressed doubt about the "continued viability of the common law trade secret exception to covenants not to compete." However, the court did not resolve the issue because it determined that the covenants in question were not limited to trade secret protection and thus were too broad to be enforceable. The court also affirmed the trial court's determination that the defendant's use of the unenforceable non-compete restrictions violated California's unfair competition law.

In light of the *Dowell* decision, California employers who wish to utilize non-compete restrictions to protect against trade secret misappropriation should ensure that the restrictions are appropriately tailored to cover the protection of trade secrets; any restrictions which impose broader restrictions may subject employers to liability under California's unfair competition laws.

CALIFORNIA SUPREME COURT REINSTATES DISABILITY HARASSMENT VERDICT AND CLARIFIES PUNITIVE DAMAGES STANDARD

In a recent decision, the California Supreme Court reinstated a jury verdict of disability harassment but recognized important constitutional limits on the accompanying punitive damages award. In *Roby v. McKesson*, Charlene Roby, a customer service liaison, sued her former employer McKesson for employment discrimination, harassment, wrongful termination, and failure to accommodate her disability. She also sued her supervisor, Karen Schoener, for harassment.

Roby worked for McKesson for 25 years. About three years prior to her termination, she began suffering from panic attacks, which caused her to miss work on very short notice to her employer. Roby's frequent, unexpected absences strained her relationship with her supervisor, who commented on Roby's unpleasant body odor (caused by her medication) and open sores on her forearms (due to a nervous disorder). Schoener referred to Roby as "disgusting" in front of other employees and ostracized her, ignoring her at meetings and assigning her to phone duty during office parties.

In 2000, McKesson terminated Roby's employment for violation of its attendance policy. Roby sued, and the jury found McKesson and Schoener liable on the claims. As reported in the February 7, 2007 FEB, on appeal, the court disagreed with the jury's verdict and found insufficient evidence to support the harassment verdict. It reduced the award against McKesson and threw out the award against Schoener.

On review, the Supreme Court reinstated the harassment verdict but limited the amount of the punitive damages award. First, the Court found the appellate court erred in disregarding evidence of conduct which created a hostile

work environment. Thus, for example, the demeaning manner in which Schoener counseled Roby about her body odor was to be considered in assessing Roby's harassment claim.

Second, the Court determined that the U.S. Constitution required a one-to-one ratio on Roby's punitive damages. The Court found only weak evidence of any ratification of Schoener's conduct by senior management, and found no evidence of any repeated unlawful action. The Court also recognized that the jury's $1.3 million award for physical and emotional distress "may have reflected the jury's indignation at McKesson's conduct, thus including a punitive component." Under these circumstances, the punitive damages award was capped by the total compensatory damages award; here, $1.9 million (reduced from $15 million).

The decision, a partial victory for employees and for employers, underscores the importance of establishing and maintaining a "no tolerance" corporate culture for harassment and other unlawful conduct. By setting an example for appropriate workplace behavior, employers can minimize exposure to harassment and other discrimination claims.

CALIFORNIA SUPREME COURT UPHOLDS BROAD "PRIVILEGE" PROTECTIONS FOR ATTORNEY'S WAGE AND HOUR OPINION LETTER

In a decision reaffirming the strong protections accorded attorney-client communications, the California Supreme Court held in *Costco Wholesale Corp. v. Superior Court* that the entirety of an attorney opinion letter – created as a result of a company's internal job classification review – should not be produced in any form to the plaintiffs and was not subject to "in camera" review by a court.

The employer in *Costco* utilized outside employment counsel to conduct a review of some of its exempt management positions to ensure compliance with wage and hour laws. As part of the review, Costco's attorney interviewed Costco managers and prepared a 22 page opinion letter setting forth the attorney's findings and conclusions. Thereafter, Costco reclassified some of its managers from exempt to non-exempt employees. A class action wage and hour lawsuit was subsequently filed – involving those employees whose job classifications changed – and the plaintiffs' lawyers sought to discover the attorney's opinion letter and its findings. Over Costco's strenuous objections, the trial court ordered a discovery referee to review the letter and the referee determined that the factual information in the letter – including witness statements obtained by Costco's attorney – should be disclosed to the plaintiffs.

On appeal, the Supreme Court agreed with Costco that the entirety of the letter was an attorney-client communication that was not subject to disclosure or even private review by a discovery referee or a trial court. The Court held that the letter was requested by Costco for the purpose of receiving legal advice, and thus all information contained in the letter was confidential. The Court also held that, so long as the letter constituted a confidential communication rendered to a client to provide legal advice, the trial court was not permitted to have a discovery referee review the letter to rule whether information within it was privileged.

The *Costco* decision is an important decision for employers and their legal counsel, as it reaffirms that properly privileged communications between attorneys and employers – including all factual discussions contained within those communications – remain protected from the eyes of litigation adversaries, and even from judges.

NEWS BITES

Alert: Federal Genetic Information Nondiscrimination Act (GINA) Effective Nov. 21

Employers should be aware that the federal Genetic Information Nondiscrimination Act (GINA), enacted in 2008, became effective on November 21, 2009. GINA generally prohibits employers, unions, and employment agencies from collecting applicants' or employees' genetic information, which is defined to include family medical history, and from requiring that employees submit to genetic tests. It also provides that employers who do obtain such information may not discriminate against individuals based on the data and must keep the information private, not disclosing it except under very limited circumstances set out in the statute.

Ninth Circuit Holds that Independent Contractors May Sue Under Rehabilitation Act

In *Fleming v. Yuma Regional Medical Center,* the Ninth Circuit (San Francisco) ruled that independent contractors, in addition to "employees," may bring discrimination claims under the Rehabilitation Act. This Act prohibits discrimination on the basis of disability by contractors and subcontractors doing business with federal agencies or under programs receiving federal financial assistance. Disagreeing with previous decisions by the Sixth (Cincinnati) and Eighth (St. Louis) Circuits, which concluded that independent contractors did not have standing to bring such claims, the Ninth Circuit held that the Rehabilitation Act does indeed cover claims by an independent contractor notwithstanding the lack of an employer-employee relationship. While this conflict will require a U.S. Supreme Court decision to resolve the issue, California employers will be governed by the *Fleming* case until such a determination is made.

Federal Jury Awards $6.2 Million in Age Discrimination Suit

Two scientists who claimed they lost their jobs at a chemical manufacturing firm during a round of layoffs were awarded more than $6.2 million in an age discrimination suit against their former employer. The employer unsuccessfully argued that the plaintiffs had lost their jobs because funding for their positions had been eliminated. The federal jury in Pennsylvania found in favor of the scientists and determined that the employer's conduct had been "willful," resulting in an automatic doubling of each plaintiff's back pay award. The jury further awarded significant compensatory damages for the emotional damage the plaintiffs allegedly suffered as a result of the discrimination.

Significant Increase in Private Sector EEOC Claims During 2009

According to the Equal Employment Opportunity Commission's 2009 annual report, the agency received 93,277 private sector discrimination charges in 2009. This marks the second highest number of claims in 20 years, and the EEOC is expecting that the number of claims will exceed 100,000 by the end of fiscal year 2010. The report attributes at least part of the increase to the additional statutory protections afforded by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) and the Lilly Ledbetter Fair Pay Act of 2009. In 2009, the EEOC obtained more than $294 million for alleged victims of discrimination—the highest level of monetary relief in the agency's history—and the recent expansion of the agency (it hired an additional 155 employees in 2009) suggests that its increasing assertiveness is a trend that will continue into 2010.