Anderson v. American Airlines, Inc. Doc. 153 Att. 1

Law Office of Frederick C. Roesti
965 Mission, Suite 445
San Francisco, CA 94103
Tel (415) 552-3733
Fax (415) 552-1849
April 1, 2011
E-mail Frederickcoesti@aol.com
Served and filed by electronic mail
WITH HARD COPY SERVED IN PERSON OR US MAIL.

Hon. William H. Alsup
U.S. District Court Judge
Courtroom 9, Floor 19
Northern District of California
450 Golden Gate, SF CA 94102

Re: Edward E. Anderson v. American Case No. C 08-4195 WHA
INVITATION TO VACATE JUDGMENT SUA SPONTE; TO RECUSE SELF AS DISQUALIFIED SUA SPONTE; AND T0 RE-SET SUMMARY JUDGMENT MOTIONS FOR HEARINGS ON MERITS.

To the Honorable William H. Alsup,

I will be filing a motion pursuant to FRCP 59(e) before April 6, 2011 to vacate the judgment entered in this matter on March 9, 2010 following the granting of summary judgment on all claims in favor of American Airlines, on March 8, 2011. I am writing this letter to the Court before the filing of the motion in order to invite the court to vacate the judgment sua sponte for the reasons set forth herein.

In oral argument this court stated that if it was up this court, it would give Mr. Anderson everything he wanted, but this court was obligated to follow the law. What this letter requests is that even if the Court does not personally want to give Mr. Anderson or his attorney anything, this court will do what the law dictates.

As this court know, Rule 5(e) motions may not be used to re-litigate old matters, or raise arguments or evidence that could have been raised prior to entry of judgment, but must granted where (1) the District Court committed some manifest error of law or fact (*Turner v. Burlington Northern Santa Fe R.R. Co.* (9th Cir. 2003) 338 F3d 1058, 1063); or (2) the District Court's ruling was premised on an incorrect factual assumption (*Duarte v. Bardales* (9th Cir. 2008) 526 Fed 563, 567); or (3) the District Court's ruling was premised on a misunderstanding versus disagreement regarding the relevant regulatory scheme (*Flynn v. Dick Corp.* (D DC 2008) 565 F. Supp 2d, 141, 145; *Hutchinson v. Staton* (4th Cir. 1993) 994 F2d 1076, 1081-1082), which in this case is Section 305 preemption.

When the error of law and fact is as manifest as it is in the Order granting Summary Judgment, this leads to

Dockets.Justia.com

the inevitable inference that the decision was based on some other impermissible factor, such as impermissible attitudes toward a defendant's attorney, or the defendant, or economic or racial class distinctions, or in reaction to the Affidavit to Disqualify this judge that was filed by Mr. Anderson in December 2009 in this action.

At that time, Mr. Anderson requested disqualification of this Judge on the grounds that this Court did not make any distinction between "assigning an African American male to work at one location" and the isolating of an African American male from other employees to "keep him in his place" which he was held up to ridicule before fellow sky cap because he was restricted to working where there was no passenger traffic, and prohibited from working where he could make tip income, despite the fact that he had seniority rights to select his location.

So, when the manifest errors of law and fact are laid bare, as they are below, that inference is raised to a level of probability that requires a judge to disqualify himself, no matter what he thinks of Mr. Anderson, or Mr. Anderson's attorney, or the economic interests of American Airlines and its executives in contrast to the sky caps who depend upon tip income.

So, when in response to Mr. Anderson's attorney who asked the court to put aside his personal prejudices, this Court responded, "If it was up to me, I would give Mr. Anderson everything he wants, but I am obligated to follow the law." What Mr. Anderson and his Attorney heard was Mississippi Talk, circa Emmet Till, that sounded like this. "Boy, I sho like you, I'd sho like to let you swim in this here swimmin hole, but it ain't up to me, I don't make the rules. I jes follow them." And we know that meant.

So obvious were the Court's predilection in this matter, that American's counsel, Kenneth O'Brien, remarked to me even before we were out of the courtroom, that I had lost this one.

