A Timely Analysis of Legal Developments

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In *Starbucks v. Superior Court*, a California Court of Appeal dismisses a class action lawsuit seeking millions of dollars against Starbucks for allegedly violating California's restriction on asking job applicants about prior marijuana-related convictions.

Starbucks Ruling is No "Pot of Gold" for Class Action Plaintiffs

By Rod. M. Fliegel and Blane M. Mall

In *Starbucks v. Superior Court*, the Court of Appeal for the Fourth District of California considered whether the plaintiffs were entitled to ask a jury to award millions of dollars against Starbucks for allegedly requiring job applicants to disclose prior convictions for misdemeanor marijuana-related offenses. At the trial court level, the judge had granted the named-plaintiffs' motion to certify a class action for the benefit of approximately 135,000 class members (unsuccessful job applicants). The trial court judge had also rejected Starbucks bid for "summary judgment," *i.e.*, to have the named-plaintiffs' lawsuit thrown out of court without a trial.

On appeal, the Fourth District agreed with Starbucks, and in a strongly worded opinion, directed the trial court to enter judgment for Starbucks. The court's opinion condemned the misuse of the class action process to pressure "payoffs by private business for alleged violations of law having no real relationship to a true public interest." It also offered useful guidance on the legal effectiveness of disclaimers in employment applications.

Background

California Labor Code section 432.8, which was enacted during the 1970s in order to minimize the stigmatizing effect of minor marijuana offenses, prohibits employers from asking job applicants to disclose information regarding certain marijuana convictions that are more than two years old. The plaintiffs' class action lawsuit accused Starbucks of violating section 432.8 by asking illegal questions on its employment application. Starbucks used the two-page employment application on a nationwide basis for store level positions. On the front side of the application, applicants were asked to disclose criminal convictions within the last seven years. The back side of the application included the following bolded text:

> **CALIFORNIA APPLICANTS ONLY: Applicant may omit any convictions for the possession of marijuana (except for convictions for the possessions**

of marijuana on school grounds or possession of concentrated cannabis) that are more than two (2) years old, and any information concerning a referral to, and participation in, any pretrial or post trial diversion program.

This California disclaimer language was contained in a 346-word paragraph directly above the signature line, after several general disclaimers, and after disclaimers for two other states, Maryland and Massachusetts.

The named plaintiffs all applied for work and filled out the Starbucks employment application. None were hired. One answered the conviction "No," one wrote, "I refuse to answer," and one wrote, "it's no one's business." None had a prior marijuana conviction.

The Trial Court's Decision

The trial court judge certified a class of all unsuccessful job applicants who had completed the employment application since June 2004, and who wanted a maximum of $200 in statutory damages. (Labor Code section 432.8 incorporates the remedies in section 432.7, which provides that: "In any case where a person violates this section ... the applicant may bring an action to recover from that person actual damages or two hundred dollars ($200), whichever is greater, plus costs, and reasonable attorneys' fees.) In also rejecting Starbucks bid for "summary judgment," the trial court held that a jury would have to decide whether the disclaimer would be effective to draw the attention of an average applicant based on its location, font size and placement in the employment application. According to the trial court judge, the plaintiffs' deposition admissions that none of them had answered the marijuana-related conviction question affirmatively, nor did they have any marijuana-related conviction, did not defeat their standing to pursue mass penalties, because section 432.8 is violated merely by requiring job applicants to answer the question.

The Court of Appeal's Holding

Starbucks filed a petition for a writ of mandate challenging the trial court's order denying summary judgment and allowing the case to proceed to trial. Characterizing the case as a "paradigmatic example" of when writ review is justified *before* trial, the court of appeal explained that, without "an earlier appellate look," corporate executives may be unfairly pressured to settle high-stakes litigation, rather than "bet their company that they are right." "Enhancing the prospects for obtaining a settlement on a basis other than the merits," the court declared, "is hardly a worth legislative objective. The civil justice system is not well-served by turning Starbucks into Daddy Warbucks."

The court of appeal first considered, and rejected, Starbucks argument that the California disclaimer was lawful, and thus, no trial was needed. The court upheld the *text* of the California disclaimer itself, but was critical of its *placement* in a "veritable sea of boldface type" and in the midst of a "host of irrelevant provisions" relating to other jurisdictions. The court reasoned that the disclaimer did not necessarily pass the "clear and conspicuous" test, because a "reasonable Starbucks applicant" might not notice it on the backside of the application form. The court was also mindful of the public policy supporting section 432.8, suggesting that a remedy should be available to job applicants who are improperly forced to reveal stigmatizing private information or decline to respond with such information at a possible cost of a lost job opportunity.

The court of appeal, however, also considered, and agreed with, Starbucks argument that no trial was needed because the named-plaintiffs' deposition admissions defeated their claims. The court disagreed with the trial court's holding that Starbucks violated section 432.8 merely by asking the disputed conviction question. Instead, the court explained, section 432.8 only provides legal protection to aggrieved job applicants, *i.e.*, job applicants with prior marijuana convictions. "[W]e decline," the court stated, "to adopt an interpretation that would turn the statute into a veritable financial bonanza for litigants like plaintiffs who had no fear of stigmatizing marijuana convictions." The court also expressed great reluctance to "create a whole new category of employment – professional job seekers, whose quest is to voluntarily find (and fill out) job applications which they know to be defective solely for the purpose of pursuing litigation."

Practical Implications

Employers with operations in California are well-advised to review their employment applications and related pre-hire paperwork (for example, background check authorization forms) both for substantive compliance with applicable law and to ensure that all disclaimers can satisfy the "clear and conspicuous" standard. Regarding the latter, particular attention should be given to the placement of the disclaimer within the form, the font size, and the overall use of bold, italics and underlining. Employers should also review each important pre-hire form to ensure that, upon completing the form, the job applicant is required to indicate on the form that he or she has reviewed and understands the entire document.

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