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Vol. 24, No. 1
April 14, 2014

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STATUTE OF LIMITATIONS

Sign on the dotted line

by Garrett Jensen
Carothers, DiSante & Freudenberger LLP

Hoping to limit the time period one of your employees has to file a lawsuit against your company, you have her sign an employment application whereby she agrees that any claim or lawsuit must be filed no more than six months after the date of the employment action in question—shorter than the statute of limitations imposed by law. If she files a lawsuit after that six-month period, will she be allowed to pursue it?

How courts view FEHA claims

California's Fair Employment and Housing Act (FEHA) declares it the "public policy" of California to "protect and safeguard" employees against discrimination by providing the remedies necessary to eliminate discriminatory practices, including those in employment. Cases interpreting the FEHA have found that the public policy against sex discrimination and sexual harassment benefits the public at large rather than a single employer or employee.

If an employee wants to file a lawsuit for a violation of one of the provisions in the FEHA, she first must file a complaint with the California Department of Fair Employment and Housing (DFEH) within a year of the unlawful act. She then has a year after the DFEH issues a right-to-sue letter to file a civil lawsuit.

Leave me alone!

Ashley Ellis was hired to work for U.S. Security Associates in 2009 as a security guard. In early 2010, she became a field training officer with Rick Haynes as her direct supervisor. Beginning in August of that year, Haynes subjected Ellis to a pattern of offensive and unwarranted sexual behavior at work. One month later, multiple female employees complained to management that Haynes was sexually harassing them. In response, management required Haynes to participate in a sexual harassment class.

Despite Haynes' participation in the class, in November 2010, a coworker complained to management about his continued harassing comments, and that same month, Ellis notified U.S. Security's headquarters about Haynes' inappropriate and harassing conduct. Haynes was terminated, and Ellis was subsequently promoted to a supervisor position and promised a raise. After not receiving the raise or a response from management about why she wasn't receiving the raise, Ellis quit U.S. Security in January 2011.

About a month before quitting, Ellis filed a complaint with the DFEH. She then filed a civil complaint in November 2011 that alleged five claims, including three under the FEHA—sex discrimination and sexual harassment, failure to maintain an environment free from harassment, and retaliation.

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CALIFORNIA EMPLOYMENT LAW LETTER (ISSN 1531-6599) is published biweekly for $547 per year by **BLR®—Business & Legal Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094.

'You're too late,' says trial court

U.S. Security pointed to Ellis' application for employment, which she was required to sign as a condition of employment. The application featured the following provision: "Any claim or lawsuit relating to my service with [U.S. Security] must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary." Based on that language, the trial court agreed with U.S. Security that the lawsuit should be dismissed as untimely since Ellis didn't file her civil complaint within six months after the employment actions that were the subject of the lawsuit. Ellis filed an appeal.

A reversal is in the works

The appellate court decided that the shortened limitation provision in the employment application was unreasonable and against public policy. The court found that a shortened limitation is reasonable only if it gives the employee a sufficient opportunity to investigate and file the action, the time isn't so short that it effectively does away with the right of action, and the action isn't barred before the loss or damage can be ascertained.

In comparing the limitations period for filing a claim under the FEHA set forth by the California Legislature—the outside limit is generally two years—the appellate court found that the six-month limitation in Ellis' application for employment violated public policy because it didn't provide sufficient time for her to pursue her judicial remedies. The appellate court relied on a similar case in which an arbitration agreement between an employee and employer that set forth a six-month limitation period was ruled unenforceable (*Martinez v. Master Protection Corp.*).

Agreements can't limit the limitations period or remedies for employees' claims.

The appellate court was also concerned that a shortened limitations period would effectively limit the DFEH's ability to investigate claims—especially small claims by employees with modest salaries—and that dismissing Ellis' case would create different limitations periods for FEHA claims. If the appellate court upheld the language of the employment application, one limitations period would begin to run from the time Haynes allegedly harassed Ellis, another would begin to run when her claim that U.S. Security failed to prevent harassment finally accrued, and a third would begin to run when the alleged retaliation took place. *Ellis v. U.S. Security Associates et al.* (California Court of Appeal, 1st Appellate District, 3/20/14).

Bottom line

Despite the trial court's support of the employer's position, on appeal, U.S. Security was unable to prevail in seeking to shorten the limitations period for claims filed against it. The broader takeaway from this case is that while companies are able to enter into agreements with their employees regarding certain aspects of claims—e.g., an agreement to arbitrate rather than litigate—the agreements can't limit the limitations period or remedies for employees' claims. The key is for companies and their counsel and HR professionals to stay up to date regarding the limitations periods and statutory remedies for claims and craft their employment applications and arbitration agreements accordingly.

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