California Labor & Employment Law Review

Volume 33
No. 1
May
2019

Official Publication of the California Lawyers Association Labor and Employment Law Section

Andrew H. Friedman is a partner with Helmer Friedman LLP in Beverly Hills. Mr. Friedman represents individuals and groups of individuals in employment law, consumer rights, and personal injury cases. Mr. Friedman served as Counsel of Record in *Lightfoot v. Cendant Mortgage Corp.* (Case No. 10-56068), where he successfully convinced the U. S. Supreme Court to grant the petition for certiorari that he filed on behalf of his clients. In January 2017, the Supreme Court, in a unanimous decision authored by Justice Sotomayor, reversed the Ninth Circuit and ruled in favor of Mr. Friedman's clients. Mr. Friedman is the author of *Litigating Employment Discrimination Cases* (James Publishing 2005–2018). Taylor Markey is an attorney with Helmer Friedman LLP in Beverly Hills. Ms. Markey represents individuals and groups of individuals in employment law, consumer rights, and personal injury cases. Prior to joining Helmer Friedman LLP, Ms. Markey clerked for the Honorable Justice Norman L. Epstein of the California Court of Appeal, Second District, Division Four.

MCLE Self-Study:

A Refresher on and Thoughts About Unconditional Offers of Reinstatement

By Andrew H. Friedman and Taylor Markey

I. Introduction

The U.S. Supreme Court has explained that "cooperation and voluntary compliance" (as opposed to litigation "proceeding at its often ponderous pace") are the preferred means to accomplish the primary objective of Title VII—*i.e.*, ending employment discrimination.[1] In a supposed effort to accomplish this objective, the Court, in *Ford Motor Co.*,[2] accepted a then-new rule "providing employers who have engaged in unlawful hiring practices with a unilateral device to cut off" [3] some, or potentially even all, liability for economic damages that would otherwise be owed "to the victims of their past discrimination."[4] Absent special circumstances (which, as discussed below, went undefined), the Court held that employers could use this rule to toll the accrual of front and back pay damages by making so-called "unconditional offers of reinstatement" to fired employees.[5] Notwithstanding the fact that unconditional offers of reinstatement are, in the vast majority of cases, nothing more than insincere attorney-driven artifices designed solely to minimize damages with no expectation or hope (but rather trepidation) that the employees will actually accept them, some courts have applied this federal doctrine to California state law employment cases, finding the doctrine to be in accord with the state's longstanding rule that wrongfully

— *Inside the Law Review* —

Absent special circumstances, if a plaintiff unreasonably rejects an unconditional offer of reinstatement, his or her front and back pay damages are cut off as of the date of the rejection.

fired employees have a duty to mitigate their damages by seeking substantially similar employment.[6]

Given that much pre-litigation (and some post-litigation) arguing occurs between defense and plaintiff counsel regarding whether offers of reinstatement are unconditional or otherwise valid and whether the rejection of such offers is justified, this article will examine the contours of the law that has developed around unconditional offers of reinstatement (including addressing the most common questions asked in this area: What is a valid unconditional offer of reinstatement? What are the "special circumstances" justifying the rejection of such an offer? What are the consequences of an unjustified rejection? Who bears the burden of proof on the issues of whether an offer was "unconditional," and whether the rejection of the offer was reasonable? Who determines whether the rejection of the offer was justified? Does California even recognize the unconditional offer of reinstatement doctrine?

The article will then close with some brief thoughts about the future of this federal doctrine, including a discussion regarding whether the California Supreme Court should find that the more flexible "avoidable consequences" rule[7] displaces the doctrine, as it found that the "avoidable consequences" rule displaced the federal *Faragher/Ellerth*[8] defense.

II. What Is a Valid Unconditional Offer of Reinstatement?

Absent special circumstances (discussed below), a valid unconditional offer of reinstatement is an offer of reinstatement that satisfies a two-, and possibly three-pronged, test.

