

# Personnel Problems and Advertising Angst

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EDITOR'S NOTE: THE FOLLOWING ARE SUMMARIES OF TEXAS APPELLATE COURT OPINIONS RELEASED OVER THE PAST THREE MONTHS THAT ARE RELEVANT TO EXECUTIVES AND THEIR BUSINESSES.

## ■ Contracts, Employment Law

*In Re: RLS Legal Solutions LLC*

**THE BOTTOM LINE:** Businesses cannot withhold employees' pay to get them to agree to an employment contract.

RLS Legal Solutions employed Amy Cobb Maida as a sales representative from 1997 to 2002. When RLS in November 2001 asked her to sign a new employment agreement, she objected to the agreement's arbitration clause and sued RLS. At trial, Maida testified that RLS told her she would not be paid if she did not sign the agreement. Maida testified that she signed the new agreement, specifically telling RLS that she was doing so under duress. At that time, RLS gave her a check for her salary. RLS contended that it had prepared the check several days earlier but that Maida was not in the office that day to pick it up. RLS moved to compel arbitration of the matter, but the trial court denied the motion. RLS appealed to Beaumont's 9th Court of Appeals, which held that the trial court did not abuse its discretion in denying RLS' motion to compel arbitration of the employment dispute on the basis that RLS used economic duress to force Maida to agree to the arbitration clause. But the Texas Supreme Court granted RLS' petition for a writ of mandamus to direct the 9th Court to compel arbitration. Maida, the Supreme Court stated, argued that the arbitration provision was not enforceable, because RLS improperly withheld her salary payment to force her to accept the arbitration provision. The Texas Supreme Court took Maida's version of the facts as true and assumed, without deciding, that she made out a case of economic duress for purposes of deciding the writ of mandamus. But the court found no evidence that RLS exerted duress on her to force her to agree specifically to the arbitration provision, as opposed to the agreement as a whole. Unless RLS singled out the arbitration provision from the other provisions when it presented the new employment agreement for Maida to sign, the court stated that Maida's claim of duress went to the agreement generally and must be decided in arbitration.

*Texas Supreme Court, No. 05-0290, April 20, 2007*

## ■ Employment Law, Discrimination

*Burrell v. Dr Pepper/Seven Up Bottling Group Inc.*

**THE BOTTOM LINE:** To prevent successful employment discrimination claims, make sure

the company asserts consistent, authentic reasons for all adverse employment decisions.

Darrell L. Burrell, an African-American male, began his employment with Dr Pepper/Seven Up Bottling Group LP (Dr Pepper) as corporate purchasing manager. Burrell initially worked under Penny Soriano, Dr Pepper's vice president of purchasing. When Soriano resigned, she recommended that Burrell replace her. Burrell sought the position and temporarily filled the job while Dr Pepper looked for a replacement, but ultimately Dr Pepper sought a replacement from outside the company. Eventually, Dr Pepper hired Ted Koester, a white male, to fill the vacant position. Koester did not have purchasing experience. Burrell and Koester clashed from the outset. During their first telephone conversation, Burrell became concerned about Koester's qualifications when Koester allegedly admitted that he lacked purchasing experience and asked Burrell to teach him purchasing. For his part, Koester alleged that Burrell engaged in various insubordinate acts. The conflict accelerated when Koester gave Burrell a negative performance review. When Burrell delivered a written response to Koester's evaluation, Dr Pepper terminated Burrell's employment. After receiving a right-to-sue letter from the EEOC, Burrell filed suit in U.S. district court alleging unlawful discrimination for refusal to promote, unlawful discrimination for termination based upon race and unlawful retaliation for termination based upon previous complaints of race discrimination. Dr Pepper moved for summary judgment. In support, Dr Pepper asserted that Burrell had failed to sufficiently refute its legitimate, nondiscriminatory reason for hiring Koester rather than promoting Burrell: Koester's greater experience in bottling. On the claims related to Burrell's termination, Dr Pepper alleged that the termination was because of insubordination. The district court granted Dr Pepper's motion for summary judgment, dismissing all of Burrell's claims. On appeal to the 5th U.S. Circuit Court of Appeals, the parties disputed the reason Dr Pepper gave for its decision not to promote Burrell, with Burrell alleging that Dr Pepper told him that it wanted to hire someone with more purchasing experience, while Dr Pepper claimed that the relevant criteria was purchasing experience in the bottling industry. The 5th Circuit overturned part of the district court's ruling, finding that Dr Pepper discriminated against Burrell in

