Fenwick Employment Brief

December 18, 2012
Daniel J. McCoy 650.335.7897
Sheeva J. Ghassemi-Vanni 650.335.7191

Fenwick
FENWICK & WEST LLP

SUPREME COURT EMPHASIZES SUPREMACY OF FEDERAL ARBITRATION ACT

In *Nitro-Lift Technologies, L.L.C. v. Howard*, the United States Supreme Court chided the Oklahoma Supreme Court for exceeding its authority and failing to follow Supreme Court precedent regarding the Federal Arbitration Act ("FAA").

While employed at petitioner Nitro-Lift, respondent employees signed confidentiality and non-competition agreements bearing arbitration clauses. When the employees left for a competitor, Nitro-Lift pursued claims against them through arbitration. In response, the former employees filed an action in an Oklahoma District Court asking that the court enjoin enforcement of the agreements because of the alleged unenforceability of the non-competes. The court dismissed the complaint in deference to the arbitration provision. On appeal, the Oklahoma Supreme Court reversed, struck down the noncompetes as illegal, and in the process stated that "the existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement."

The Supreme Court granted certiorari, and scolded the lower court for its decision, stating that it had disregarded the Court's precedent and was obligated to abide by the FAA, as it is the "supreme Law of the Land." The Court reminded the lower court that although courts may assess the validity and enforceability of an arbitration clause, they may not address the merits of the dispute. It is for the arbitrator, not the court, to decide all other issues.

Here, the Court reiterated the strong public policy under the FAA favoring arbitration and vacated and remanded the decision of the Oklahoma Supreme Court.

HONEST BELIEF INADEQUATE DEFENSE IN CFRA INTERFERENCE CLAIM

A California court in *Richey v. AutoNation, Inc.* held that an employer's "honest belief" that its employee abused a leave of absence, without an investigation and/or supportive facts, was insufficient to bar the employee's California Family Rights Act ("CFRA") interference claim.

Richey opened a family restaurant while working as a sales manager for one of the respondents' car dealerships, Power Toyota. Richey injured his back at home resulting in a CFRA leave of absence. During Richey's leave, Power Toyota discovered that he was working at his restaurant, in violation of company policy prohibiting other employment while on leave. The company ordered various employees to surveil Richey, and they observed him allegedly taking orders, sweeping, and performing other tasks. Power Toyota then terminated Richey for working at his restaurant while on leave, in violation of company policy.

Through arbitration, Richey sued Power Toyota's parent companies for, among other claims, interference with his right to take CFRA leave. In defense, respondents asserted an honest belief, whether or not mistaken, that Richey was abusing his leave of absence by working at his restaurant. The arbitrator found in favor of respondents, despite finding that the company's outside employment policy was poorly written and its investigation "superficial."

A court of appeals reversed, holding that the arbitrator committed legal error by barring Richey's CFRA claim based solely on respondents' "honest belief." It emphasized that the respondents bore the burden to prove by actual evidence – something more

than an "honest belief" – that their failure to reinstate Richey was justified, since CFRA generally *guarantees* reinstatement following a covered leave. Thus, it was incumbent on respondents to have investigated and proven to the arbitrator that they refused to reinstate Richey because he violated his CFRA leave, rather than just rely on their policy and "honest belief."

This decision highlights the importance of a thorough investigation of employee misconduct, especially where it will serve as the basis for termination of an employee on a protected leave.

NEWS BITES

Class Action Waivers In Arbitration Agreements Still Viable, But Vulnerable, In California

A California court of appeals held in *Franco v. Arakelian Enterprises, Inc.* that the United States Supreme Court decisions in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* and *AT&T Mobility LLC v. Concepcion* did not overrule the California Supreme Court's *Gentry v. Superior Court* decision regarding the viability of class action waivers in arbitration agreements.

Franco signed an arbitration agreement during his employment with Arakelian that contained a class action waiver. He filed a class action complaint against Arakelian in court for alleged wage and hour violations, and Arakelian sought to compel arbitration of the claims. In denying Arakelian's petition to compel arbitration, the court applied *Gentry* (September 2007 FEB), which held that class action waivers in arbitration agreements may be unenforceable in certain circumstances – for example, where class arbitration is a more effective practical means of vindicating the rights of the affected employees and the prohibition of the class action will lead to less comprehensive enforcement of overtime laws for the affected employees – and provided factors to use in analyzing whether such waivers should be enforced. On appeal, Arakelian argued that the subsequent United States Supreme Court decisions in *Stolt-Nielsen* and *Concepcion* overruled *Gentry*.

