Fenwick Employment Brief

February 2013
Daniel J. McCoy 650.335.7897
Saundra L. M. Riley 650.335.7170

Fenwick
FENWICK & WEST LLP

CAL SUPREME COURT REFUSES TO IMMUNIZE EMPLOYERS IN MIXED-MOTIVE DISCRIMINATION CASES, BUT SIGNIFICANTLY LIMITS REMEDIES

Resolving a question that has been pending for three years, in *Harris v. City of Santa Monica*, the California Supreme Court held that, in mixed-motive cases, where an illicit purpose is a substantial motivating factor for an adverse employment action, the employer will be liable for unlawful discrimination but, if it shows that it would have made the same decision absent the illicit motive, the plaintiff's remedies will be limited.

In *Harris*, plaintiff Wynona Harris, a bus driver for the City, sued her former employer for pregnancy discrimination when it fired her less than a week after she disclosed her pregnancy to her supervisor. She testified at trial that her supervisor, George Reynoso, reacted with "seeming displeasure" to the information.

The City denied the allegation, claiming it fired Harris for legitimate business reasons. The City showed that, during Harris' six months of employment as a bus driver, she had two preventable accidents and twice arrived to work late without adequate advance notice (a "miss-out"). Per City policy, such conduct justified termination. Following an investigation into the second miss-out, in early May 2005, the transit services manager, Bob Ayer, recommended the miss-out remain in Harris' file and, at the assistant director's request, he examined Harris' complete personnel file. Ayer reported to the assistant direct that Harris "was not meeting the [City's] standards for continued employment . . . ."

On May 12, 2005, Harris had a "chance encounter" with her supervisor. In response to Reynoso's instruction to tuck in her uniform shirt, Harris informed him that she was pregnant. On May 16, 2005, Harris provided Reynoso a doctor's note permitting her to work with restrictions. That same day, Reynoso received a list of drivers who were not meeting standards for continued employment, which included Harris. Harris' last day of employment was May 18, 2005.

At trial, the City asked the court to instruct the jury that, if the termination was actually motivated by both discriminatory and legitimate reasons, the City would not be liable if it established that it would have made the decision based solely on the legitimate reason. The court refused, instead instructing the jury that the City was liable if the discriminatory reason was a motivating factor for the termination. The jury found, in a 9-to-3 vote, for Harris, awarding nearly $178K in damages and over $400K in attorneys' fees.

The City appealed, alleging the jury instruction misstated the law. The appellate court reversed and the California Supreme Court agreed to review the case. Relying largely on the policies underlying the California Fair Employment and Housing Act, the supreme court took a middle-of-the-road approach:

- A plaintiff must first show that the illicit purpose, if not a "but for" cause, was a "substantial motivating factor" in the challenged action. This "more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision" while recognizing liability for the employer even if other factors would have led to the same decision at the time.

- An employer relying on a same-decision defense must show that, more likely than not, it would have made the same decision at the same time for legitimate reasons. If it does so, then a plaintiff's remedies are limited to a declaration of wrongdoing, an injunction barring further unlawful conduct, and reasonable attorneys' fees and costs. This approach helps "prevent and deter unlawful employment practices" while avoiding an "unjustified windfall" to the plaintiff-employee or "unduly limiting an employer's freedom to make legitimate employment decisions."

This decision provides welcome guidance for assessing liability and exposure in mixed-motive cases, but is a mixed bag for employees and employers. Employees no longer face a do-or-die situation when an employer asserts a same-decision defense since employers are still on the hook for discriminatory conduct. The monetary "hook," however, is limited to reasonable attorneys' fees and costs (which can still be costly). Further, while the decision provides clarity on the legal standard and remedies available in such cases, it leaves significant questions about what makes a motivating factor "substantial" – questions that will impact all aspects of litigation of such claims, including discovery, motions for summary judgment, and trial preparation.