First, the offer must provide for reinstatement of the plaintiff to the same (or substantially equivalent) position that he or she formerly held, and must afford the claimant virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status.[9] In this regard, some courts have held that the reinstatement offer "must be sufficiently specific for the plaintiff to be able to gauge whether the employment offered is comparable to the employee's previous job."[10] Indeed, these courts have explicitly rejected defense arguments that, to the extent an offer is vague, the plaintiff has a duty to inquire into the specifics before rejecting the offer.[11]

Second, the offer must, not surprisingly, be "unconditional"—*i.e.*, it must not place any restrictions or conditions on reinstatement. In that regard, courts have specifically held that an offer is not "unconditional" if it requires the employee to compromise her legal claims.[12] Of course, courts have also held that an employer's mere offer to allow the plaintiff to apply or interview for a position does constitute an "unconditional" offer of reinstatement.[13]

Third, some, but not all, courts have further mandated that, in order to be deemed valid, an unconditional offer of reinstatement must be made in good faith.[14]

III. Exceptions to the *Ford Motor Co.* Rule: What Are "Special Circumstances"?

In *Ford Motor Co.*, the Supreme Court held that "absent special circumstances, the simple rule that the ongoing accrual of backpay liability is tolled when a Title VII claimant rejects the job he originally sought comports with Title VII's policy of making discrimination victims whole."[15] Unfortunately, the Court failed to provide any guidance on what circumstances might constitute "special" ones, other than providing a cursory example—if the claimant was "forced to move a great distance to find a replacement job, a rejection of the employer's offer might reflect the costs of relocation more than a judgment that the replacement job was superior, all things considered, to the defendant's job."[16] Instead of providing any guidance in this area, the Court left this issue to the "sound discretion" of the trial court.[17]

Expanding on the Supreme Court's exception for "special circumstances," some federal courts have found that reinstatement is not always a reasonable remedy for plaintiffs in two general situations. First, some federal courts have held that rejection of an offer of reinstatement is justified when there is continuing hostility between the plaintiff and the employer or its workers.[18] However, in this situation, the plaintiff's fear of hostility must be reasonable and not fanciful.[19] Interestingly, courts seem to routinely reject plaintiff requests for court-ordered reinstatement as a remedy for illegal discrimination when employers argue that front pay would be more appropriate because the reinstatement would cause "discord and antagonism" between the parties.[20] Second, some

federal courts have found that rejection of an offer of reinstatement is justified because of psychological injuries that the discrimination or wrongful treatment has caused the plaintiff and/or where the stress of returning to work for the employer would imperil the plaintiff's health and well-being.[21]

IV. What Are the Consequences of Unreasonably Rejecting an Unconditional Offer of Reinstatement?

Absent special circumstances, if a plaintiff unreasonably rejects an unconditional offer of reinstatement, his or her front and back pay damages are cut off as of the date of the rejection.[22]

If, on the other hand, the plaintiff reasonably rejects such an offer, there are no negative consequences for the plaintiff.[23]

V. Burden of Proof Issues

The law is clear that the employer bears the burden of proving that an employee failed to mitigate his or her damages.[24] As acceptance of an unconditional offer of reinstatement is merely one form of damage mitigation, the law is equally clear that the employer bears the burden of proving both that it made a valid unconditional offer of reinstatement and that the employee failed to reasonably accept that offer.[25]

VI. Who Determines Whether an Unconditional Offer of Reinstatement Was Valid and Whether the Rejection of Such an Offer of Reinstatement Was Reasonable?

The federal courts have held that whether an offer was unconditional and whether the rejection of such an offer was reasonable are questions for the trier of fact.[26] Although a paucity of California state cases mention, without analyzing, *Ford Motor Co.*, the Ninth Circuit has opined that "*Ford Motor Co.* [does not] alter[] the California rule that the reasonableness of mitigation is a question of fact."[27] Of course, if there are no genuine disputes of material fact, the courts can and do decide this issue on summary judgment.[28]

VII. Does California Recognize the Unconditional Offer of Reinstatement Doctrine?

The California Supreme Court has not indicated whether the federal unconditional offer of reinstatement doctrine is applicable under California law. There is a scarcity of California court of appeal cases even mentioning *Ford Motor Co.,* and none of those cases provide any analysis regarding whether the unconditional offer of reinstatement doctrine is applicable under California law. Likewise, while some federal courts have applied the unconditional offer of reinstatement doctrine to employment cases brought under California law, none have actually provided any analysis of whether California has adopted that federal doctrine.[29]

