FENWICK & WEST LLP

Weekly Employment Brief

December 16, 2003

Saundra Riley Contributor 650.335.7170
Trey Wichmann Contributor and Co-Editor 415.875.2418
Shawna Swanson Co-Editor 415.875.2487

California Court Permits Company to Fire Supervisor for Dating Subordinate

A California appellate court held an employer legally could fire a supervisor for dating his subordinate in violation of company policy. In *Barbee v. Household Automotive Finance Co. ("HAFC")*, plaintiff Robert Barbee, a sales manager for HAFC, began dating a subordinate sales person. HAFC had a policy providing that intimate relationships between supervisors and subordinates raised potential conflicts of interest that might require reassignment. Aware of rumors of Barbee's relationship, HAFC's CEO told Barbee that "intercompany dating was a bad idea." Thereafter, HAFC determined the relationship raised a conflict of interest and told Barbee that either the relationship must end or one of the employees would need to resign. Barbee responded that both of them planned to remain with the company, which HAFC took as an acknowledgement that they would end their dating relationship. When HAFC later learned that the relationship had continued, it terminated Barbee. Barbee claimed this constituted wrongful termination in violation of California public policy and violated his right to privacy under the California Constitution. The Court rejected his privacy claim, holding that he did not have a reasonable expectation of privacy in pursuing an intimate relationship with his subordinate, particularly in view of the company's conflict of interest policy and the CEO's warning against dating a subordinate. On the public policy claim, Barbee claimed the termination violated Labor Code section 96(k), which permits the California Labor Commissioner to hear wage claims resulting from terminations for "lawful conduct occurring during nonworking hours away from the employer's premises." The Court of Appeal held that this section does not create substantive rights for employees, but merely establishes a procedure for the Labor Commissioner to assert employees' recognized constitutional or statutory rights. This decision is significant, as it previously was not clear whether section 96(k) created independent, substantive rights, or whether it could form the basis for a public policy tort claim. Employers should also recognize the importance of HAFC's effective communication of its policy and its intent to enforce the policy, which diminished Barbee's expectation of privacy.

Policy Against Rehiring Violators of Workplace Rules Can Be Legitimate Reason to Refuse to Rehire Former Employee Who Resigned After Positive Drug Test

The United States Supreme Court recently recognized that a "no-rehire policy is a quintessential legitimate, nondiscriminatory reason for refusing to rehire an employee" who previously violated workplace conduct rules. In *Raytheon Company v. Hernandez*, Hughes Missile Systems (now Raytheon Company) allowed plaintiff Joel Hernandez to resign in lieu of termination after he failed a drug test. Two years later, after successfully completing a drug treatment program, Hernandez applied for re-employment. A Hughes employee reviewed the separation statement in Hernandez' personnel file and rejected the application based on the company's policy against rehiring employees who either had been terminated for workplace misconduct or resigned in lieu of termination. Hernandez claimed discrimination in violation of the Americans with Disabilities Act, because his application was rejected due to his record of past drug addiction. The district court agreed with Hughes that its no-rehire policy constituted a legitimate, nondiscriminatory reason for its action. The Ninth Circuit Court of Appeals, however, disagreed with the district court and held the no-rehire policy was not a legitimate, non-discriminatory reason, because, though it was lawful on its face, it was unlawful as applied to employees who were forced to resign for illegal drug use but have since been rehabilitated. (See June 24, 2002 W.E.B. Update.) The United States Supreme Court then reversed the Ninth Circuit's decision, holding that when a plaintiff

claims intentional discrimination, inquiry into the discriminatory impact of an otherwise neutral policy is irrelevant. Instead, an employer need only identify a legitimate, nondiscriminatory reason for its action, such as Hughes' no-rehire policy. Although the policy might have been subject to challenge on a disparate impact theory, Hernandez failed to plead that theory in his complaint.

Going Against the Grain, California Court Upholds Large Punitive Damages Award

An appellate court in Los Angeles has upheld a $1.7 million punitive damages award in a real estate fraud case though compensatory damages were only $5,000. In *Simon v. San Paolo U.S. Holding Co. Inc.*, Simon had sued San Paolo seeking damages for breach of contract and fraud for an allegedly false promise to sell him property in downtown Los Angeles. The U.S. Supreme Court had sent the large jury award back to the California appellate court to review in light of its holding in S*tate Farm Mutual Automobile Insurance Co. v. Campbell*, that punitive damages awards must be more closely related to the harm actually suffered, and should rarely, if ever, exceed nine times the amount of compensatory damages awarded. (See April 28, 2003 WEB Update). The California court then reaffirmed the $1.7 million punitive award, relying on the Supreme Court's statement that larger ratios may be appropriate "where a particularly egregious act has resulted in only a small amount of economic damages." The California court pointed to the fact that San Paolo's conduct showed a pattern of repeated intentional deceit directed at Simon. The court also noted that even though Simon's out-of-pocket damages were only $5,000, the fraud deprived him of the $400,000 difference between the property's appraised value and the price at which San Paolo falsely promised to sell him the building. Because the contract involved real estate, such "loss of bargain" damages were not available. Thus, the punitive damages award was only four times the amount of the real harm Simon suffered. In contrast to last week's discussion of *Romo v. Ford Motor Co.*, this case shows that defendants are not completely immune to large punitive damages awards, and that courts will take advantage of loopholes in the Supreme Court's *State Farm* case to award punitive damages awards they feel are "fair."

San Francisco Voters Approve Nation's Highest Minimum Wage

In the recent November election, San Francisco voters approved Proposition L, a ballot measure that establishes an $8.50/hour minimum wage for virtually all employers operating within the city limits. The measure, which garnered 60% of the votes, will replace the $6.75 state minimum wage in the city on February 2, 2004. However, nonprofit organizations and companies with fewer than 10 employees will have two years to fully implement the raise. As a result of the measure, minimum salaries for full-time employees will increase from $14,040 to $17,680.