MANAGER'S BIAS, PUBLIC POLICY, AND DEFAMATION CLAIMS – DUE TO TERMINATION FOLLOWING INVESTIGATION – THROWN OUT BEFORE TRIAL

In *McGrory v. Applied Signal Technologies, Inc.*, Applied Signal ("AST") secured the dismissal of a former manager's claims that his termination was discriminatory and violated public policy and that AST defamed him, and a court of appeals upheld the dismissal. AST fired plaintiff McGrory because, in AST's view, he was untruthful and uncooperative in the investigation of a complaint that he discriminated against and harassed a subordinate based on gender and sexual orientation. The investigation also revealed he had participated in "off-color" jokes and commentary.

McGrory argued that his refusal to cooperate constituted "protected activity," thus rendering his termination unlawful. The appellate court rejected this argument, noting that "refusing to participate in or cooperate with an investigation into a discrimination claim is not participation or assistance and is not a protected activity" under federal or California law or public policy. The court further observed that McGrory presented "virtually no evidentiary support" to show the termination flowed from bias against men, and his "rank speculation" to the contrary could not sustain an inference of discrimination. Finally, the court rejected McGrory's claim that AST defamed him when the Vice President of Human Resources allegedly informed McGrory's former coworker of the reason for his termination, because the communication was made without malice.

AST's victory serves as an important reminder for employers everywhere: employers have a right to demand cooperation during workplace investigations and refusal to cooperate may warrant discipline up to and including termination.

VALIDITY OF 2012 NLRB RECESS APPOINTMENTS AND DECISIONS IN QUESTION

The D.C. Circuit Court of Appeals declared President Obama's January 2012 recess appointments to the National Labor Relations Board (the "NLRB") unconstitutional, leaving the ongoing validity of the Board's 2012 (and possibly earlier) decisions in question. In *Noel Canning v. N.L.R.B.*, the employer challenged the authority of the Board to issue orders on constitutional grounds. It contended that three "recess appointments" (of the five total Board members) did not conform to the Recess Appointments Clause because Congress was in session; consequently, the appointments exceeded presidential authority and were invalid.

Further action in this matter is widely anticipated. March 8 is the deadline to petition for rehearing, and the deadline to petition the U.S. Supreme Court for review is April 25. Thus far, the U.S. Supreme Court has opted to stay out of a similar dispute: it twice declined a request in *In re HealthBridge Management Kreisberg* to step into a labor dispute that involves a challenge to the recess appointments. Other cases are lined up to address the issue and, as jurisprudence – including a further split on the recess appointments authority and whether it applies here – develops, it is possible the Court will weigh in.

Until then, the question remains as to what impact the *Noel Canning* decision, and others like it, will have on the validity of the Board and its decisions since 2012 (and possibly back to 2011). The *Noel Canning* decision does not go so far as to declare all such decisions invalid, but, practically speaking, the 2012 decisions – including the many decisions addressing social media policies and their impact on protected Section 7 rights – will remain subject to attack until the validity of the recess appointments is resolved.

NEWSBITES

Kmart Victorious in First Suitable-Seating Trial

Kmart emerged triumphant in the first of the "suitable seating" cases to be tried. In *Garvey v. Kmart*, a California federal district court evaluated the state's wage order provision that "All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." After considering the evidence, which included agreement that seats could not be provided to cashiers at the Tulare store in a safe way that achieved legitimate business goals such as efficiency and projecting a customer-service focused image, the court concluded the plaintiff class failed to prove that the nature of a cashier's work reasonably permitted the seating modification urged by plaintiffs' counsel at trial. Signaling for future cases, which involve different stores and cashier station configurations, the court invited a more developed record on use of a lean-stool.

California Supreme Court Announces Sea-Change in Rules Governing Use of Parol Evidence to Show Fraud in Contract Interpretation

In *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association*, the California Supreme Court clarified and ultimately rewrote the applicable legal standard for introduction of parol (or oral) evidence that a written contract is tainted by fraud. The Court overruled a decades-old doctrine that only allowed parol evidence that "tend[ed] to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing." While in the borrower-lender context, the decision is likely to have far reaching effects, including in employment contexts, since it lowers the bar for alleging and proving a fraudulent inducement claim. For further information on the decision, see the January 28, 2013 Litigation Alert.