refusing to promote him. Dr Pepper, the court stated, conceded that Burrell established his prima facie case on his failure-to-promote claim. Dr Pepper responded to Burrell's prima facie case with a legitimate, nondiscriminatory reason for not promoting Burrell to the vice president of purchasing position: Dr Pepper desired someone with more "purchasing experience in the bottling industry." Burrell, the court stated, sought to prove that Dr Pepper's proffered reason for failing to promote him was a pretext for racial discrimination. The court concluded that a genuine issue of material fact remained regarding whether Dr Pepper's hiring decision was based on purchasing experience in the bottling industry. The court noted Koester's lack of purchasing experience. Most significantly, the court stated that the testimony of a company executive permitted the inference that Dr Pepper knew that Koester had less purchasing experience in the bottling industry than Burrell. Dr Pepper's rationale for its hiring decision, the court stated, was also suspect, because it changed during the litigation. Before the district court, Dr Pepper stated that it hired Koester because he had more bottling experience. In contrast, before the EEOC and on appeal, Dr Pepper asserted that it hired Koester for his purchasing experience. Thus, the court remanded Burrell's failure-to-promote discrimination claim for trial. On Burrell's termination-related claims, the court stated that Dr Pepper put forth a legitimate, nondiscriminatory reason for his termination: his on-the-job insubordination. The court agreed with the district court that no reasonable jury could infer that racial discrimination or retaliation was the reason or a motivating factor in Burrell's termination.

*5th U.S. Circuit Court of Appeals, 06-10267, March 20, 2007*

#### ■ Torts, Business Law

*Astoria Industries of Iowa Inc. v. SNF Inc.*

**THE BOTTOM LINE:** Be careful with comparison-type advertising to avoid allegations of false advertising. Also be wary of situations when potential trade secrets of competitors fall into the company's hands.

Astoria Industries of Iowa and SNF, which does business as Brand FX Body Co., were business competitors. They manufactured and sold fiberglass utility bodies and toppers for commercial vehicles. A utility body is a storage compartment that runs alongside the bed of a commercial truck. A topper is a structure that covers the bed of a commercial truck. Brand FX's topper utilized a stair-step roof line that Brand FX claimed was unique to its brand. Initially, Astoria's only topper design had a rounded or domed roof line. In late 2002, however, Astoria developed a topper with a stair-step design virtually identical to Brand FX's topper for Cook's Pest Control, a Brand FX client. Astoria's chief engineer, Randy Thole, admitted that Astoria purposely copied the stair-step design as closely as possible. Brand FX contended that Astoria used methods

to design its stair-step topper by obtaining Brand FX's design drawings. In February 2003, Astoria began running a "DARE TO COMPARE" advertisement in an industry trade journal. The ad ran 10 times over 14 months. The advertisement compared "High Quality Astoria Bodies v. Low Quality Brand X Bodies." According to Fort Worth's 2nd Court of Appeals, the ad claimed that Brand X product was built with "no engineering" and "sub-standard materials." After unsuccessfully trying to get Astoria to stop running the ad, Brand FX sued Astoria for claims including business disparagement, false advertising and tortious interference with prospective business relations. Brand FX contended that Astoria's reference to "Brand X Bodies" was a poorly disguised reference to Brand FX. Brand FX further contended that three of the statements in the ad were statements of fact that were demonstrably false. Brand FX also asserted that Astoria either knew the statements were false when it ran the ad or at least failed to perform any sort of investigation regarding the truthfulness of the statements. Astoria moved for summary judgment on the claims, but a trial court denied Astoria's traditional and no-evidence motions for summary judgment. Astoria appealed the denial of the motions. Astoria defended itself on appeal on free speech grounds, allowing the 2nd Court to examine the business disparagement, false advertising and tortious interference claims before the dispute went to trial. The 2nd Court found sufficient evidence for the false advertising claim to go to trial. Brand FX, the court stated, produced enough evidence from which a jury could infer that Brand FX had been or was likely to be injured as a result of the ad. Brand FX presented evidence showing that Astoria's "built with substandard materials" claim was false. A jury could infer that Brand FX was injured or likely to be injured as a result of the ad, the court found. The court also allowed Brand FX's claim for tortious interference with prospective business relations to go forward. To make a tortious interference claim, a plaintiff must show a reasonable probability that the plaintiff and a third party would have entered into a contractual relationship; that an independently tortious or wrongful act by the defendant prevented the relationship from occurring; that the defendant did the act with a conscious desire to prevent the relationship from occurring or knew that the interference was certain or substantially certain to occur as a result of the conduct; and that the plaintiff incurred actual harm or damage as a result of the defendant's interference. The court found that Brand FX's stair-step design was a trade secret and that Astoria obtained it from Cook's, despite Brand FX's claim that it told its customers such designs were confidential. Astoria, however, viewed the drawings as sales drawings and not trade secrets. But the court stated that this evidence of possible trade secret misappropriation helped Brand FX meet its burden of producing sufficient evidence to go to trial.

*Fort Worth Court of Appeals, 2-05-315-CV, March 29, 2007*