

***First Wednesday — A Monthly Discussion of Employment Law
Issues and Other Hot Topics for Management***



By Jeffrey A. Snyder - Issue No. 28: November 3, 2004

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When Is A Termination Not A Termination?

An aspiring actress and model worked a one-day assignment as a hair model for L’Oreal. She was to be paid \$500 for her day’s work. She completed the work but when her check arrived two months later, the model sued L’Oreal for penalties under the California Labor Code, which requires the immediate payment of all wages earned when the employer discharges the employee. However, L’Oreal won this case based upon a subtle yet important distinction in the law: whether or not the model was discharged (terminated) for purposes of waiting time penalties under the Labor Code. The Court ruled that the model was not discharged or terminated; rather, she had simply completed her one-day assignment. (*Smith v. Superior Court of Los Angeles County (L’Oreal USA)*, decided October 19, 2004, 04 CDOS 9303, No. B176918.)

This ruling has some very practical implications based on the unique issue decided. But first, here is a quick review of the potential penalties that L’Oreal faced for the delayed payment of wages.

Labor Code Section 201 states that an employer who discharges an employee must “immediately” pay all wages earned and unpaid at the time of discharge. In addition, Section 203 states that if the employer willfully fails to pay these wages immediately, the wages of the employee shall continue as a penalty from the due date

up to a period of 30 days. This penalty is commonly referred to as the “waiting time penalty” for a failure to pay promptly upon discharge any wages owed to the employee, no matter how small, computed at the employee’s daily rate. Here, L’Oreal would have owed \$15,000 (30 days x \$500). Section 203 is meant to be punitive – if L’Oreal had only paid her \$450, shorting her \$50, it would still have owed the full \$15,000 if waiting time penalties were otherwise appropriate.

To fit within sections 201 and 203 and recover waiting time penalties, the model had to prove she was “discharged” which, she contended, includes any termination resulting from completion of the work or expiration of the term. As cited in this case, there is some earlier California case law on her side, but the court found her argument, and the earlier cases, unpersuasive. The Court held that a “discharge” means “the affirmative dismissal of an employee by an employer from ongoing employment and does not include the completion of a set period of employment or a specific task.” Essentially, since there was no affirmative action taken by L’Oreal to dismiss the model – only the passive expiration of her employment term – there was no entitlement to waiting time penalties.

Now, consider some other practical applications of this ruling. What happens if an employee has a one-year term contract with a large severance payout, to be payable by the company upon discharge unless the termination is for “good cause,” in which case there will be no severance? Assume the contract ends upon the one-year anniversary and the employee is not invited back to work, but there is no good cause for termination. The employer will argue there was no discharge, but the employee will argue he was terminated without good cause. Each side has a decent argument that the severance should be paid. (Labor Code section 2920(a) adds another twist – it states that employment is terminated when the term expires.) Rather than leave it ambiguous for the parties and ultimately the court to decide later, this issue should be addressed by careful drafting of the severance and termination clauses within the employment agreement.

Similar issues arise when term employment contracts have unclear non-renewal or automatic renewal clauses. For example, is it a discharge when an employee’s employment ends after three years of successive renewals of a one-year term contract,

and then neither side says anything about renewal, but the employer hires a replacement? Similarly, is it a discharge when the employer fails to comply with the technical requirements of a renewal-by-notice clause, unintentionally leaving the employment intact despite the ending of the term?

To avoid ambiguity when drafting employment agreements, one must consider the implications of this new *L'Oreal* case to aim for clarity of the circumstances, expectations and duties surrounding termination.

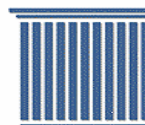
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