

OCT 4 - 2006

GORDON PARK-LI, Clerk
BY: VICKI MACK
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

County Of San Francisco

Department No. 514

EXECUTIVE DIRECTION, INC.,
Plaintiff,

vs.

RAMONA ERIKA JOHANSON, and
DOES 1 through 25, inclusive,
Defendants,

RAMONA ERIKA JOHANSON,
Cross-Complainant,

vs.

EXECUTIVE DIRECTION, INC., FRED
NADERI, and ROES 1 through 20, inclusive,
Cross-Defendants.

Case No.: CGC-04-436237

**TENTATIVE STATEMENT OF
DECISION**

COMPLAINT

First Cause of Action - Breach of Contract

EDI claims that Erika Johanson breached her employment agreement by "taking" her job at Wells Fargo to EDI's competitor, JLC. As the three-month

1 term of EDI's assignment of Ms. Johanson to Wells Fargo was about to expire,
2 Ms. Johanson attempted to negotiate an increase in the cash compensation she was
3 being paid by EDI. For several reasons, that effort proved unsuccessful. Ms.
4 Johanson then attempted to increase her pay for doing the same work at Wells
5 Fargo by working through JLC. She was successful in this effort, apparently with
6 the active assistance of Joyce Wells, her supervisor at Wells Fargo. She continued
7 doing the same work for Wells Fargo, at significantly enhanced pay, and EDI
8 ceased to reap the benefit of whatever difference may have existed between the
9 rate per hour that EDI charged Wells Fargo and the direct costs associated with
10 employing Ms. Johanson, including most notably her cash compensation. (As
11 discussed more fully below, the evidence does not establish what the direct costs
12 were nor what the difference may have been between those direct costs and the bill
13 rate paid by Wells Fargo.)

16 The contract Ms. Johanson had with EDI plainly forbade this course of
17 conduct, and EDI seeks to recover damages for the breach. Ms. Johanson is bound
18 by the contract she signed. She was free to accept it or reject it. The vague claim
19 of duress is not supported by the evidence. She chose to accept it, and she fully
20 executed the contract EDI had prepared. Ms. Johanson's claim that she signed it
21 without bothering to read it does not shield her from liability for breach of her
22 obligations, but several other facts may well do just that.
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1 In the simplest terms, EDI's ability to survive in its business of placing
2 temporary technical workers at firms similar to Wells Fargo depends on EDI's
3 ability to prevent the prospective worker and Wells Fargo from agreeing, after EDI
4 brought them together, to "cut out the middleman" by making their own agreement
5 for temporary services at a price which cuts the cost for Wells or increases the
6 takehome pay of Ms. Johanson, or both, by eliminating EDI's compensation.
7 Prevention of that result is surely a major reason EDI used the contract terms that it
8 did. Just as clearly, those contract terms lessen the competition that EDI has to
9 face in its business of earning a profit by providing both Wells Fargo and Ms.
10 Johanson with mutually beneficial placements. If a rule of reason were to be
11 applied to determine the validity of the restrictions imposed, it is possible that EDI
12 could prove that some sort of restriction could be reasonable. The terms of the
13 contract the parties made here could not survive that test.
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16 It is not without significance that Ms. Johanson faithfully performed the full
17 term of the three-month assignment she accepted. It may well be true, although the
18 evidence does not prove it, that EDI does not realize reasonable compensation for
19 the efforts it made in placing Ms. Johanson with Wells Fargo when EDI receives
20 only the three months' compensation it agreed to with Wells Fargo. It cannot be
21 true that EDI would never be reasonably and fairly compensated at the end of the
22 temporary employee's assignment, no matter how long it extended. That, however,
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1 is precisely what the contract imposes: "an exclusive agency period" running six
2 months longer than any assignment.

3 No rule of reason governs here. The recent decision in Edwards v. Arthur
4 Anderson, 142 Cal. App. 4th 603 (2006) sets forth an unmistakably bright line rule:
5 any agreement that restrains competition is invalid if it fails to come within either
6 the statutory exceptions set out in B & P Code Sections 16601- 16602 or the
7 exception developed for protection of trade secrets.

