

WAGE AND HOUR LAW

Wage and hour violations serve as basis for unfair business practice claim

In a recent case from California's Second Appellate District, telemarketers who sold newspaper subscriptions sued their employer, claiming violations of federal and state labor laws. After the trial court granted a pretrial dismissal, the appellate court considered (1) whether a state unfair competition claim could be based on the federal Fair Labor Standards Act (FLSA), (2) whether the employees qualified for the commission exemption from California overtime laws, and (3) whether the employer lawfully deducted points employees had earned from a sale if the customer later cancelled the subscription.

Deciding the FLSA doesn't preempt the unfair business practice claim and that the employer could be liable for the wage and hour violations, the appellate court ruled that the case should go to trial.

Telemarketers pointed in wrong direction

Toby Harris and four associates worked as telemarketers selling subscriptions to *Investor's Business Daily* (IBD), a financial newspaper. They were compensated based on a point system, receiving a certain number of points for each type of subscription sold. Employees also received points for winning sales contests and were eligible for fixed monetary bonuses if they sold a specified number of points at certain levels. As employees earned more points, the value of the points increased. Employees were paid \$15.80 per point for the first 9.99 points earned, \$22.30 for the next 10 to 16.99 points, and so on. The point values weren't tied to the price of the subscription sold.

The telemarketers were subject to a "chargeback" policy whereby they were "charged back" the points earned from a sale if the customer cancelled within 16 weeks. The chargeback included any bonuses earned by way of the employee being at a high earning level. Although the compensation plan provided that employees would be paid the greater of commissions earned on paid subscription sales or the prevailing minimum wage for hours worked, according to the telemarketers, several of them "did not receive the minimum wage for all hour[s] worked."

Harris and friends filed a class-action lawsuit (suing on behalf of themselves and all other employees suffering from the same problem) against IBD, making claims under the California Labor Code for overtime pay and unlawful commission deductions and unfair competition under Section 17200 of California's Business and Professions Code for violating the FLSA's overtime laws.

IBD requested a pretrial dismissal, arguing that the chargebacks were a lawful recovery of an advance. It contended that the commission wasn't earned until the subscriber had been a customer for 16 weeks, money paid to the employee in the meantime was merely an advance, and the telemarketers agreed to the policy. IBD also argued that the telemarketers were exempt from the FLSA as commission-based employees paid more than one and a half times the minimum wage. According to IBD, commission compensation may be based on "value," a term that goes beyond price to include "worth, merit and importance."

IBD further argued that the telemarketers' unfair competition claim was barred as preempted by the FLSA because traditional opt-out class actions are available under California law, while under the FLSA, class members must opt in. According to the employer, the federal law supercedes since it's impossible to comply with both the opt-in provision of the FLSA and the opt-out requirement of California law.

FLSA claim proper basis

Although the trial court granted the pretrial dismissal, California's Second Appellate District reversed the judgment, concluding that the point system didn't constitute commission payments and that the issue of whether the chargeback plan violated the Labor Code should go to trial. The appellate court also ruled that the claim of FLSA overtime violations under Section 17200 wasn't preempted by the FLSA opt-in requirement. In this case, federal law didn't preempt state law because the FLSA establishes a floor for

wage and hour requirements but expressly contemplates that other laws may increase those minimum requirements.

IBD couldn't show that the telemarketers were exempt because it couldn't show that they received more than half of their compensation through commissions and that they received more than one and one-half times the minimum wage. *Harris v. Investor's Business Daily* (March 29, 2006).

Bottom line

California law grants an overtime exemption when an employee's earnings exceed one and one-half times the minimum wage if more than half of the employee's compensation represents commissions. A commission is compensation paid for services rendered in the sale of property and services and is "based proportionately upon the amount or value thereof."

The California Supreme Court has defined two essential requirements for finding that a compensation scheme involves commissions:

The point system didn't constitute commission payments.

- (1) the employees are involved in selling a product or service; and
- (2) the amount of compensation is “a percent of the price of the product or service.”

IBD got into trouble because its commissions weren't based on the product price.

