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Merely Hiring From Competitor Not Unlawful Interference With Contract

A California appellate court recently held that a company did not interfere with its employee's prior partnership contract merely by hiring her, even though the partnership had been the company's competitor. In *Powers v. The Rug Barn*, plaintiffs Fred Powers and Earth Tapestries sued The Rug Barn for interference with contract when The Rug Barn hired Suzanne DeVall, a former partner at Earth Tapestries. Powers and DeVall had formed the partnership to provide services related to textiles and home furnishing products. Earth Tapestries and The Rug Barn explored a potential business arrangement, but nothing transpired due to "differences in perceptions of how to organize [the] business[.]" Thereafter, DeVall accepted employment with The Rug Barn and formed a new venture called Indika. Plaintiffs sued The Rug Barn, claiming it knew of the partnership, but nonetheless lured DeVall to work for a competing partnership, causing her to violate her partnership contract.

The trial court granted The Rug Barn's summary judgment motion, in part because the plaintiffs failed to establish the elements of their interference claim. The appellate court affirmed, holding that when a defendant employer hires a plaintiff's employees to compete with the plaintiff, the plaintiff must show the defendant used "unfair methods" to bring the case "outside the ordinary course of competition." This requirement prevents every resignation from becoming a tort against the new employer, preserves the mobility of employees and recognizes that unfair competition laws redress actual cases of unfair hiring practices. Here, plaintiffs relied solely on the fact of the hiring, whereas The Rug Barn showed that DeVall independently had concluded that irreconcilable differences existed between her and Powers.

Employee May Claim Retaliation Even if Underlying Complaint Lacks Merit

A Massachusetts court of appeal held a plaintiff stated a retaliation claim for adverse treatment after she complained about a superior officer's romance with his assistant, their conduct in the workplace, and the favoritism shown to the assistant. In *Ritchie v. Department of State Police*, Mary Ritchie, a state trooper, sued the Department of State Police ("Department"), claiming she was subjected to a sexually hostile work environment and then was penalized for complaining about it. Ritchie claimed her superior officer engaged in an office romance with his assistant (involving in-office conduct with "sexual overtones," such as playing "footsie" and playing romantic music in their shared office), and that the superior officer showed favoritism toward the assistant. After Ritchie informally and formally complained about the conduct, the superior officer allegedly retaliated against her by improperly issuing an employee observation report, reducing her employee evaluation scores and threatening to remove her from her assignment.

On the Department's motion, the trial court dismissed the hostile work environment and retaliation claims. On appeal, the court expressed some doubt as to whether the alleged conduct could support a hostile work environment claim. Nonetheless, the appellate court held that even if the underlying harassment claim failed, the retaliation claim could survive if the plaintiff had a reasonable and good faith belief that the employer engaged in wrongful conduct.

This holding underscores an important legal and practical lesson for employers: even if an employee's underlying complaint ultimately lacks merit, anti-retaliation laws protect the employee so long as the complaint was made in good faith. Thus, employers should take precautions to ensure that *all* employees who complain about

discrimination do not suffer adverse treatment because of their complaints.

Employment Decisions Based on Information Infected With Bias May Be Discriminatory

The First Circuit Court of Appeals (encompassing Massachusetts, among other states) recently held a termination based on intentionally withholding exculpatory information could constitute discrimination. In *Cariglia v. Hertz Equipment Rental Corp.*, plaintiff John Cariglia, a sexagenarian manager for Hertz, sued Hertz and his supervisor, James Heard, for age discrimination when Hertz terminated Cariglia's employment. In 1994, Heard had instructed Cariglia to pay to have certain equipment painted, but to defer the actual painting until a later time to mitigate Hertz's tax liability. In mid-1996, Heard ordered an audit of Cariglia's branch "to get the goods" on him, because he thought Cariglia was "over the hill." When the audit revealed the expenditure and the unpainted equipment Heard reported back to Hertz that "there was no accountability for the money that was paid," but he did not reveal the exculpatory circumstance—that it was done at Heard's suggestion for tax purposes. Hertz terminated Cariglia for "gross misconduct," and Cariglia sued for age discrimination.

After a bench trial, the district court determined that Heard had an age-based bias against Cariglia, but because he never communicated that bias to Hertz's neutral decisionmakers, the bias could not be imputed to the termination. On appeal, Cariglia argued that Heard's failure to reveal exculpatory information rendered the termination discriminatory. The Second Circuit held the district court erroneously focused on "whether Heard's bias infected people (the decisionmakers) rather than the process (manipulating the information relied upon by the decisionmakers)" and remanded the matter to the district court to consider whether Heard in fact had withheld the exculpatory information.

This case demonstrates that terminations and other employment decisions ultimately are only as credible and lawful as the information and motivation underlying the decisions, and employers should take steps to ensure a bias-free decisionmaking process.

Mother With Young Children May Pursue Discrimination Claim Based On Gender Stereotyping

The Second Circuit Court of Appeal (encompassing New York, among other states) recognized that basing employment decisions on stereotypes about mothers and balancing work and family life is gender discrimination. In *Back v. Hastings on Hudson Union Free School District*, plaintiff Elana Back, a psychologist at the Hillside Elementary School, claimed the school district and her supervisors unlawfully denied her tenure based on the stereotype that Back could not sufficiently commit herself to her job and be a good mother to her young children. Back claimed two of her supervisors, who had initially given her positive performance reviews, began making discriminatory comments as her tenure review approached, such as (1) suggesting Back "reconsider whether [she] could be a mother and do this job;" (2) stating that if "family was a priority . . . maybe this was not the job for [her];" and (3) saying it was "not possible for [her] to be a good mother and have this job." Her supervisors then informed her they would not recommend her for tenure, and the superintendent would follow their recommendations.

The trial court granted the defendants' motion for summary judgment on the grounds Back failed to provide evidence that fathers were treated differently. The court also determined the alleged comments constituted mere "stray remarks." On appeal, the Second Circuit reversed, holding that gender stereotyping by itself is a form of discrimination: "where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based." The appellate court found the comments were not mere "stray remarks" and that comparative evidence was not required to prove up the intentional discrimination claim.

California employers should note that California law *expressly* prohibits discrimination based on gender stereotypes. Thus, employers and their decision makers must refrain from basing employment decisions on how they believe an applicant or employee of a particular gender should or would act.