

EMPLOYMENT LAW UPDATE

Relationship-Driven Results

June 2009

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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

E-Verify Mandate for Federal Contractors Delayed Again

The date upon which federal contractors and subcontractors must begin to use E-Verify has been delayed until September 8, 2009 in order to provide the Obama administration with additional time to review the matter. E-Verify is an internet-based system operated by the U.S. Department of Homeland Security and the U.S. Citizenship and Immigration Services that allows employers to verify the employment eligibility of their employees, regardless of citizenship. Information the employee provides on his or her Form I-9 is electronically checked by E-Verify against records in Homeland Security and Social Security Administration databases.

California Legislation

A number of bills that could have impacted California's employers and employees missed the deadline for winning approval from various legislative committees and thus are unlikely to see further action this year. These bills include:

AB 842 (Swanson): AB 842 would have expanded mandates associated with the California WARN Act. The legislation would have also increased penalties for violations of the Act.

AB 1000 (Ma): This bill would have mandated paid sick leave for employees working in California.

II.

JUDICIAL UPDATE

Post-Termination Commissions Not Recoverable as Wages

In *Nein v. HostPro, Inc.*, Plaintiff Randy Nein ("the Employee") worked for Defendants HostPro, Inc. and Interland, Inc. (collectively "the Employer") as a salesperson between October 1999 and December 2001. The Employee entered into a

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written employment agreement with the Employer, which provided that: (1) the Employee was responsible for web-hosting sales; (2) the Employee’s starting salary was \$24,000 per year, plus commissions of 4 percent “on all direct initial sales”; (3) the Employee “will be eligible for commission pay as set forth in this [document], so long as [the Employee] remains employed with the [Employer] as a Sales Representative”; and (4) the employment agreement “may be amended only by a written agreement executed by each of the parties hereto.”

In April 2001, the Employer promoted the Employee to channel manager. He and the Employer consummated an oral agreement which provided that: (1) the Employee’s salary was increased to \$75,000 per year; and (2) the Employee would receive commissions of “20% of the up front costs’ revenues on all accounts brought in by [the Employee] or through [the Employee’s] contacts or efforts.”

The Employee was discharged by the Employer in December 2001. He then sued, seeking payment of commissions for a transaction that occurred after he left, but which was allegedly achieved through his “contacts or efforts.”

The Court of Appeal disposed of the Employee’s argument that he was entitled to post-termination commissions from the Employer, stating:

We agree with [the Employer] that, on its face, the italicized language is reasonably susceptible to only one interpretation—that once [the Employee] ceased to be employed by [the Employer], he would no longer be eligible for commission pay. . . . Accordingly, we conclude as a matter of law that **the written employment agreement precludes [the Employee] from collecting additional commissions post-termination.**

It is important to note that the court did not consider whether the commission portion of the employment agreement was unconscionable. The court also did not consider the question of whether any of the Employee’s claimed commissions were earned prior to discharge and therefore should have been paid.

Court of Appeal Holds that Employer Can Compel Arbitration of Administrative Wage Claims

In *Sonic-Calabasas A, Inc. v. Moreno*, the California Court of Appeal held that an employer can require an employee to submit a wage claim to binding arbitration instead adjudicating the claim before the Division of Labor Standards Enforcement (“DLSE”).

Frank Moreno (“the Employee”) was a former employee of Sonic-Calabasas A, Inc. (“the Employer”), which owns and operates an automobile dealership. As a condition of his employment, the Employee signed a predispute arbitration agreement

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that required both parties to submit their employment disputes to “binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act.” By its terms, the arbitration agreement applied to “all disputes that may arise out of the employment context . . . that either [party] may have against the other which would otherwise require or allow resort to any court or other governmental dispute resolution forum . . . whether based on tort, contract, statutory, or equitable law, or otherwise.”

In December 2006, the Employee filed an administrative wage claim with the DLSE for unpaid vacation pay. In response, the Employer filed a petition in superior court to (1) dismiss the claim before the DLSE; and (2) compel arbitration. The court of appeal determined that nothing precluded the substitution of the arbitrator for the deputy labor commissioner and thus compelled arbitration. The Employee then argued that arbitration would not include the special statutory provisions regarding the de novo appeal to superior court after the hearing (i.e., the employer posting an undertaking in order to appeal and bearing the employee’s fees and costs in the event of a judgment at the superior court). The court dismissed this argument as well.

“Me Too” Declarations Admissible to Defeat Summary Judgment

In *Johnson v. United Cerebral Palsy/Spastic Children’s Foundation of Los Angeles and Ventura Counties*, the California Court of Appeal decided that co-employees’ declarations claiming similar discrimination were admissible to defeat a motion for summary judgment. Dewandra Johnson (“the Employee”) alleged that she was subjected to pregnancy discrimination. Her employer (“the Employer”) argued that it discharged Employee because she falsified time records. The trial court granted the Employer’s motion for summary judgment and dismissed the case. The appellate court reversed, however, after identifying a number of issues from which the jury could determine that the real reason for the discharge was discriminatory. In doing so, the court relied upon declarations submitted by the Employee’s co-workers which alleged that the same managers who discharged the Employee had similarly manufactured reasons for discharging them on the basis of pregnancy.

