Appeals Court To Employee: "You're Kidding Us, Right?"

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California's Sixth Appellate District recently issued a decision upholding an employer's right to modify the compensation terms of an at-will employment agreement where the employee never made a written protest to the modification and the employee continued to accept the modified compensation offered. *Foust v. San Jose Construction Company, Inc.*

San Jose Construction hired Richard Foust in 1999 as a project manager pursuant to a written employment agreement. The agreement provided for at-will employment, a base salary, and a performance bonus of 20% of all gross profits over $780,000 generated by Foust's projects. In 2000, Foust's salary increased from $130,000 to $160,000.

At the company's request, Foust prepared written outlines of the changes in compensation for that year and noted the increase in salary and a different performance bonus formula than the one set forth in the employment agreement. Foust testified that the company's president told him that "he was going to make good on this." In the meantime, Foust never made a written complaint about his change in compensation and continued working for San Jose Construction under the different compensation terms.

In 2001, San Jose Construction held a meeting with all of the project managers. The company's president indicated that performance bonuses would be paid at 10% going forward. Foust claimed he never accepted this change and just listened to what was said at the meeting. Foust nonetheless continued working under the changed compensation terms. At the end of 2002, Foust again prepared written outlines, at the direction of the company, of the changes in compensation for 2001 and 2002 and determined that the outline reflected a different performance bonus formula than that set forth in the employment agreement.

In 2003, Foust's salary was reduced and he had no idea why. Foust testified that he "understood that this was the deal" but he did not agree with it. Again, he never put his protest in writing. The trial court entered judgment in favor of San Jose Construction finding that there was no breach of the at-will employment agreement because Foust acknowledged the changes in compensation in writing each year and accepted them by continuing to work at San Jose Construction. Foust then filed an appeal, challenging the sufficiency of evidence.

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"We Are Not Amused"

The California Court of Appeal rejected Foust's appeal as frivolous. Not only did the Court of Appeal uphold the trial court's decision finding no breach of contract but further imposed sanctions on Foust for filing an appeal that was indisputably without merit. The Court of Appeal stated that Foust "failed to present a colorable claim that the trial court erred. [He] challenged the sufficiency of the evidence following a three-day court trial during which oral and documentary evidence were presented, but elected to proceed without a reporter's transcript."

The Court of Appeal further reasoned that to find in favor of Foust, it would have to ignore the trial court's express finding that "Foust acknowledged in writing – on more than one occasion – that his compensation package changed, but he not only made no written protest to these changes, he accepted the compensation offered."

This decision serves as a strong reminder that employers are free to change the terms of employment compensation prospectively as long as there is no contractual provision prohibiting such changes. Our advice? Exercise caution in drafting your employment agreements, and always insert language that expressly sets out how changes in compensation are to be handled.

For more information contact the author at mrossiter@laborlawyers.com or 949-851-2424.

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