VIII. Some Closing Thoughts

There is a superficial logic to the unconditional offer of reinstatement doctrine—a wrongfully fired worker gets his or her job back. But, the job that the wrongfully fired employee has lost, and to which he or she has an entitlement, is the job he or she held *without the commission of employment violations*. In many circumstances, the working conditions that existed *ex ante* simply no longer exist. The employee may find the post-violation workplace, with all its tensions, burned bridges, and hurt feelings, to be a much different and less hospitable place. Indeed, in most instances, a wrongful firing so changes the working conditions into which the discharged employee would return that the offer is virtually always of inferior and dissimilar employment. Moreover, in many instances, knowing that some courts will find no retaliatory motivation when an adverse employment action comes months after protected activity, employees will correctly suspect that employers will be biding their time until they can get rid of the employee under some pretext.

The determinants of employees' success in their careers are often fundamentally relational,[30] dependent upon other employees' willingness to work cooperatively with them and on supervisors' willingness to promote or recommend them. Statistically, employees who are reinstated are less likely to remain with the employer and are more likely to experience retaliation.[31] Although reputational and interpersonal harms are less concrete than working conditions like salary and seniority, these types of harm need to be considered when determining whether an employee can reasonably reject an unconditional offer of reinstatement. Indeed, empirical studies validate the subjective fear felt by many wrongfully discharged employees that they will be retaliated against upon their return to the workplace. In the U.S., two studies of the reinstatement remedy were conducted in the context of the National Labor Relations Act in 1962–1964 and 1971–1972.[32] In both studies, less than half of employees who were offered reinstatement accepted it.[33] The most cited reason among those employees who refused reinstatement was fear of retaliation and hostility.[34] In the 1962–1964 study, only 30 percent of reinstated employees were still working for the employer within two years.[35] In the 1971–1972 study, this number dropped to 11 percent.[36] In both studies, the vast majority of those employees no longer working with the employer had resigned, citing unfair treatment by the employer upon reinstatement.[37] More recent studies in Canada and the U.K. also support the argument that reinstated workers fare worse than other employees and often face retaliation.[38]

Anecdotally, many employment attorneys on both sides of the "*v.*" feel that the back-and-forth that ensues from an unconditional offer of reinstatement is a farce (or a form of Kabuki theater) in which each party must profess to want something in which it is actually completely uninterested. The employer must pretend that it wants to reinstate an employee whom it actually views as a nuisance and constant threat of liability; the employee must pretend that he or she wants to return to a workplace from which he or she was wrongfully terminated. Some have argued that any remedy short of reinstatement allows the employer to effectuate its discriminatory goal of removing protected workers from the workplace.[39] This retributive focus on punishing the employer with the presence of the protected worker forgets the experience of that worker, who has been reduced to a cudgel.

Because the preference for reinstatement as a remedy does not align with the reality that most employers making offers of reinstatement do so insincerely (and actually hope that the employees reject the offers) and that most employees do not want to return to a workplace from which they were wrongfully fired (and will not fare well in when returned), the California Supreme Court should reject the doctrine and find that it is at odds with California's strong public policy of eradicating employment discrimination. Alternatively, unconditional offers of reinstatement should be presumed to be invalid absent compelling evidence from the defendant, and the exceptions to the enforcement of unconditional offers of reinstatement should be dramatically expanded. While there might be situations in which reinstatement is truly desired by the parties and not detrimental to the employee, these are the true "special circumstances." The usual case, anecdotally and empirically speaking, is one in which it would be for the best if everyone went their separate ways.