Discharge Lawful Where Store Manager Could Not Be Physically Present in Store

In *Lawler v. Montblanc North America, LLC*, the Ninth Circuit Court of Appeals (applying California law) recognized that adverse action because of a disability is unlawful discrimination *only if* "the disability would not prevent the employee from performing the essential functions of the job, at least not with reasonable accommodation." Lawler, a manager for a Montblanc store in the Valley Fair Shopping Center, was responsible for "hiring, training, and supervising sales staff; overseeing and developing customer relations; administering stock and inventory; cleaning; creating store displays; and preparing sales reports." It was undisputed that Lawler could perform her duties only in the store. In 2009, Lawler was diagnosed with a chronic medical condition requiring a reduced workweek. While Montblanc was evaluating her accommodation request, in a related incident, Lawler injured her foot. Lawler presented certification of her need for leave through the holiday season and into January. After unsuccessfully soliciting further information from her physicians to confirm whether alternative means existed to return Lawler to work, Montblanc terminated her employment because she could not be present in the store. The court threw out Lawler's disability discrimination claim because Lawler's inability to be physically present in the store meant she could not perform the essential functions of her position even with the requested accommodation.

FB Posts of Mexico Vacation Land Employee on FMLA Leave in Hot Water

In *Lineberry v. Richards*, an employee on FMLA leave due to back and leg pain so angered her colleagues by her Facebook posts of a Mexico vacation and other activities that they reported her for potential leave abuse. When confronted with questions about the vacation, the employee asserted she used wheelchairs at both airports so she did not have to stand for long periods. Upon further investigation, the employee admitted she had not used a wheelchair; other Facebook posts also showed the employee holding her grandchildren and described other social activity inconsistent with her alleged medical need for FMLA leave. The employer terminated her employment for dishonesty and leave abuse. A Michigan federal district court threw out the employee's claim that her employer interfered with her FMLA rights, finding the employer "treated [the employee] 'the same, whether or not she took leave,' as required and permitted by the FMLA." Recognizing the limits of the FMLA, the court observed that, "Based on such undisputed dishonesty, [the employer] had a right to terminate

[the employee] – without regard to her leave status because the FMLA does not afford an employee greater rights than she would have if she was not on FMLA leave."

Six-Month Claims Limitations Period In Arbitration Agreement Unconscionable

In *Bowlin v. Goodwill Industries of Greater East Bay, Inc.*, a California federal district court found Goodwill's requirement, as part of an arbitration agreement, that employees file claims within a six-month limitations period to be one-sided, oppressive and overly harsh. This is the latest in a line of cases finding, under California law, such limitations to be unconscionable, violative of an employee's statutory rights, and unenforceable under *Armendariz*. Employers maintaining arbitration agreements that limit claims periods must do so with the full understanding that such limitations expose the agreement to attack. If the arbitration agreement has a severability clause and withstands any other challenges for unconscionability, as was the case in *Bowlin*, it is possible a court will sever the provision and compel the parties to arbitrate the claims. But, such a result is neither guaranteed nor usual. Thus, employers should include limitations on claims periods only after consulting counsel and carefully balancing goals and legal risk.

NLRB Continues Focus on Overbroad Employer Policies

Notwithstanding the uncertainty of the validity of the current NLRB quorum, the Board continues its focus on the intersection of employer policies and protected activity. In *In re DirectTV U.S. DirecTV Holdings LLC*, the Board again found fault with broad prohibitions in employer policies that fail to distinguish between protected and unprotected activity. Specifically, the court found four of the employer's policies – which prohibited contacting the media, communicating with law enforcement, or disclosing company information including employee records and information on the job or coworkers – failed to distinguish protected concerted activity from violation of the policies. Examples of protected activity that could be chilled under the policies include communications with the media about labor relations and communications with Board agents or other enforcement officers.

Save the Date: Commissions Breakfast Briefing – May 7 (Mountain View, 8-10am) and May 8 (San Francisco, 9-11am)

AB 1396 became effective January 1, 2013, requiring all agreements to pay employees commissions based on services to be rendered in California to be in a writing signed by the employer and employee, with a copy retained by the employer. *See* October 2011 FEB. If your company has sales employees, you likely have (or need) a commission or compensation plan, but do you know the common legal pitfalls of such plans? Save the date and join us for a two-hour breakfast briefing in which we will review, among other things, common drafting mistakes, key provisions that should be included in every plan, and how plans impact exempt classifications.

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