This is not a personal judgment, your honor. It's just that you can go to Harvard, and you can clerk for Justice Douglass, but old institutionalized race and class attitudes are deeply ingrained early. And they have strange ways of manifesting themselves –like a "concession to the shortness of life" --but when they do manifest themselves, then as someone who did attend Harvard, who did clerk for Justice Douglass, **the honorable thing to do is to disqualify yourself**

Then the matter can be heard by a judge without the pre-history of this Judge or this Judge's prehistory with my fumbling and shortcomings so that Mr. Anderson, now approaching age 78, **is not denied by delay the due process that the law requires, when this Court has it in its power to do what honor requires.**

This need to disqualify itself was first demonstrated by the Court, itself. First, this Court was shown a photograph of American Airline's Bag Charges taken about 10 feet from the sign, **and all the court saw, like the public, was the Bag Fee.** Second, the Court was shown a photograph of the same sign, taken about 4 feet from the sign. Now, the Court could see the disclaimer at the bottom of the sign that the bag fee did not include tips. So, now the Court saw **what the average passengers does not see or read,** according to the sworn signed affidavits of Skycap Anderson, Skycap Patrick Jack, Skycap Steven Olson. See Opposition Exhibits 1, 2, 3). Finally, the Court was shown a third sign from another airline. There, at the very top of sign, the passengers could read, "Tips not included." These sign prompted this Court to comment out loud, "**Is that all you are arguing about?"** As if damages within the diversity jurisdiction of the court did not merit the court's attention or that of a

jury.

Inferences of disqualification from manifest errors of law regarding the Breach of Contract Cause of Action, including the Status Quo Agreement and, alternatively, the American Employment Agreement : The District Court committed manifest error of law and fact in granting summary judgment on the breach of contract cause of action on the grounds that the right to tip income under the Status Quo Agreement with American in August 2005 required interpretation of a defunct collective bargaining agreement under the bankrupt TWA that pre-dated year2000.

This finding itself was highly suspect. The only actual evidence regarding the terms of the Status Quo agreement did not come from the defunct TWA collective bargaining agreement from the sworn testimony of Mr. Anderson, from Admissions by American Supervisors to Mr. Anderson, and from the conduct of the parties from December 2001 to August 2005, when Mr. Anderson worked for American and was entitled to keep all tips and monies paid him by American's passengers without any account to American. For this purpose, the TWA collective bargaining agreement was totally irrelevant.

American itself recognized the defunct TWA collective bargaining agreement had no evidentiary value. It took no steps to put the defunct TWA collective bargaining agreement in evidence.

Therefore it was a manifest error of law to grant summary judgment on preemption grounds because the application of federal preemption under Section 305 of the Labor Relations Management Act of 1947 **only applies** if the application of state law requires an interpretation of a collective bargaining agreement. See *Lingle v. Norge Division of Magic Chef, Inc. (1988)* 486 U.S. 399, 413.

Furthermore preemption under Section 305 **does not apply** to state law causes of action that neither encourage nor discourage the collective bargaining process (*Metropolitan Life Insurance Company Case at* 471 U.S. 724. 755) and references to collective bargaining agreements do not defeat state causes of action where the state cause of action has no direct or detrimental effect on federal statutory rights of employees. *Livadas v. Bradshaw* 512 U.S. 107, 134.

Here, the Breach of Contract cause of action in the Second Amended Complaint read:

> Defendant's conduct, as set forth above, constitutes a breach of contract with plaintiff. Among other things, plaintiff was employed by American Airlines under a Status Quo Agreement that was to ensure plaintiff would retain all the collective bargaining benefits he had enjoyed as a skycap prior to his employment for American when it purchased Transworld Airlines, and at all times herein, plaintiff worked for American Airlines under a contract, express of implied, oral or written, that provided for plaintiff to have gratuities and tip income as part of his compensation. In imposing the $2 bag fee and $15-$25-$100 baggage fees, and additional fees, defendant breached the terms of its contract with plaintiff and therefore plaintiff is entitled to the relief sought below."
>
> (Second Amended Complaint, Par 36, page 10, lns 3-11)

This is "notice" pleading. It gave American notice that imposition of the $2 per bag fee and $15-$25-$100

baggage fee and additional fees breached Mr. Anderson's right to keep all tips and monies paid him by passengers without accounting by American under (1) the Status Quo Agreement and (2) alternatively under Mr. Anderson's employment contract with American.

Unless American put the language of the defunct TWA collective bargaining agreement before the Court, the Court would no basis to determine if the Status Quo Agreement itself required interpretation of any phrase in the TWA collective bargaining agreement.

In other instances involving Status Quo agreements, "the inquiry is not one which looks to the parties' collective bargaining agreement; instead, the act requires an objective determination of the actual status quo." *International Association of Machinists and Aerospace Workers v. Aloha Airlines, Inc.* 776 F. 2d 812, 816 (9th Cir. 1985). There the distinction between a Status Quo Agreement and a collective bargaining agreement arose under Section 6 of RLA, 45 U.S.C 156. Here, the Status Quo Agreement was an incident of negotiating the purchase of TWA by American Airlines.

