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ATTORNEYS' FEES

Insufficient pleading results in denial of fees to terminated employee

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A terminated employee sued a nonprofit organization for employment claims. The employee partially prevailed, including on his claim that the nonprofit failed to pay his bonus. When the employee sought to recover all of his attorneys' fees, the trial court denied the request. The California Court of Appeal affirmed the denial, finding that because the employee's operative complaint did not request fees generally or in connection with the bonus claim, he had not met applicable statutory requirements.

Executive director files suit

Michael Shames founded Utility Consumers' Action Network (UCAN) to educate San Diego consumers on regulated utility matters and to assist them with representation in regulatory proceedings. Shames served as UCAN's executive director for 27 years, with oversight from a board of directors. In May 2012, UCAN hired a new executive director. Shames offered to remain on as a part-time employee to assist with ongoing litigation, but a conflict allegedly arose between him and the new executive director. In June 2012, UCAN terminated Shames' employment.

In February 2013, Shames sued UCAN. His first amended complaint included claims for illegal eavesdropping, waiting-time penalties due to a willful failure to pay final wages, failure to provide legally compliant wage statements, failure to indemnify costs, and breach of contract/declaratory relief arising out of his allegation that UCAN did not pay him bonus compensation due under its incentive plan (the bonus claim). The bonus claim did not include a request for attorneys' fees, nor did the general request for relief.

UCAN countersued, alleging that during Shames' tenure as executive director, he paid himself unauthorized incentive bonuses. Shames denied UCAN's claims and requested that judgment be entered in his favor and that he recover reasonable attorneys' fees.

A jury determined that UCAN failed to provide Shames with itemized wage statements, indemnify his legal costs, and pay him incentive bonus payments. The jury did not find that Shames had breached any fiduciary duties that he owed to UCAN.

Shames then sought to recover all of the \$136,721.25 in attorneys' fees he had incurred in litigating his claims, via Labor Code Section 218.5. The trial court awarded him \$2,000 in attorneys' fees on his wage statement claim and \$6,151.23 in costs. The trial court denied the remainder of his request on the basis that he did not sufficiently request Section 218.5 attorneys' fees upon initiating his lawsuit. Shames appealed, and the court of appeal affirmed the decision.

Section 218.5 provides avenue for attorneys' fees

The general "default" rule is that each party in a lawsuit must bear its own attorneys' fees. The exception to that rule is that a prevailing party may recover fees when authorized by statute or contract. Labor Code Section 218.5 states in pertinent part: "In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action."

Statutory attorneys' fees need not always be specifically requested at the beginning of a lawsuit and proven at trial. In certain circumstances, they may properly be requested and awarded after entry of judgment. However, Section 218.5 requires an initial formal request to place the parties on notice, early in the action, that the ultimate cost of litigation could surpass the damages enumerated in the complaint. The court of appeal considered whether Shames had satisfied Section 218.5's statutory requirements.

Trial court properly denied Shames' request

Shames prevailed on his bonus claim against UCAN for the nonpayment of wages. On appeal, he contended that because he requested attorneys' fees in connection with three of the claims detailed in his first amended complaint, Section 218.5 authorized his entire fee award. The court of appeal disagreed.

Shames' first amended complaint requested attorneys' fees in connection with his unsuccessful claims for illegal eavesdropping and waiting-time penalties and his claim for pay stub violations. Significantly, the only successful claim brought by Shames "for the non-payment of wages" was his bonus claim, and it did not contain a request for attorneys'

fees. And Shames' request for relief did not include an overarching request for attorneys' fees. Nor was Shames' request for attorneys' fees in his answer to UCAN's cross-complaint sufficient for purposes of Section 218.5.

UCAN had sued Shames for breach of fiduciary duty, which did not constitute an "action brought for the nonpayment of wages." UCAN did not receive adequate notice that it could potentially be held liable for the attorneys' fees Shames incurred in litigating the bonus claim.

Court refused to 'read out' statutory requirements

The purpose of Section 218.5 is to assist aggrieved employees in recovering their attorneys' fees. Wage claims usually involve relatively small amounts of money, and the expense of paying an attorney to pursue a lawsuit often exceeds the value of the claim. Without fee-shifting provisions, many aggrieved employees would not be able to afford to enforce their right to the full and fair payment of wages.

In this case, the court of appeal acknowledged that given the fact that Shames had prevailed against UCAN on his bonus claim, denying his request for fees was a harsh result. But the court refused to "read out" the intentional statutory requirements necessary for a Section 218.5 fee award. *Shames v. Utility Consumers' Action Network* (California Court of Appeal, Fourth Appellate District), 6/29/17.

Bottom line

The possibility of a "successful" or "prevailing" party recovering its attorneys' fees changes the economic calculus of litigation. The ability to recover fees often means the difference between an aggrieved employee pursuing employment claims or simply moving on.

A necessary first step in bringing or defending against any employment-related claim is to seek experienced legal counsel to perform a full and complete assessment of potentially applicable attorneys' fee statutes. Attorneys should pay close attention to the language of those fee statutes when drafting initial pleadings and assessing legal exposure.

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