The Court of Appeal held that:

[t]he evidence sets out factual scenarios related by former employees of the [Employer] that are sufficiently similar to the one presented by the [Employee] concerning her own discharge by [the Employer], and the probative value of the evidence clearly outweighs any prejudice that would be suffered by [the Employer] by its admission. Dissimilarities between the facts related in the other employees’ declarations and the facts asserted by [the Employee] with regard to her own case go to the weight of the evidence, not its admissibility.

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Court of Appeal Overturns Tip Pooling Verdict

The California Court of Appeal issued a decision clarifying California's rules regarding tip-sharing among employees. In doing so, the court reversed a jury award of \$86 million against Starbucks. *Chau v. Starbucks Corporation* involved former baristas who claimed that their shift supervisors improperly shared in the tips from the collective tip box. The basis for the plaintiffs' argument was California Labor Code section 351, which states that an employer cannot "collect, take, or receive any gratuity" that is left by a customer. The section provides that any gratuity is the sole property of the employee to whom it was paid.

The court concluded that an employer can require tip-sharing arrangements among employees. The reasoning was that there is no California law prohibiting an employer from allowing an employee to keep a portion of the collective tip, so long as that portion relates to the amount of hours worked. Significantly, the court stated that it does not matter that the employee has limited supervisory duties, noting that the evidence demonstrated that the shift supervisors spent the majority of their time performing the same service tasks as the baristas. The court reasoned that customers would not be capable of distinguishing between an employee who was a barista and one who was a shift supervisor. The court then concluded that "customers who place money in the tip box understand and intend that the money will be shared by the entire team, including baristas and shift supervisors."

Summary Judgment Granted in Discrimination Case

In *Turner v. Public Service Company of Colorado*, an employee alleged sexually discriminatory hiring practices under Title VII of the Civil Rights Act of 1964. The Tenth Circuit Court of Appeals affirmed the employer's motion for summary judgment, finding that the employee failed to meet her burden of proving the employer's proffered legitimate nondiscriminatory reasons for failing to hire her were merely pretextual.

In 2004, Susan Turner ("the Employee") applied for an entry-level position at the Comanche power plant operated by Public Service Company of Colorado ("the Employer"). The Employee was one of 26 applicants applying for six open positions. Of the 26, only two of the applicants were women. The Employee passed a standardized written test assessing her mechanical aptitude, and based on the job experience set forth on her resume, was selected for an interview. The interview panel, which consisted of four men, asked each applicant an identical set of questions designed to elicit information about relevant job skills. After each applicant's interview, the panel debated his or her responses, and determined a "consensus score" pertaining to each relevant skill.

The Employee received the second-lowest overall rating. The only other woman who was interviewed received the second-highest overall rating. Based on the consensus scores, the Employer extended offers to the six highest-scoring applicants,

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including the other female applicant. The Employee, however, claimed discrimination, citing three pieces of evidence which allegedly established discriminatory animus. The Tenth Circuit considered and rejected all three.

First, the Employee argued that because the Employer had lost a lawsuit relating to sexual harassment in 1991, a reasonable jury could conclude that the Employer had sexually discriminated against her in 2004. The court found that the 1991 lawsuit was too remote in time to support an inference of sex discrimination in 2004. The court further noted that none of the men on the Employee's interview panel were connected in any manner with the earlier lawsuit.

The court also rejected the Employee's argument that the interview panel had relied upon "purely subjective" hiring criteria. While acknowledging that subjective hiring criteria may sometimes conceal discriminatory hiring practices, the court noted that the interview panel had asked all applicants the same questions, and had scored their responses according to pre-determined criteria. The court also concluded that the lack of any women on the interview panel, without showing that any of the four men harbored discriminatory attitudes, was insufficient to create an inference of discrimination.

Finally, the court rejected the statistics submitted by the Employee to support her claim. Specifically, the court found that the larger number of men employed by the Employer was irrelevant to the Employer's 2004 hiring decision because the Employee failed to provide evidence of the number of male and female applicants and interviewees considered for the positions in question. The court also dismissed the Employee's argument that she had applied for a position three times and been rejected each time, pointing out that while the Employee had not succeeded in getting hired in 2006 (her third attempt), three other women were hired that year.

The *Turner* case demonstrates the importance of developing and applying pre-determined objective hiring criteria. An employer's ability to show that its hiring decisions are guided by neutral, nondiscriminatory hiring criteria greatly strengthens its defense against hiring discrimination claims.

This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Cara Patton, Tyler Theobald, Jenna Leyton or Andrea Kaplan at (858) 755-8500 or Eric DeWames at (310) 417-1137. For access to previous updates and reports, please go to <http://www.pettitkohn.com/EmployLabor.html>.

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