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Bingham Can't Arbitrate Ex-Atty Bias Suit: Calif. Appeals Court

By **David McAfee**

Law360, Los Angeles (March 29, 2013, 3:31 PM ET) -- A California appeals court on Friday rejected Bingham McCutchen LLP's petition to force a former associate to arbitrate her allegations that she was wrongfully terminated after developing a rare sleep disorder, saying a trial court didn't err in concluding the arbitration provision was unenforceable.

The decision comes exactly one year after California Superior Court Judge Mel Red Recana ruled that Bingham's employment agreement with former associate Hartwell Harris was governed by Massachusetts law, and precedent from that state says mandatory arbitration applies to statutory discrimination claims only if agreements "at a minimum, state clearly and specifically that such claims are covered by the contract's arbitration clause," which Harris' contract didn't.

The three-judge appeals panel rejected Bingham's argument that the plaintiff's claims are governed by California law, saying the agreement's choice-of-law provision applies Massachusetts law to the employment relationship.

"California strongly favors enforcement of choice-of-law provisions and its courts have upheld application of other states' internal statutes, rules and laws to arbitration contracts," Judge Vincent J. O'Neill wrote in the opinion. "We conclude that Massachusetts law governs the enforceability of the arbitration clause in the employment agreement at issue here."

Tamara S. Freeze, who represents Harris, highlighted the importance of the decision.

"This is a significant decision because it shows that even a big and experienced law firm, like Bingham McCutchen LLP, is not immune from drafting errors in its own arbitration contract," Freeze told Law360 on Friday. "The California Court of Appeal made it clear the Bingham McCutchen, one of the largest law firms in the country, 'cannot have it both ways' and demand that the arbitration contract that they drafted for their associates be interpreted only for their benefit, while denying its associate-employees of the same choice-of-law provision providing state statutory rights against employment discrimination."

Harris first filed the lawsuit in November 2011, claiming that although she had always gotten positive feedback on her work before she developed delayed sleep-phase syndrome, once she was afflicted with the condition Bingham granted her a short-term disability leave, then put her on unpaid leave and ultimately let her go.

The disease affects sleep-and-wake cycles, according to Harris' complaint, in which she alleged the firm refused her doctor's proposed accommodations, such as flexible start times or

telecommuting and didn't offer her any other options to accommodate her disability.

On March 29, 2012, Judge Recana denied Bingham's arbitration petition on the grounds that the provision was not enforceable under Massachusetts law.

The appeals court on Friday affirmed the lower court's denial of Bingham's petition to compel arbitration and awarded Harris her costs on appeal. The panel also found that, in light of the resolution of this portion of the dispute, there was no need to consider Harris' contention that the instant employment agreement is unenforceable because it is unconscionable.

Judges Vincent J. O'Neill, Orville A. Armstrong and Sandy R. Kriegler sat on the panel for the appeals court.

A representative for Bingham McCutchen declined to comment.

Harris is represented by Tamara S. Freeze, Robert Odell and Allison Lin of the Law Offices of Tamara S. Freeze.

Bingham McCutchen is represented by Debra L. Fischer, Robert A. Brundage and Jessica S. Boar of Bingham McCutchen.

The case is Hartwell Harris v. Bingham McCutchen et al., case number B240522, in the Court of Appeal of the State of California, Second Appellate District, Division Five.

--Editing by Lindsay Naylor.

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