IBD also incurred liability because California's Labor Code (Section 221) prevents an employer from taking back any wages from an employee after they're earned. Wages are defined broadly to include “all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.” ❖

ALTERNATIVE DISPUTE RESOLUTION

Mandatory arbitration clause in CBA too unclear to stop employee's FEHA claim

A television network's request to compel arbitration of a former employee's discrimination claim under a collective bargaining agreement (CBA) with its union was denied. Both the trial court and the appellate court ruled that the union hadn't clearly and unmistakably waived its members' right to go to court regarding statutory discrimination claims. Additionally, both courts concluded that the employee didn't waive his right to judicial resolution of his statutory claims by first submitting his discrimination grievance to an arbitrator.

Guy not tight with TV family

Miguel Lopez is a cartoonist and member of Local 839 of the Motion Picture Screen Cartoonists and Affiliated Optical Electronic and Graphic Arts Union. In June 1999, Fox Television Animation hired him to create animation models for *The Family Guy* television show.

The CBA between Local 839 and Fox had a grievance procedure providing that “[i]n the event of any dispute between the Local Union or any of the persons subject to this Agreement and [Fox] with regard to discipline (up to and including discharge), wages, hours or other conditions of employment or with regard to the interpretation of this Agreement, the procedure, unless otherwise specifically provided herein, shall be as set forth in this [section].” The outlined grievance procedure culminated in binding arbitration. Another CBA section, titled “non-discrimination,” read: “The parties agree to continue to comply with all applicable federal and state laws relating to non-discriminatory employment practices.”

Lopez worked on staff for Fox without any complaints and was kept on after others had been laid off in the spring of 1999. In May 2000, he stopped working as staff but con-

tinued to freelance for *The Family Guy*, expecting to be called back as staff in January 2001. In late December 2000, however, he learned that Fox was actively seeking to replace him. On December 29, associate producer Tony Garcia told him he wouldn't be called back, and Fox fired him a week later.

On January 16, 2001, Local 839 sent Fox a letter announcing its grievance regarding Lopez's discharge. The letter asserted that Garcia's statements constructively discharged Lopez and constituted unlawful threats of retaliation and a violation of the nondiscrimination, seniority, and discipline sections of the CBA. In June, the parties agreed to expedited arbitration under the CBA. On August 17, Local 839 withdrew its grievance.

No clear and unmistakable waiver

Four months later, Lopez sued Fox for national origin discrimination, unlawful retaliation, and wrongful discharge in violation of California's Fair Employment and Housing Act (FEHA). Fox requested that the court compel him to arbitrate, arguing that the CBA contained a “clear and unmistakable waiver” by Local 839 of his right to a judicial forum to resolve his discrimination claims. It also argued that even if Local 839 didn't waive that right, Lopez nonetheless did so by submitting his grievance, including his discrimination claims, to arbitration.

The trial court denied Fox's request, concluding that the CBA section concerning antidiscrimination statutes *wasn't* a clear and unmistakable waiver of judicial resolution of discrimination claims. California's Second Appellate District affirmed the ruling denying mandatory arbitration.

The appellate court explained that the CBA language was too general and insufficient to show a waiver, calling for arbitration of disputes regarding *conditions of employment* under the agreement as opposed to *substantive statutory rights*. The court stated that the provision to arbitrate disputes “with regard to the interpretation of this Agreement” was overly broad and unspecific and requires interpretation of the CBA, not application of the FEHA.

Likewise, there was no *explicit* incorporation of statutory antidiscrimination requirements of the FEHA into the CBA. Nor was there an express provision in the CBA that subjects that general antidiscrimination commitment to the agreement's grievance provisions. Additionally, the appellate court emphasized that an employee's submission to the grievance process *doesn't* constitute a waiver of the right to file a discrimination claim in court. *Lopez v. Fox Television Animation* (March 27, 2006).

Bottom line

California courts usually presume that mandatory arbitration clauses contained in CBAs are valid. That presumption, however, doesn't apply to statutory discrimination claims. A union's waiver of its members' statutory