

EMPLOYMENT MATTERS

CALIFORNIA SUPREME COURT ISSUES THREE IMPORTANT DECISIONS

CLASS ACTION WAIVERS IN PRE-EMPLOYMENT ARBITRATION AGREEMENTS MAY BE UNENFORCEABLE

In a ruling that will disappoint many employers, the California Supreme Court held that class action waivers in pre-employment arbitration agreements are

by Circuit City, his new hire package included an arbitration agreement with a class action waiver, and a form that gave him 30 days to opt out of the arbitration agreement. He did not do so.

Gentry later filed suit in superior court, seeking overtime pay on behalf of a class of managers who allegedly had been misclassified as exempt employees. The trial court ordered Gentry to arbitrate and

submit to the waiver. The court of appeal found the waiver enforceable, and held that the arbitration agreement was not procedurally unconscionable.

What The Court Decided

The Supreme Court ruled that the trial court was required to consider additional factors before

JESSICA CHRISTENSEN TO JOIN COOK ROOS WILBUR THOMPSON

Jessica Christensen will be joining Cook Roos Wilbur Thompson on October 15, 2007. Jessica was formerly an associate with Minami Tamaki. We are excited to have Jessica join us.

deciding whether to enforce the arbitration agreement. The Supreme Court did not hold that class action waivers in overtime cases are necessarily unenforceable. Instead, *Gentry* holds that when a plaintiff alleges that an employer has systematically denied overtime pay to a class of employees, and requests a class action in spite of a class action waiver in an arbitration agreement, the trial court must consider the following factors to determine if a class action is likely to be a significantly more effective means of vindicating statutory rights than individual arbitration or litigation:

- Whether the amount of the potential individual

recovery is “modest,”

- The risk of retaliation for the individual,
- The likelihood that some individuals might not sue because they are unaware that their rights have been violated, and
- “Other real world obstacles” to individual arbitration.

The trial court must invalidate the waiver if, after consideration of these factors, it finds that a class action is likely to be a “more effective practical means” and disallowance of a class action will likely lead to a less comprehensive enforcement of overtime laws.

The Court also ruled that

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not enforceable if a class action would be a “significantly more effective way of vindicating the rights of affected employees” than individual arbitration or litigation. *Gentry v. Superior Court*, S141502 (Aug. 30, 2007).

Background

When Gentry was hired

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PLAINTIFFS ALLEGING DISABILITY DISCRIMINATION MUST PROVE THEY CAN PERFORM THE ESSENTIAL FUNCTIONS OF THE JOB

Bringing California law into line with the federal Americans with Disabilities Act, the California Supreme Court ruled in *Green v. State of California*, S 137770 (Aug. 23, 2007) that the California Fair Employment and Housing Act (“FEHA”) requires plaintiffs alleging disability discrimination to prove that they are “qualified individuals,” capable

him. In 2000, after an unrelated back injury resulting in light duty and then leave, Green was denied the opportunity to return to work. He filed a claim of discrimination with the Department of Fair Employment and Housing, followed by a complaint in superior court alleging disability discrimination. The trial resulted in a jury verdict for the plaintiff.

FEHA, that is, capable of performing the essential duties of the job, either with or without reasonable accommodation, as part of his case establishing that an employer has unlawfully discriminated on the basis of disability. This burden of proof allocation is in line with the ADA’s prohibition on discrimination against “a qualified individual with a disability,” and reflects the California Legislature’s intention to conform the FEHA to the ADA. In addition, this ruling is consistent with the general rule that a party must prove each fact essential to the claim for

relief being asserted.

What Does This Mean for Employers?

Green makes it clear that if a plaintiff alleging disability discrimination under the FEHA cannot prove that he/she can perform the essential duties of the position with or without reasonable accommodation, the claim fails as a matter of law.

Accordingly, employers may now be able to move for summary judgment in more disability cases, and potentially dispose of disability claims without having to go to trial.



of performing the essential functions of a position.

Background

Green was a long-term employee at a State correctional facility. He was diagnosed with Hepatitis C in 1990, but was not subject to any work restrictions and did not lose any time at work until 1997. At that time, he underwent Interferon treatment, and the employer accommodated

The court of appeal affirmed, ruling that under the FEHA, the employer must prove that a plaintiff cannot perform the essential functions of his job.

What The Court Decided

The Supreme Court disagreed with the court of appeal, and ruled that the plaintiff in a disability discrimination case must prove that he is a qualified individual under the

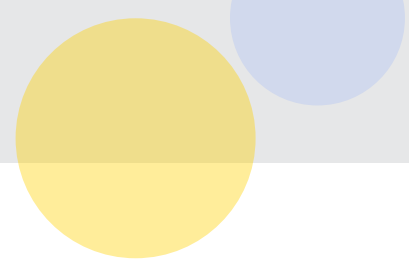
CALIFORNIA SUPREME COURT CHANGES DIRECTION AND ALLOWS PROFIT BASED INCENTIVE PLANS

The California Supreme Court has upheld an employer’s profit-based incentive plan. In *Prachasaisoradej v. Ralphs Grocery Co., Inc.* S 128576 (Aug.23, 2007), the Court held that the employer could provide supplementary pay to employees to reward them, over and above their regular wages, if and when their collective efforts produced a profit for the store at which they worked. In so holding, the Court overruled lower court decisions that the employer improperly took deductions for cash short-

ages, merchandise damage, and the costs of workers’ compensation when computing store profits.

