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Employment Law Commentary

Paton v. Advanced Micro Devices: Does a Sabbatical Have to Be Treated Like Vacation?

By Lloyd W. Aubry, Jr.

Over the years a small but growing number of employers have offered, in addition to traditional vacation, sabbaticals intended to provide their employees with a lengthy period of time away from work for the purpose of rejuvenation and as an incentive to continued employment. The sabbatical is provided only after a lengthy period of employment and, if not taken while eligible, is lost. Obviously, these types of programs are based on sabbaticals in the academic world in which professors are generally provided with a significant period of time off after seven years of employment. In the 1980s, after the *Suastez v. Plastic Dress-Up Company* case was decided imposing the requirement in California that unused vacation be paid out as wages at the time of termination, the Labor Commissioner in a series of letters developed sabbatical policies which were very narrow due to the concern that employers might try to shift vacation into sabbatical and thus avoid the day-by-day vesting and pay-out rules of the *Suastez* case.

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Recently in *Paton v. Advanced Micro Devices*, 197 Cal.App.4th 1505 (2011), a California appellate court reviewed a sabbatical program and laid down rules defining when sabbaticals will and will not be considered vacation for the purpose of pay out at the time of termination if the sabbatical has not been used.

In *Paton*, a former employee brought a class action against Advanced Micro Devices, alleging that he was entitled to be paid for an eight-week sabbatical that he had earned but not used by the time he resigned. Under AMD's sabbatical policy, salaried employees with seven years of service were eligible for an eight-week fully paid sabbatical. The leave was forfeited, however, if the employee did not use it before the end of employment. Plaintiff claimed that defendant's sabbatical program was really just extra vacation and that under California Labor Code § 227.3, an employer may not require an employee to forfeit vested vacation pay. Plaintiff further claimed that his right to the sabbatical had vested over the seven years he worked for defendant; thus, he was entitled to be paid for it when he resigned. Moreover, class members who had worked for less than seven years were entitled to be paid for the unused sabbatical in proportion to the time they had worked.

The trial court granted defendant's motion for summary adjudication, finding, as a matter of law, that the sabbatical program offered a true sabbatical that was not subject to § 227.3.

The Court of Appeal reversed, holding that it could not determine as a matter of law that the sabbatical leave was not vested vacation pay subject to § 227.3. Adopting three tests promulgated by the Labor Commissioner and adding a fourth test, the Court held that sabbatical leave differs from vacation as follows:

First, sabbatical leave that is granted infrequently must be intended to retain experienced employees who have devoted a significant period of service to the employer.

Second, the length of the leave should be adequate to achieve the employer's purpose and should be longer than that normally offered as vacation. Since regular vacation time may be used for rest, a sabbatical ought to provide the extended time off work that regular vacation does not.

Third, a legitimate sabbatical will always be granted in addition to regular vacation. Because an employer could offer a minimal vacation plan and reward senior staff with sabbaticals as a way to avoid the financial liability of a more generous vacation plan, the employer's regular vacation policy should be comparable to the average vacation benefit offered in the relevant market.

Fourth, since a sabbatical is designed to retain valued employees, a legitimate sabbatical program should incorporate some feature that demonstrates that the employee taking the sabbatical is expected to return to work for the employer after the leave is over.

In reversing, the court held that the ultimate fact to be determined was defendant's purpose in establishing its sabbatical policy, and reasonable minds could find that the leave was intended as additional vacation. In other words, it must be clear that the sabbatical is intended to incent continued service and not to compensate for past service. If there is evidence that the sabbatical is for past service then, according to *Paton*, there is a chance it will be deemed vacation. This is the issue that will be determined on remand to the trial court in *Paton*.

In any event, the Court has laid out a road map for the development of sabbatical programs. As the case makes clear, employers need to design these programs with great care in order to avoid paying out sabbaticals as vacation.

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