8
9 Plainly, the statutory exceptions do not apply. The contention of EDI that
10 the trade secrets exception applies here has not been proven. The existence of the
11 position at Wells Fargo was not confidential. The details of the assignment were
12 not treated by EDI as confidential, and the billing rate EDI was paid was not
13 known to Ms. Johanson when she negotiated her new arrangement with JLC.
14 Through what appears to be a classic failure of communication, EDI disclosed that
15 information to Ms. Johanson in an e-mail, but the e-mail was wrongly addressed
16 and never reached her. What Ms. Johanson was receiving for her services could
17 not by express provision of the Labor Code, Section 232, be confidential, and all
18 of the requirements of Wells Fargo and Ms. Johanson's duties at Wells Fargo were
19 more fully known to Wells Fargo and Ms. Johanson than they ever were to EDI.
20 The court finds that EDI's contract, both as a whole and with respect to those
21 provisions which support the claimed breach here, is an unlawful restraint on Ms.
22 Johanson's freedom to pursue her occupation, and that the contract is prohibited by
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1 Business and Professions Code Section 16600 and California public policy. No
2 action for damages from its breach will lie.

3 In any event, even if the evidence established a breach of her contract with
4 EDI, plaintiff has failed to prove the damages it suffered with any certainty. The
5 only conclusion that can be drawn from all the evidence is that EDI had numerous
6 direct expenses incurred in providing temporary services to Wells Fargo through
7 Ms. Johanson's temporary assignment. When her employment ceased, so did those
8 direct expenses. The only damages EDI could recover would equal what it lost in
9 profit after deducting all the direct expenses. The evidence furnishes no basis,
10 apart from sheer speculation, for determining what those direct expenses (other
11 than her cash compensation) were. No damages for breach could, in any event, be
12 awarded.
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15 16 **Second Cause of Action - Misappropriation of Trade Secrets**

17 EDI claims that Johanson misappropriated its trade secrets by taking her
18 "job" to JLC. The evidence does not prove the claim.
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20 At the relevant times, Wells Fargo used numerous placement firms, and its
21 job orders were simultaneously placed through several of them. Johanson testified
22 that the EDI advertisement she responded to had also been issued by another
23 agency. Although EDI claims that it disclosed certain information about the
24 offered job to Johanson, EDI admitted that it never informed Wells Fargo that any
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1 information was a trade secret. Any such attempt would have been entirely futile
2 because any confidential information EDI had was given to it by Wells Fargo. As
3 discussed above, the law prevents the pay rate Ms. Johanson received from being a
4 trade secret because Ms. Johanson is free to disclose that pay rate to anyone.
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6 Even if EDI arguably had some trade secret, it was not disclosed by Ms.
7 Johanson. She did not disclose any bill rate agreed upon between EDI and Wells
8 Fargo to JLC. In fact, Ms. Johanson did not know the bill rate at the time she
9 negotiated with JLC. JLC was another one of Wells Fargo's vendors and there was
10 nothing to prohibit Wells Fargo from disclosing whatever information it wished to
11 disclose about EDI 'job orders', pay rates, etc., to JLC. Wells Fargo apparently
12 suggested to Ms. Johanson that she contact JLC so that she could continue her
13 work Wells Fargo after her employment at EDI concluded.
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15 EDI did not have a "job order" trade secret that could implicate B & P Code
16 Section 16607. Ms. Johanson did not misappropriate any customer list of EDI.
17 Section 16607 was never intended to apply in this type of situation, and it has no
18 application to the facts of this case.
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21 **Third Cause of Action - Breach of Fiduciary Duty**

22 As a matter of law Ms. Johanson did not owe any fiduciary duty to EDI.
23 She was a temporary contract employee and was not entrusted with any
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1 information that could give rise to a fiduciary duty. She was not an officer or
2 director or EDI.

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5 **Fourth Cause of Action - Breach of Duty of Loyalty**

6 Ms. Johanson did not breach any duty of loyalty she owed to EDI. The
7 evidence reflects that while Johanson was employed with EDI she attempted to
8 negotiate for a pay increase, but she did not actually violate any of the restraints in
9 the employment agreement, even those which are illegal. She performed fully the
10 three month assignment she had accepted from EDI. It was only as her assignment
11 and employment with EDI was ending and after she had tried unsuccessfully to
12 negotiate a pay increase with EDI, that she, at Wells Fargo's request or suggestion,
13 contacted JLC. She did not commence working through JLC until after her
14 employment by EDI had, by the very terms of their contract, ended. EDI has not
15 proved that Ms. Johanson breached any duty of loyalty during her employment
16 with EDI.
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20 **Fifth Cause of Action - Unfair Competition**

21 The court finds that EDI's unfair competition claim is unsupported by the
22 evidence, and that, in any event, none of the relief that would be available had it
23 been proven is sought by EDI.
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1 **Eighth Cause of Action - Intentional Interference with Contract**