Background

The plaintiff in *Prachasaisoradej* had argued that the plan at issue violated specific prohibitions against deductions from employee wages for the costs of workers’ compensation, cash shortages, breakage or equipment loss not due to dishonest or willful acts or gross negligence of the employee, among others. A line of cases had held that deductions from



EEOC ISSUES ENFORCEMENT GUIDANCE ON WORKERS WITH CAREGIVING RESPONSIBILITIES

Caregiver discrimination has become a prominent issue in the workplace, particularly as women, who continue to act as primary caregiver for both children and elders, now comprise nearly half of the national labor force. A number of laws, including the Family and Medical leave Act, the California Family Rights Act, California’s “kin care” statute, and the recent San Francisco sick leave ordinance, expressly prohibit discrimination against caregivers in specific circumstances. Other and older employment discrimination laws, such as Title VII, the Americans with Disabilities Act and the California Fair Employment and Housing Act, do not contain specific provisions regarding discrimination of caregivers. This does not mean however, that an employer who discriminates against an employee based on caregiving status can escape liability under these laws.

In May, the EEOC issued *Enforcement Guidance on Unlawful Disparate Treatment of Workers With Caregiving Responsibilities* (“*Guidance*”) to assist employers and employees in determining whether discrimination against caregivers constitutes unlawful discrimination under Title VII and the ADA. The

Guidance explains that violation of these laws may arise where a worker with caregiving responsibilities is subjected to discrimination based on sex, race, national origin and/or association with an individual with a disability.

Examples of such discrimination include:

- Sex-based stereotyping of working women, such as reassigning a new mother to less desirable projects based on the assumption that she will be less committed to her job;
- Lowering subjective evaluations of a female employee’s work performance after she becomes the primary caregiver of a family member, despite the absence of an actual decline in performance;
- Discrimination against male caregivers, such as denying a male employee leave to care for a child under circumstances where leave would be granted to a female employee;
- Discrimination against women of color, based on family stereotypes; and
- Stereotyping based on association with an individual with a disability, such as refusing to hire a

worker who is a single parent of a child with a disability based on the assumption that she will be unreliable;

Under the *Guidance*, employment decisions that adversely affect caregiver employees, and which are based on sexual and/or racial stereotypes violate Title VII, and employment decisions that discriminate against workers with caregiving responsibilities based on their association with an individual with a disability violate the ADA. However, an employment decision that adversely affects a caregiver that is based on the employee’s actual work performance, rather than on a protected characteristic, generally will not violate Title VII or the ADA, even if the unsatisfactory work performance is as a result of the caregiving obligations.

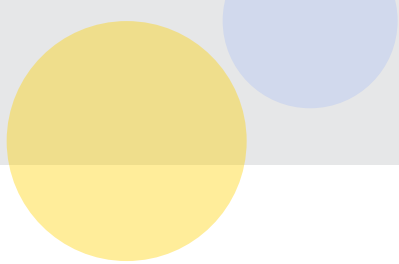
Employers can also face liability under Title VII and the ADA under the *Guidance* if workers with caregiving responsibilities are subjected to offensive comments or other harassment because of their sex, race, or association with an individual with a disability, and the conduct is sufficiently severe or pervasive to create a hostile work environment.

Furthermore, because



discrimination against caregivers may violate Title VII and/or the ADA, retaliation against employees who complain about such discrimination may also violate these laws. The *Guidance* notes that caregivers may be particularly vulnerable to retaliation because of the challenges they face in balancing their responsibilities. Title VII and the ADA prohibit any action that would be reasonably likely to deter a caregiver from engaging in protected activity.

Employers must be aware that even if discrimination against a caregiver does not violate Title VII or the ADA, as explained by the *Guidance*, this conduct might violate FMLA, CFRA, the kin care statute, or the San Francisco sick leave ordinance. Accordingly, before responding to an employee with caregiving responsibilities differently than an employee without those responsibilities, employers should make sure that they are in compliance with all potentially applicable laws, and that they can set forth legitimate, non-discriminatory reasons for the action.



PRE-EMPLOYMENT ARBITRATION AGREEMENTS, CONTINUED FROM PAGE 1

the arbitration agreement was procedurally unconscionable, notwithstanding the opt out, because the information provided to employees about arbitration did not advise them of the disadvantages of the procedure and the plaintiff might not have felt free to opt out.

What Does This Mean for Employers?

Employers may not be able to avoid class claims for overtime pay through waivers in pre-employment arbitration agreements. However, waivers may be enforced in other employment claims involving more substantial damages, like claims of alleged discrimination or

public policy violations.

Gentry also means that opt out provisions may not be effective if the employer

Employers may not be able to avoid class claims for overtime pay through waivers in pre-employment arbitration agreements.

provides no information to employees about specific disadvantages of arbitration. As a practical matter, an “opt-out” clause may have little ultimate effect on whether a class action waiver will be given effect.

CALIFORNIA SUPREME COURT CHANGES DIRECTION, CONTINUED FROM PAGE 2

employee sales commission and bonus payments, for any of the purposes prohibited by these laws were improper. In fact, an earlier decision of the court of appeal, involving the very same bonus plan, had ruled that the plan violated California law.

The Supreme Court held that the nature of the plan before it—as supplemental to the agreed and guaranteed wages paid as full compensation for work produced by the employees efforts—and the method of bonus calculation—based on a profit as

determined by standard accounting procedures—compelled it to conclude that the bonus was not illegal.

What Does This Mean for Employers?

Employers can lawfully implement profit-based bonus plans that take into account expenses that had appeared to be off limits under previous law. However, because the Supreme Court did not overturn the earlier decisions, these opinions may have continuing effects when applied to bonus plans that are not similar to the one at issue in *Prachasaisoradej*.

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