ENDNOTES

1. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975).
2. *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (*Ford Motor Co.*).
3. *Id.* at 241-42 (Blackmun, J., dissenting).
4. *Id.*
5. *Id.* at 241 ("[A]bsent special circumstances, rejection of an employer's unconditional job offer ends the accrual of potential backpay liability.").
6. *Boehm v. American Broad. Co.*, 929 F.2d 482, 485 (9th Cir. 1991) (finding that the "*Ford Motor* framework accords with California law"); *Parker v. Twentieth Century-Fox Film Corp.*, 3 Cal. 3d 176, 182 (1970) (*Parker*) (establishing common law duty to mitigate applies to breach of employment agreement); *Villacorta v. Cemex Cement, Inc.*, 221 Cal. App. 4th 1425 (2013).
7. *State Dept. of Health Servs. v. Superior Court*, 31 Cal. 4th 1026 (2003).
8. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
9. "Substantially equivalent employment" for purposes of Title VII mitigation has been defined as employment which affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the position from which the Title VII claimant has been discriminatorily terminated. *See Sellers v. Delgado Cmty. Coll.*, 839 F.2d 1132, 1138 (5th Cir. 1988); *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983).
10. *Xiao-Yue Gu v. Hughes STX Corp.*, 127 F. Supp. 2d 751, 756 (D. Md. 2001).
11. *Id.* ("In addressing Plaintiff's complaints of vagueness in the offer, Defendant apparently counters that Plaintiff had a duty to inquire as to any specifics relating to the offer of reinstatement before rejecting it. The Court disagrees.").
12. *Ford Motor Co., supra*, 458 U.S. at 232, n.18 ("The claimant's obligation to minimize damages in order to retain his right to compensation does not require him to settle his claim against the employer, in whole or in part. Thus, an applicant or discharged employee is not required to accept a job offered by the employer on the condition that his claims against the employer be compromised."). S*ee also Odima v. Westin Tucson Hotel*, 53 F.3d 1484 (9th Cir. 1995); *Bruno v. W.B. Saunders Co.*, 882 F.2d 760, 770 (3d Cir. 1989).
13. *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1097, n.7 (5th Cir. 1994); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 625 (6th Cir. 1983); *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 879 (11th Cir. 1986).
14. *See Stanfield v. Answering Serv., Inc.*, 867 F.2d 1290, 1296 (11th Cir. 1989); *Smith v. World Ins. Co.*, 38 F.3d 1456, 1464-65 (8th Cir. 1994) (*Smith*); *Donovan v. Commercial Sewing, Inc.*, 562 F. Supp. 548, 555 (D. Conn. 1982). *But see Aston v. Tapco Int'l Corp.*, 2014 U.S. Dist. LEXIS 93513, 2014 WL 3385073, at *16 (E.D. Mich. July 10, 2014, No. 12-14467).
15. *Ford Motor Co., supra*, 458 U.S. at 238-39.
16. *Id.* at 238, n.27.
17. *Id.*