The court rejected Arakelian's theory, finding that both *Stolt-Nielsen*, which held that a plaintiff can only pursue claims on a class basis in arbitration if the arbitration agreement expressly or impliedly authorizes class actions, and *Concepcion*, which overturned a California court's refusal to enforce such waivers in the consumer arbitration arena, can be read in harmony with *Gentry*.

Thus, while class action waivers between employer and employee may be permissible under California law, they must nevertheless satisfy the *Gentry* analysis.

Supreme Court To Define "Supervisor" Under Title VII

Who is a supervisor for purposes of Title VII and the strict liability standards that can apply to harassment by supervisors? In *Vance v. Ball State,* the United States Supreme Court heard oral argument on the issue, and will issue a ruling in 2013 and resolve conflicting lower court rulings on the issue. In a hostile work environment harassment claim, harassment by a supervisor results in imputed liability to the employer (subject to certain defenses), whereas harassment by non-supervisors results in employer liability only if the victim proves that the employer failed to take reasonable steps to stop the harassment.

The issue in *Vance* hinges on a split in the federal courts regarding a more narrow definition (*i.e.*, power to hire, fire, demote, etc.) versus a more expansive definition (*i.e.*, authority to direct and oversee the victim's daily work) of the term "supervisor." Courts such as the Seventh Circuit (at issue in this case) subscribe to the narrow definition, while courts such as the Ninth Circuit (which covers California) follow the expansive definition.

At oral argument, the Justices tested the limits of the expansive view, asking whether a senior employee threatening another employee to either date him or be forced to listen to country music all day would make him a supervisor since he would be affecting the daily activities of the employee. The Court's decision will hopefully set forth clear parameters for employers and employees alike.

NLRB Continues To Dissect Employer Social Media Policies

Consistent with its decision to invalidate a *Costco* social media policy that prohibited employees from posting damaging or defamatory statements about the company or any other individual, the National Labor Relations Board ("NLRB") recently invalidated two statements in Dish Network's social media policy, one prohibiting employees from making "disparaging or defamatory comments" about Dish and another prohibiting such behavior on "Company time." Applying the test outlined in *Costco* (October 2012 FEB), the NLRB held that this language violated the National Labor Relations Act by "banning employees from engaging in negative electronic discussion during 'Company time,'" and failing to clarify such discussion could occur during breaks and other non-working hours at the business. This decision further highlights the importance of a carefully drafted social media policy, with the assistance of legal counsel.

Record Recovery In 2012 For Discrimination Claims

The Equal Employment Opportunity Commission had a banner year for private sector discrimination claims – it oversaw the recovery of $365.4 million in damages for fiscal year 2012.

The Price Is Right Verdict

A California jury awarded a former "The Price is Right" model, Brandi Cochran, over $8.5 million for pregnancy discrimination. Ms. Cochran, who worked on the show for over seven years, alleged that she was fired when she sought to return to work following a protected maternity leave. While the case did not break new legal ground, it is notable for the jury's damage award – $776,000 in compensatory damages, and $7.7 million in punitive damages. The high punitive damages award was mostly attributable to the aggregate wealth of the production company defendants.

Suitable Seating PAGA Class Certification To Be Reviewed By Ninth Circuit

The Ninth Circuit will review certification of a suitable seating class action filed against Wal-Mart under the Private Attorney General Act ("PAGA"). The action seeks nearly $150 million in penalties under PAGA for about 22,000 cashiers in California who claim they were not provided "suitable seating," as mandated by the Labor Code. The main issue on appeal is whether, as Wal-Mart advocates, the court should require more individualized proof from class members. Much like the prior *Wal-Mart v. Dukes* decision, this case could further shape the requirements for class action certification.

Commission Plan Reminder

Under AB 1396, effective January 1, 2013, all agreements to pay employees commissions based on services to be rendered in California must be in a writing signed by the employer and employee, with a copy retained by the employer. See our October 2011 FEB for further information on these requirements.

Follow us on Twitter at: http://twitter.com/FenwickEmpLaw