FENWICK & WEST LLP

Fenwick Employment Brief

December 15, 2004

Brian K Nagatani	Contributor	650.335.7181
Victor Schachter	Co-Editor	650.335.7905
Daniel J. McCoy	Co-Editor	650.335.7897

Employees Who Resign from At-Will Employment May Recover Damages for Unfulfilled Promise of Future Employment

In a case of first impression, a California appellate court recently held that an employee who resigns from an at-will position in reliance on a job offer from another employer may, in certain circumstances, recover damages if the prospective employer withdraws its offer.

In *Toscano v. Greene Music*, plaintiff Joseph Toscano worked as a general manager for a piano store. Unhappy with his job, Toscano pursued work with defendant Greene Music and received an offer for a sales management position. In reliance on this offer, Toscano resigned his current position. However, before Toscano began his new employment, Greene Music withdrew its offer.

Toscano sued primarily under a promissory estoppel theory, and alleged that Greene Music's offer induced Toscano to resign his former position and thereby lose out on substantial wages from the prior employer. A trial court awarded Toscano reliance damages of $536,833 (his wages up to retirement). Greene Music appealed.

The appellate court held that an employee may recover lost future wages from a prospective employer that withdraws an offer of employment, if the employee can prove he would have been entitled to such wages had he stayed with the prior employer. However, in a somewhat puzzling outcome (though helpful to employers), the appellate court held that Toscano did not have a definite expectation of continued employment with the piano store for any particular period of time. Thus, Toscano could not recover *any* wages he allegedly would have earned but for Greene Music's unfulfilled promise of future employment.

Although Greene Music ultimately prevailed, this decision establishes that withdrawals of employment offers are risky if the spurned candidate can prove he would have continued to earn wages with his prior employer for a significant period had he not resigned to pursue other opportunities.

Employer Not Liable for "Equal Opportunity" Abuser

A California appellate court recently struck down a former employee's racial discrimination claims because his supervisor uniformly abused all employees and did not target a particular class of individuals for ridicule or harassment.

In *Lee v. Intel,* Otto Lee, an Asian in-house attorney for Intel, claimed that Intel's termination of his employment constituted racial discrimination. Lee alleged that his supervisor was abrasive with him from the moment they began working together. She frequently raised her voice, and she cursed and cut Lee off when they interacted. Lee admitted that the supervisor treated white and female employees in a similarly abusive fashion, for she routinely cursed and yelled at various employees (of different races and genders) in her group.

When Lee's supervisor terminated him for poor performance, Lee filed suit for race discrimination,

among other claims. The trial court dismissed Lee's claims. The appellate court affirmed on two primary grounds. First, the supervisor's abuse revealed only that she bore a personal grudge against Lee, which can constitute a legitimate, nondiscriminatory reason for a termination provided the grudge is unrelated to prohibited prejudice. That is, hostility toward an employee is permissible, provided it is not based on a protected characteristic. Second, the evidence demonstrated that the supervisor abused numerous employees of different races and genders, and did not single out Lee for abusive treatment.

Of course, this decision should not serve to sanction abusive behavior by supervisors, or give employers comfort that they can ignore "equal opportunity" abusers. However, it clarifies a potential defense for "equal opportunity" abusers that employers may assert against discrimination claims.

Minor Change in Duties Upon Return to Work Does Not Violate FMLA

The Seventh Circuit Court of Appeals (encompassing Illinois and other Midwestern states) recently held that a minor change in an employee's duties upon return from Family and Medical Leave Act ("FMLA") leave does not violate the statute.

In *Mitchell v. Dutchmen Manufacturing, Inc.*, Tina Mitchell worked on a recreational vehicle assembly line for Dutchmen, performing various tasks. Mitchell took an FMLA leave of absence for depression and anxiety. While on leave, Dutchmen consolidated two of its production lines and reassigned personnel to different tasks and departments. Upon Mitchell's return, she was returned to her former department and job, with no change in pay or benefits, but Dutchmen required Mitchell to operate a new screw gun and seal gun on the line. Mitchell then injured her wrist, and as a result, her doctor required her to limit excessive gripping and twisting of workplace tools. Although Mitchell's supervisor excused her from using the screw gun, the supervisor continued to require Mitchell to use a seal gun. Mitchell refused and resigned, and then sued Dutchmen for violation of the FMLA on the theory that the company did not restore Mitchell to an equivalent position when it required her to use the new hand tools.

The trial court dismissed Mitchell's claims, and the court of appeals affirmed. The Seventh Circuit found that Mitchell's duties remained substantially similar upon her return, and it held that the FMLA allows employers flexibility to implement minor changes to the job.

This decision confirms that employers need not return an employee from an FMLA leave to an *identical* position with respect to job duties. Rather, if the employee returns to perform duties *substantially similar* to those he or she performed before the leave of absence, the employer will have satisfied its FMLA obligations.

Arbitration Service Provider Refuses to Enforce Clauses Forbidding Class Actions

More and more employers in California and elsewhere are implementing mandatory, binding arbitration agreements with their employees. However, in recent years, both the court and administrative agencies have actively imposed limits on the scope and enforceability of such agreements. A recent policy change by JAMS (one of the country's largest arbitration service providers) continues this trend of reigning in overbroad agreements.

JAMS announced it would no longer enforce clauses that forbid consumer and employment class action arbitrations. Many employers have inserted such anti-class action clauses in their arbitration agreements with employees in the hopes of avoiding the many legal and logistical burdens associated with class proceedings. Effective immediately, however, JAMS will not enforce such clauses and will adjudicate employment class action arbitrations even if the petitioner is contractually prohibited from pursuing class relief .

The American Arbitration Association — another major arbitration service provider — has not yet weighed in on this subject.

We encourage readers to consult counsel before they implement such anti-class action clauses in their arbitration agreements with employees. For those who already use such clauses, it might be worthwhile to review their efficacy in light of these trends.