18. *Thorne v. City of El Segundo*, 802 F.2d 1131, 1137 (9th Cir. 1986); *Miano v. AC&R Advertising, Inc.*, 875 F. Supp. 204, 226 (S.D.N.Y. 1995); *Xiao-Yue Gu v. Hughes STX Corp.*, 127 F. Supp. 2d 751, 757 (D. Md. 2001); *Naylor v. Georgia-Pacific Corp.*, 875 F. Supp. 564, 582 (N.D. Iowa 1995); *Wilcox v. Stratton Lumber, Inc.*, 921 F. Supp. 837, 843 (D. Me. 1996); *Maturo v. National Graphics, Inc.*, 722 F.Supp. 916, 924 (D. Conn. 1989). *See also Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001); Susan K. Grebeldinger, *The Role of Workplace Hostility in Determining Prospective Remedies for Employment Discrimination: A Call for Greater Judicial Discretion in Awarding Front Pay,* 1996 U. Ill. L. Rev. 319 (1996) (*Workplace Hostility*) (citing more capacious understandings of the exception from the U.S. Court of Appeals for the Tenth Circuit, which have emphasized the necessity of a "warm relationship" between employer and employee); *EEOC v. General Lines, Inc.*, 865 F.2d 1555, 1564 (10th Cir. 1989).
19. *Saladin v. Turner*, 936 F. Supp. 1571, 1582 (N.D. Okla. 1996); *Aston v. Tapco Int'l Corp.*, 2014 U.S. Dist. LEXIS 93513, 2014 WL 3385073, at *17 (E.D. Mich. July 10, 2014, No. 12-14467).
20. *Lewis v. Federal Prison Indus., Inc.*, 953 F.2d 1277, 1280 (11th Cir. 1992). *See also E.E.O.C. v. Prudential Federal Sav. and Loan Ass'n*, 763 F.2d 1166, 1172 (10th Cir. 1985), *cert. denied*, 474 U.S. 946 (1985); *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 281 (8th Cir. 1983).
21. *Lewis v. Federal Prison Indus., Inc.*, 953 F.2d 1277, 1281 (11th Cir. 1992); *Ortiz v. Bank of America Nat. Trust and Sav. Ass'n*, 852 F.2d 383, 387 (9th Cir. 1987). *See also Pollard*, *supra* n.18, 532 U.S. at 846.
22. *Ford Motor Co., supra*, 458 U.S. at 231.
23. *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990).
24. *EEOC. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1251-52 (11th Cir. 1997). *See also Parker*, *supra* n.6, 3 Cal. 3d at 182 ("Before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages.").
25. *Smith*, *supra* n.14, 38 F.3d at 1465 ("World also argues that the [jury] instruction should have shifted the burden to Smith to demonstrate that his rejection of the offer was reasonable. We disagree. We have consistently held that while the wrongfully discharged employee must take reasonable measures to mitigate damages, the defendant-employer bears the burden of proving that the employee failed to take those measures. We find no authority or reason for altering the burden in this case. Accordingly, we believe the burden is correctly placed upon the employer to prove that it made an offer of reinstatement and that the plaintiff's rejection of it was objectively unreasonable." (citations omitted)).
26. *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 830 (2d Cir. 1992); *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982) ("Generally, it is the duty of the trier of fact to weigh the evidence to determine whether a reasonable person would refuse the offer of reinstatement."). *See also Smith*, *supra* n.14, 38 F.3d at 1464-65 ("The refusal of a reinstatement offer is measured by an objective standard: Generally, it is the duty of the trier of fact to weigh the evidence to determine whether a reasonable person would refuse the offer of reinstatement.").
27. *Ortiz v. Bank of Am. Nat'l Trust and Sav. Ass'n*, 852 F.2d 383, 387 (9th Cir. 1987).
28. *See, e.g.*, *Knox v. Cessna Aircraft Co.*, 2007 U.S. Dist. LEXIS 71528, 2007 WL 2874228, at *11 (M.D. Ga. 2007, No. 4:05-CV-131(HL)) (granting summary judgment in favor of employer as to plaintiff's failure to mitigate damages by unreasonably rejecting unconditional offer of employment while recognizing that "[w]hether a plaintiff acted reasonably in rejecting an unconditional offer of reinstatement is generally a question of fact to be decided by the jury").
29. *See e.g., Carpenter v. Forest Meadows Owners Ass'n*, No. 1:09-cv-01918-JLT, 2011 U.S. Dist. LEXIS 82295, 2011 WL 3207778, at *8 (E.D. Cal. 2011).
30. *See generally* Mitch Prinstein, *Popular: The Power of Likability in a Status-Obsessed World* (2017).
31. Martha S. West, *The Case Against Reinstatement in Wrongful Discharge* 1988 U. Ill. L. Rev. 1, 28-32 (1988) (*Wrongful Discharge*).

32. *Id.* at 28-32; National Labor Relations Board, *Reinstatement Offers* (2018) at https://www.nlrb.gov/news-outreach/graphs-data/remedies/reinstatement-offers (in the past ten years, offers of reinstatement in NLRA cases have been accepted on average 57.9 percent of the time; in the past three years, that average was 38 percent).
33. *Wrongful Discharge*, *supra* n. 31 at 28-32.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. Gilles Trudeau, *Is Reinstatement a Remedy Suitable to At-Will Employees?,* 30 Indus. Rel. 302, 310-11 (1991) (finding 67 percent of reinstated workers felt they were unfairly treated by their employer following reinstatement); Genevieve Eden, *Reinstatement in the Non-Union Sector,* 49 Indus. Rel. 87, 89 (1994) (finding that 40 percent of reinstated employees were no longer with the employer after two years and that 56 percent of employers of reinstated employees felt that the reinstatement was unsuccessful); Bernard Walker & Robert T. Hamilton, *Employee-Employer Grievances* 13 Int'l J. Mgmt. Rev. 40, 50-52 (2011) (citing British and Canadian research suggesting that reinstated employees have higher turnover rates than other employees).
39. Fred W. Alvarez, *Remedies for Individual Cases of Unlawful Employment Discrimination: A Law Enforcement P*erspective, 3 Lab. Law. 199, 209 (1987).

The *California Labor & Employment Law Review* is published by the Labor and Employment Law Section of the California Lawyers Association.