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EMPLOYMENT CONTRACTS

CA court refuses to permit employee to change claims during trial

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A salesperson sued her employer for breach of contract. The employee attached one version of an employment agreement to her complaint, but a second, significantly different version of the agreement was introduced into evidence at trial. Halfway through trial, the employee moved to amend her complaint to incorporate the second agreement. The trial court denied her request and granted judgment in favor of the employer. The California Court of Appeal affirmed the ruling in an unpublished decision.

Sales rep sues for back pay

K&M Meat Company hired Crystal LeMieux in 1992 to sell meat to restaurants and hotels. LeMieux prepared a letter dated July 17, 1992, purporting to describe the terms of her employment. According to the letter, which was signed by K&M's owner, Felix Goldberg, LeMieux was eligible for an annual salary increase linked to K&M's annual gross sales.

K&M did not pay LeMieux according to the terms of the July 17 letter, and the parties had different views of her pay structure. LeMieux believed K&M was supposed to pay her a commission of three percent of its annual gross sales increase plus a \$2,000

weekly draw. Goldberg intended for K&M to pay LeMieux a commission of three percent for her clients plus a \$2,000 weekly salary.

In 2012, LeMieux's relationship with Goldberg deteriorated, and a disagreement arose over her performance and the terms of her compensation. LeMieux submitted a written request for payment of commissions based on the increase in K&M's gross sales. Goldberg refused. In response, LeMieux sued K&M for claims arising out of the July 17 letter.

The version of the July 17 letter attached to LeMieux's complaint included a July 22, 1992, notary stamp on the second page and a July 21, 1992, countersignature by Goldberg. During trial, it became clear that there were two versions of the letter—one dated July 17, 1992, and one dated July 21, 1992. The letters contained different compensation structures—the July 21 agreement provided for the payment of monthly commissions but not for annual increases in salary. Problematically for LeMieux, she had kept the originals of both letters in her safe, but she testified that she had forgotten about the July 21 letter until she saw it in court.

After LeMieux presented her case at trial, she moved to amend her complaint to incorporate the July 21 letter. The trial court denied her motion. In finding that the

contract on which the case was based was no longer operative, the court also granted K&M's motion for judgment in its favor. LeMieux appealed, and the court of appeal affirmed.

On appeal, LeMieux challenged the trial court's refusal to allow her to amend her complaint after presenting her case. Trial courts have discretion to permit amendments to "conform to proof at trial" so long as the amendments do not raise new issues against which the other side has not had sufficient opportunity to defend. Specifically, courts will examine whether:

- (1) There is a reasonable excuse for the delay;
- (2) The amendment relates to the facts or only to legal theories; and
- (3) The opposing party will be harmed by the amendment.

In this case, each of those factors supported the court's denial of LeMieux's motion.

No reasonable excuse for LeMieux's delay

LeMieux failed to exercise reasonable diligence in prosecuting her claim. She should have known about both versions of the letter. She had stored the July 21 letter in the same safe as the July 17 letter. She or someone on her behalf must have had the July 21 letter in hand when copying the notary stamp over the July 21 letter and attaching it to the July 17 letter. Moreover, the lawsuit lasted several years and involved a claim for tens of millions of dollars in damages. One would expect that LeMieux or her lawyers would have examined the complete versions of those two different pages at some point before trial. Whether LeMieux knew of the different letters before trial or simply failed to do the minimal investigation necessary to discover them, the circumstances did not suggest a reasonable excuse for her delay in requesting leave to amend her complaint.

Proposed amendment would have harmed K&M

LeMieux sued for back pay based on the terms of the July 17 letter, which contained a different compensation structure than the July 21 letter. By moving to amend her complaint to incorporate the July 21 letter in the midst of trial, LeMieux was not simply applying a new theory to the same facts but rather was seeking to change the most critical term of the contract upon which she had sued. Switching from the salary adjustments described in the July 17 letter to the monthly commissions contemplated in the July 21 letter necessitated a very different damages calculation. These proposed changes would have unfairly required K&M to adapt to and defend against a new damages calculation for the first time at trial. The change in the compensation terms would also deprive the company of the opportunity to investigate and assert potential defenses.

Finally, LeMieux conceded that granting the motion to amend would have required a delay of the trial to permit additional discovery (exchange of evidence). When a trial date is set, counsel, the parties, the trial court, and the witnesses have blocked out that time. If the only way to avoid harm to the opposing party is to continue the trial date to allow further discovery, refusing LeMieux's request to amend her complaint could not be an abuse of discretion. Thus, the need for a continuance itself further supported the trial court's decision not to allow the amendment. *LeMieux v. K&M Meat Company, Inc.* (California Court of Appeal), 2nd Appellate District, 5/30/17 (Unpublished).

Bottom line

It seems obvious that employers should keep accurate and complete records of employment-related documents. The quality of your record keeping, however, often is not put to the test until a problem arises with an employee, at which time it may be too late to gather the records. In this case, although the employer won, it had to spend many thousands of dollars in legal fees and days in trial, all of which may have been avoided.

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