Here, the evidence of the "objective actual provisions" of the Status Quo Agreement included the following: (1) Mr. Anderson's testimony that he was entitled to keep all tips and monies received curbside for his services without accounting to American until his retirement, Anderson sworn Affidavit, Opposition Exhibit No. 1; (2) The working conditions of Mr. Anderson at American from December, 2001 to August, 2005; (3) The admission of American supervisor, Ron Olsen, Opposition Exhibit No. 4, page 39 ln 8 - 23 page 52, ln 4-24;; (4) The American Airlines adjusted seniority date, Opposition Exhibit No; 1; and (4) Anderson Deposition Testimony, Opposition Exhibit No. 4. **Nothing required any interpretation of the defunct TWA collective bargaining agreement.**

Here, as in all notice pleadings, the legal and factual issues were flushed out during the litigation, and in the proposed Jury Instructions submitted by plaintiff Anderson, as well as defendant American. The actual proposed jury instructions are in the record, and may be judicially noticed by this Court as an incident to this letter. **Neither American nor Mr. Anderson proposed any jury instruction that required any interpretation of the defunct TWA collective bargaining agreement.** Instead, the jury instructions regarding breach of contract that were submitted by both parties relied on standard jury instructions when there are disputes regarding the formation of a contract based on the conduct of Mr. Anderson and American.

Inferences of disqualification from egregious manifest errors of fact regarding the Breach of Contract Cause of Action, including the Status Quo Agreement, and alternative American Employment Agreement: First, the Court concluded that Mr. Anderson had not identified any right to keep tip income under the Status Quo Agreement apart from the defunct TWA collective bargaining agreement (*Order,* page 10, ln 20 to page 11, ln 4). Then, the Court relied entirely on American's representations (*Order,* page 11, ln 5-19). This was egregious manifest error of fact because it ignored the following:

(a) The Status Quo Agreement did not arise out of the defunct collective bargaining agreement; It arose out of the purchase of TWA by American when TWA filed for bankruptcy. (Anderson Opposition to Summary Judgment, page 3; Anderson Affidavit No. Exhibit No 1; Anderson Deposition Testimony, Exhibit No. 4, page 40, 9.21);

(b) Anderson's documented seniority date under the Status Quo Agreement was traced solely to a document, dated August 29, 2001, totally independent of any defunct TWA collective bargaining agreement (Opposition, page 3-4, Anderson Affidavit, Exhibit No. 1);

(c) American itself had taken the position that Anderson's employment with American was governed entirely by a contract that Anderson signed with American in 2001 evidenced by American's personnel package with Anderson. (Opposition, page 4; Opposition Exhibit No. 4);

(d) Anderson documented the existence of the Status Quo Agreement with American by admissions from American's supervisors, not based on interpretation of the defunct TWA collective bargaining agreement (Opposition page 4; Opposition Exhibit No. 4, pages 38-39);

(e) In consideration for the ability to work under the Status Quo agreement to keep all tips and monies paid to Anderson by America costumers without account to American, Anderson and other skycaps from TWA were not allowed to transfer to other locations, or other available jobs (Opposition, page 5, Anderson Affidavit, Opposition Exhibit No. 1; Anderson Deposition Testimony, Opposition Exhibit No. 4, pages 66, and 69-70). In other words, the terms of the Status Quo Agreement were totally independent of the defunct TWA collective bargaining agreement;

(f) From December 20, 2001 to August 15, 2005, Anderson worked under the terms of the Status Quo Agreement, or under the alternative Employment Agreement with America. The actual working conditions under these agreements from December 20, 2001 to August 15, 2005 included keeping all tips and monies paid to Anderson by American's costumers without any account to American (Opposition, page 5)

(g) In August, 2005, when American implemented the $2 bag fee, Anderson refused to sign papers presented by American because he explained to his supervisors the papers violated his Status Quo Agreement that allowed him to keep all tips and monies paid by American customers without any account to American (Opposition, page 5, Anderson Affidavit, Opposition Exhibit No. 1; Opposition Exhibit No. 7)

In each instance, when the District Court ignores the actual evidence of the Status Quo Agreement and alternatively, the Employment Agreement with American with regard to tip income in favor of a legal fiction (the need to interpret a defunct TWA collective bargaining agreement) in this manner, there is a strong inference that try as it might like, the Court was looking for justification to uphold its prejudgments unrelated to what the actual obligation of the law require.

The same inferences arise from manifest errors of law and facts regarding other causes of action. Here, the Court argued that plaintiff's attorney agreed that American was entitled to implement the baggage fee as if that were a legal defense. This was a very limited response to a limited question from the court, limited in recognition of American's right to impose a bag fee, that did not unlawfully divert tip income to American, for which Anderson would be entitled to damages as the non-breaching party. In fact, the court makes it appear to look like Mr. Anderson's attorney thought American's actions wee proper, which in fact, Mr. Anderson's attorney sought injunctive identified the law and facts that supported injunctive relief.