2 EDI alleges that Johanson interfered with a contractual relationship between
3 it and Wells Fargo. The court finds in favor of Johanson. In order to prove that
4 claim, EDI must prove that the act of Ms. Johanson constituting interference was
5 somehow wrongful. EDI has not proved that. The claimed act of interference was
6 that Johanson continued working at Wells Fargo after the assignment secured by
7 EDI ended. EDI contends essentially that unless it was through EDI, Ms.
8 Johanson could not work at Wells Fargo. Only by application of the invalid
9 contractual restriction could that prohibition be established. EDI has not cited any
10 case in which interference with contract was founded on the employee continuing
11 to provide her own personal services that 1) the contractor for temporary services
12 wanted and 2) for which services the employee and the temporary service provider
13 could not reach agreement on appropriate compensation.
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16 The only way the EDI-Wells Fargo contract was going to continue was if
17 Ms. Johanson would continue rendering services for compensation she found
18 unacceptable. That proposition was not proved, and from all the evidence it is
19 more likely than not that she would have left if she could not obtain better
20 compensation. One way or another, the EDI-Wells contract with respect to Ms.
21 Johanson was not going to continue.
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23 Judgment should be entered in defendant's favor on the Complaint and on
24 each cause of action contained in the Complaint.
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CROSS-COMPLAINT

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First Cause of Action - Violations of Employment Laws

6 Johanson seeks damages for violation of her civil rights. She asserts that
7 because the contract EDI proposed and she signed contains provisions that are
8 prohibited by several different sections of the Business Professions Code and of
9 the Labor Code, her civil rights have been violated and she is entitled to damages.

10 The contract requires that Johanson keep her rate of pay confidential as
11 EDI's trade secret. That provision violates Labor Code Section 232, and is
12 unenforceable.

13 The 'exclusive agency' term prohibiting Johanson from working at Wells
14 Fargo unless it is through EDI constitute an unlawful restraint on trade prohibited
15 by Business & Professions Code Section 16600 and California public policy.
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17 The contractual reversal of the employer's statutory duty to indemnify the
18 employee for necessary employment-related expenses and liabilities, with the
19 intended result of imposing such liability on Johanson to the benefit of EDI,
20 violates Labor Code Sections 2802 and 2804.

21 EDI's use of these illegal contractual terms was intentional and for the
22 purpose of attempting to convince Johanson to forego or relinquish basic rights
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1 guaranteed her by California law, both statutory and constitutional. This litigation
2 instituted by EDI is a continuation of that effort.

3 Ms. Johanson claims that she has a right of action for damages because of
4 Civil Code Section 52.1, but subdivision (j) of that same Section 52.1 states:
5 "speech alone is not sufficient to support an action brought pursuant to
6 subdivisions (a) or (b) , except upon a showing that the speech itself threatens
7 violence," and that the person threatened reasonably fears violence will be
8 committed, and that the person threatening has the apparent ability to carry out the
9 threat. Only speech, in the form of the contract and subsequent email
10 correspondence, Exhibit 114, is proven here. The evidence supports no finding of
11 any threat of violence. Ms. Johanson has not proven her claim for damages for
12 violation of her civil rights.

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15 Johanson requested leave to amend to conform the cross-complaint to the
16 proof during trial that EDI also violated Labor Code Sections 1050 and 1054,
17 which the court grants. That claimed violation relates not to matters alleged in the
18 first cause of action of the cross-complaint, but to the email, Exhibit 114, alleged in
19 the second cause of action, and considered below.

20 21 22 **Second Cause of Action - Defamation**

23 Ms. Johanson claims that an email dated October 12, 2004 from Fred Naderi
24 EDI's Chief Executive Officer, addressed to Joyce Wells, Ms. Johanson's
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1 supervisor at Wells Fargo, (Ex. 114) injured her in several respects, and that
2 statements made in this email constituted libel per se. Ms. Wells received the
3 email and forwarded it to Ms. Johanson. The defamation claim is supported by the
4 evidence.

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6 The email is plainly designed to induce Wells Fargo to discontinue its use of
7 Ms. Johanson's services. Ms. Johanson was at the time the email was sent a former
8 employee of EDI. The correspondence from Mr. Naderi was false in numerous
9 aspects, particularly in purportedly factual statements about Ms. Johanson's
10 behavior and demeanor. Mr. Naderi testified he had no personal knowledge about
11 those assertions and Ms. Johanson flatly denied them. No other evidence furnishes
12 support for the accuracy of those very damaging assertions. Those statements in
13 the email were intended to cause Johanson to be shunned or avoided by Wells
14 Fargo. The court finds that the overall purpose of the correspondence was to have
15 Wells Fargo prohibit any work by Johanson unless Johanson was employed by
16 EDI.

