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Weekly Employment Brief

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Employee's Contract Claim Withstands Motion to Dismiss Because of Frail "At Will" Provision

A California court of appeals recently allowed a plaintiff to take to trial a breach of contract claim against his former employer. The decision rested, in part, on an incomplete "at will" provision and representations during a hiring interview *inconsistent* with "at will" employment.

In *Dore v. Arnold Worldwide, Inc.*, plaintiff Brook Dore served as a management supervisor for defendant Arnold Worldwide, Inc. ("Arnold"). During Dore's pre-hire interviews Arnold officials allegedly stated: (1) they were looking for "a long-term fix, not a Band Aid," (2) "he would play a critical role in growing the agency," (3) employees were treated like "family," and (4) Arnold terminated the two previous management supervisors for cause. Dore later signed an offer letter characterizing his employment as "at will." However, the letter defined the term "at will" to mean that Arnold had "the right to terminate your employment at any time just as you have the right to terminate your employment with [Arnold] at any time." The offer letter also provided for a 90-day probation period.

Two years after Dore's hire, Arnold terminated him but gave no reason for the decision. Dore sued for breach of contract and contended that the offer letter and pre-hire representations imposed on Arnold an obligation to terminate Dore only for good cause. The trial court dismissed the claim based on the "at will" provision in Dore's offer letter. However, the court of appeals reversed and remanded the case to trial on two grounds. First, Arnold expressly limited the meaning of the "at will" provision to termination "at any time" but not necessarily "for *any reason*." Second, the 90-day probation period, which would have been unnecessary if Arnold could terminate Dore for any reason, and the statements of Arnold officials created a material issue of fact, that could not be resolved by way of a motion to dismiss, as to whether Dore was entitled to be terminated only for good cause.

This case underscores the importance of a carefully drafted "at will" provision extending to the employer the right to terminate employees at any time and for any reason with or without notice. It further underscores the need for hiring managers to avoid making casual, careless statements – at any stage of employment – inconsistent with "at will" employment. It also calls into question the propriety of probationary periods of employment for "at will" employees, which are unnecessary unless expressly and *solely* tied to the right to participate in benefits programs. Finally, this case points up the utility of including "integration" clauses in "at will" agreements and offer letters to exclude claimed "oral" modification of the employment contract terms.

Employer Liability for Non-Employee Sexual Harassment May Be Based on Conduct That Occurred Prior to Enactment of FEHA Amendment

A California court of appeals recently held that Assembly Bill 76 ("AB 76"), which revised the California Fair Employment and Housing Act ("FEHA") to make employers liable for sexual harassment committed by consultants and other non-employees, applies to conduct that occurred *prior* to its October 3, 2003 effective date.

In *Salazar v. Diversified Paratransit, Inc.* (initially reported in the November 5, 2002 WEB Update), plaintiff Raquel Salazar, a bus driver for defendant Diversified Paratransit, filed a FEHA claim against the company after a passenger sexually assaulted her. The court of appeal upheld the dismissal of the claim on the ground that FEHA did not impose employer liability for harassment by non-employees. However, while Salazar's appeal to the California Supreme

Court was pending, the California Legislature enacted AB 76. Thereafter, the supreme court remanded the case back to the court of appeal for reconsideration in light of the new legislation.

On remand, the court of appeal permitted Salazar to pursue her claim, notwithstanding Diversified's argument that AB 76 should not apply retrospectively to conduct that occurred before its enactment (the passenger assaulted Salazar before the effective date of the statute). The court concluded that the revision was merely a clarification of a previously ambiguous component of FEHA regarding employer liability for non-employee sexual harassment.

Thus, employers are on notice that that they can be held liable for sexual harassment by non-employees even if that conduct occurred prior to October 2003.

Woman Instated as Boys' Basketball Coach After Presenting Direct Proof of Sex Discrimination

The Sixth Circuit Court of Appeals (encompassing Michigan and Ohio among other states) recently upheld an order of instatement and monetary damages for a woman unlawfully denied a promotion based on her sex.

In *Fuhr v. School Dist. of the City of Hazel Park*, plaintiff Geraldine Fuhr, a teacher, girls' varsity basketball coach, and boys' varsity assistant coach in the Hazel Park School District ("Hazel Park"), sued for sex discrimination when the school denied her a promotion to the varsity boys' head coach position. Fuhr possessed extensive varsity coaching experience with both boys and girls. However, Hazel Park promoted a male gym teacher with only two years of freshman boys' coaching experience, and cited the potential overlap in the girls' and boys' varsity seasons, and the otherwise difficult logistics associated with Fuhr holding back-to-back varsity assignments, as the basis for its decision. Yet Fuhr presented direct evidence of discrimination, including evidence that the School Board President relayed to a colleague he was "very concerned about a female being the head boys' basketball coach."

A jury awarded Fuhr $245,000 in damages (plus attorney's fees), and the trial court ordered Hazel Park to instate Fuhr as the boys' varsity basketball coach. The Sixth Circuit affirmed the award, based in part on the conclusion that the jury had a reasonable basis to reject Hazel Park's purported non-discriminatory motive, especially given the direct evidence of discrimination.

This case highlights the profound risks employers take when they deny promotions to qualified candidates who occupy a protected class, especially when the denial is accompanied by direct evidence of discrimination. While instatement is a rare remedy, it can be ordered, especially in the face of "direct evidence" of intentional unlawful discrimination.

Recovering Drug Addict May Pursue ADA Discrimination Claim Based on Employer's Refusal to Rehire

The Ninth Circuit Court of Appeals (encompassing California and other western states) permitted a recovering drug addict to pursue a disability discrimination claim after his employer did not rehire him.

In *Hernandez v. Hughes Missile Systems Co.*, plaintiff Joel Hernandez, who resigned from defendant Hughes in lieu of discharge for violating Hughes' workplace code of conduct regarding drug use, claimed Hughes failed to rehire him because he was a recovering addict, in violation of the Americans with Disabilities Act ("ADA"). In its response to Hernandez' administrative complaint before the Equal Employment Opportunity Commission, Hughes identified Hernandez' drug use and failure to show rehabilitation as the bases for its decision not to rehire him. However, after Hernandez brought suit in federal court, Hughes cited – for the first time – its uniform, unwritten policy not to rehire individuals originally terminated for violating company conduct rules as its justification.

The Ninth Circuit held that Hernandez' claim could proceed

to trial because he presented sufficient evidence that Hughes' stated reason for not rehiring him could be pretextual. Specifically, the court concluded that Hughes' knowledge of Hernandez' past drug abuse and current recovery, coupled with the inconsistency between Hughes' proffered reasons for its decision, created a triable issue of fact.

This case emphasizes the need for employers to use great caution when taking adverse action against employees who have completed a drug rehabilitation program. Employees who complete such programs have no greater right to employment than those who are not afflicted by drug addition. However, employers should avoid taking any action that might lead a court or jury to conclude that a failure to hire, termination, demotion, etc. was motivated in any way by an individual's participation in a drug program.