Breach of duty of good faith and fair dealing: Here, American contended it had a right to change the terms of the contract, i.e. to implement the baggage fee. So, there was no section 305 preemption argument. Instead, plaintiff brought to the Court's attention the duty of American to exercise good faith and fair dealing when it applies a discretionary right to impose baggage fees, and the manner in which it imposes them, citing *Carma Developers (Cal. Inc. v Marathon Development California, Inc.* (1992) 2 Cal. 4th 342, 371-372. The illustration with the baggage fee signs was but one illustration of a factual dispute regarding American's breach of its duty of good faith and fair dealing to implement a baggage fee system in a way that did not deprive skycaps of the benefit of their contract to handle curbside baggage for American.

California Labor Code Section 351: The Court granted summary judgment to allegations of unlawful tip diversion on grounds that Section 351 did not create a private right of action. Then, the Court ignored the actual substantive provisions of Section 351, and the case law that interpreted it, and the fact that these violations of Section 351 are predicates to unfair competition cause of action under Business and Profession Code Section 17200, which extends to (1) "any unlawful, unfair, or fraudulent business act or practice, and unfair, deceptive untrue and misleading advertising" and (2) schemes to divert tip and gratuity income in violation of Section 351 with an express purpose of preventing fraud upon the public in connection with the practice of tipping.

These prohibitions extend to misleading signage regarding the baggage fee in relation to tip income. Section 351 through Section 17200 imposes strict liability for these violations. For this purpose, it is not necessary to show that American intended to injury anyone with curbside signage that mislead the public or that anyone was mislead. It is only necessary to show that members of the public would likely be deceived by signs advertising bag fees, where the disclaimer regarding tip was so small it cannot be read by the average traveler, or placed on the bottom where it is least likely to be seen.. *Searle v. Wynam International, Inc.* (2002) 102 Cal. App. 4th 132. **Even this Court was deceived by American's signage.**

Interference with economic relations Both parties submitted proposed jury instructions to the court on this cause of action. These instructions set forth the requirements of law, and the remaining issues were factual issues for the jury not the court. Here, American passengers that use curbside services are a defined group of people. Not only as a generic group, but because of the recurring relationship between skycaps and passengers. At most, this raised issues for a jury to decide under appropriate instructions, not for the court to take away from a jury.

Quantum meruit - unjust enrichment: "Quantum meruit refers to an obligation created by law without regard to the intentions of the parties in "situations in which one person is accountable to another on the ground that otherwise he would unjustly benefit or the other would suffer loss." *California Emergency Physicians Medical Group v. PacificCare of California Inc.* (2003) 111 Cal. App. 4th 1127. "A person who has been unjustly enriched at the expense of another is required to make restitution" Restatement, Restitution, Section 1). This means, that one person should not be permitted to unjustly enrich himself at the expense of another, but should be required to make restitution of benefits received, retained, or appropriated, where it is just and equitable that such restitution should be made, and where making restitution does not violate or frustrate law, or public policy. This obligation rests on all persons, natural and artificial, independent of any express contract. *Lucky Auto Supply v. Turner* (1966) 244 Cal. App. 2d 872, 885; *Dinosaur Development, Inc. V. White* (1989) 216 Cal. App. 3d 1310.

Here, the court committed manifest error of law and fact when it granted the summary judgment where the

factual evidence shows that American implemented its baggage fee program in a manner that **significantly reduced skycap total compensation** as a result of lost tip income, while requiring skycaps as an incident of maintaining employment to administer its baggage fee scheme that reaped billions of dollars from passengers to the benefit of American Airlines and its highest paid executives as documented in American's Annual Report. See AMR Corporation 2009 Annual Report with Executive compensation for fiscal years 2007, 2008, 2009, Opposition Exhibit No. 29.

In fact, this Court's spirited defense of the corporate right to increase executive compensation at the expense of skycaps prompted Mr. Anderson to wonder whether this Court was a member of American's Admiral Club, which would also disqualify the Court due to conflict of interest.

For all these reasons, I am inviting the Court on its own motion to vacate the judgment sua sponte before the filing of any motion to vacate judgment so that the Court on its own motion can recuse itself as disqualified, and parties' respective motions for summary judgment can be hearing on its merits before another Judge who has not been tainted by the proceedings in this matter.

Respectfully submitted,

/s/ Frederick C. Roesti /s/
Frederick C. Roesti, attorney
for Edward E. Anderson

cc: Client, file
Clarence B. Jones