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19 Apart from the defamation claim, communications such as Ex 114 are
20 specifically forbidden by Section 1050 of the Labor Code:

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22 Any person, or agent or officer thereof, who, after having
23 discharged an employee from the service of such person or
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1 after an employee has voluntarily left such service, by any
2 misrepresentation prevents or attempts to prevent the former
3 employee from obtaining employment, is guilty of a
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5 misdemeanor.

6 Section 1054 confers on the former employee who is so targeted a private
7 right of action with treble damages. While Ms. Johanson did not lose her ability to
8 continue to work at Wells Fargo, she most certainly did suffer damage as a result
9 of EDI's chief executive sending Exhibit 114. Ms. Johanson testified convincingly
10 that she did suffer those damages.
11

12 The statements made regarding Ms. Johanson's behavior and demeanor are
13 libelous per se. For that reason special damages are not required to be proven and
14 none are claimed by Johanson. The statement made are a plain violation of Labor
15 Code Section 1050. Johanson is awarded general damages in the amount of
16 \$20,000, against Fred Naderi and EDI, jointly and severally. Those damages
17 against EDI shall be trebled.
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20 **Third Cause of Action - Intentional Interference with Prospective Economic**
21 **Advantage**

22 Johanson withdrew this claim.
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1 **Fourth and Fifth Causes of Action -Infliction of Emotional Distress**

2 Johanson claims EDI and Naderi negligently or intentionally inflicted
3 emotional distress by sending Exhibit 114 and attempting to have her removed
4 from her position at Wells Fargo. Although the letter sent by Naderi to Wells
5 Fargo was not directly sent to Johanson, Naderi reasonably knew that if he was
6 successful that Johanson would necessarily learn of it since she would, as a direct
7 consequence, no longer have had a job.
8

9 At the time he sent Exhibit 114, Mr. Naderi in all probability held the
10 opinion that EDI's contract was valid and enforceable, even though it violates
11 California law in several respects. But Mr. Naderi had no basis for the
12 misrepresentations he made about Ms. Johanson's behavior and demeanor, and he
13 sent the email for the purpose of causing her substantial financial harm. He had no
14 right to do so. That he did not succeed makes the conduct no less outrageous. The
15 necessary elements of intentional infliction of emotional distress are proven. The
16 damages already awarded are sufficient to compensate Ms. Johanson for the
17 emotional distress she has suffered.
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21 **Sixth and Seventh Causes of Action - Declaratory and Injunctive Relief**

22 Johanson seeks a declaration that various provisions in EDI's employment
23 agreement that unenforceable and an injunction against their future enforcement.
24 Having already determined that the several terms discussed above are illegal no
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1 purpose would be served by a separate declaration. There is no showing that
2 plaintiff is likely to attempt to assert those provisions against Ms. Johanson in the
3 future, so no basis for injunctive relief is established.

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5 Judgment on the Cross-Complaint should be that Cross-Complaint have and
6 recover the sum of \$20,000, which sum shall be trebled to \$60,000 only as to EDI,
7 on the defamation claim, as amended to conform to proof, and on the intentional
8 infliction of emotional distress claim against EDI and Fred Naderi, jointly and
9 severally.

10 This tentative statement of decision shall become the Court's Statement of
11 Decision unless within twenty days from the date set forth below any party
12 specifies controverted issues or makes proposals not covered in this statement.
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16 Dated: October, 4 2006

THOMAS J. MELLON, JR.

Thomas J. Mellon, Jr.
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
County of San Francisco

EXECUTIVE DIRECTION, INC.,

Plaintiff(s)

vs.

RAMONA ERIKA JOHANSON, et al,

Defendant(s)

AND RELATED CROSS-COMPLAINT

Case Number: CGC-04-436237

CERTIFICATE OF MAILING
(CCP 1013a (4))

I, Vicki Mack, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On October 4, 2006, I served the attached TENTATIVE STATEMENT OF DECISION by placing a copy thereof in a sealed envelope, addressed as follows:

Stephen D. Finestone, Esq.
LAW OFFICES OF STEPHEN FINESTONE
456 Montgomery Street, 20th Floor
San Francisco, CA 94104

Brian Kindsvater, Esq.
LAW OFFICE OF BRIAN KINDSVATER
2377 Gold Meadow Way, #1031
Gold River, CA 95670

and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: October 4, 2006

GORDON PARK-LI, Clerk

By:

V. MACK

Vicki Mack, Deputy Clerk