

## Blog Post

# A Cautionary Tale for Recruiters

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Unprecedented levels of employee attrition and turnover are forcing employers to pull out all the stops in attracting—and retaining—top talent. Hiring bonuses, relocation pay, and wellness benefits are quickly becoming the norm in the affected industries. But a recent decision from the California Court of Appeal, *White v. Smule*, reminds employers to proceed with caution, particularly when relocating new workers with such initiatives. Under the ruling, even at-will employers could now be held liable for influencing workers to relocate for work if they mislead them regarding the kind or character of their job. Although the opinion is based on a specific provision of the California Labor Code, its rationale will be familiar to employers and practitioners nationwide—and serves as an important reminder to take care with all recruiting outreach efforts.

## The Factual Background—*White v. Smule*

Smule, Inc. is a company based out of San Francisco that develops and markets consumer applications with a specialty in music social applications. In July 2018, Smule’s Vice President of Engineering, Alan Shang, approached Kenneth White with a new job opportunity. Shang told White that Smule needed an experienced project manager who could train, supervise, and recruit other project managers, restructure project responsibility, and develop a functional project management team. Shang hoped that reorganization would be substantially complete in one year, and that White would develop training protocols and manuals over the next couple of years.

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At the time, White was a Washington resident and was married. As such, he was only interested in a secure, long term position where he could grow with a company expanding its business, preferably with a director title. Shang assured White that the job opening was meant to be long term, and that many of Smule's workers were long term employees. Shang agreed to provide White with a title of lead project manager and told him they would revisit the director title in one year. White agreed, and after resigning from his employment in Washington, moved his family to the Bay Area. Five months later, Smule terminated him on the grounds that his job was being eliminated. White filed suit under California Labor Code Section 970.

Section 970 bars employers from influencing, persuading, or engaging any person to relocate for work from any place outside or within California "by means of knowingly false representations . . . concerning . . . [t]he kind, character, or existence of such work," or "[t]he length of time such work will last." Among other things, a violation of Section 970 requires the plaintiff to establish justifiable reliance and a knowingly false representation. White claimed that Smule had fundamentally misrepresented the nature of the job and, in reality, had desired nothing more from him than a consultation or improvement plan on how it could enhance its operations. Indeed, according to White, Smule had always intended to transfer his job functions to its Bulgaria office to save on labor costs.

Smule asked the court to enter summary judgment without the need for trial, contending that White could not establish that he justifiably relied on the representations or that they were knowingly false when made. Among other things, Smule argued that, as an "at-will" employee, White had agreed that his employment was terminable at any time and for any reason. Thus, the company was within its right to eliminate his position without incurring liability under Section 970. The trial court agreed, finding that the at-will nature of White's employment

negated his claim under Section 970, and granted summary judgment.

The Court of Appeal reversed in part. The court agreed with the trial court that White could not reasonably rely on purported promises of long-term employment. His offer letter stated that his employment was at will and terminable at any time, and White had conceded that Smule had never promised him employment for a specific period of time.

However, the court reached a different conclusion with respect to Smule's alleged misrepresentation regarding the lead project manager role. The court held that an at-will employer "does not have carte blanche to lie to an employee about any matter whatsoever to trick him or her into accepting employment," particularly where the employer made promises regarding the kind, character, or existence of work the employee was hired to perform. Taken together, the court found that a reasonable trier of fact could infer from the available evidence that Smule had never intended to employ someone in the lead project manager position represented to White, and that the company had instead planned on exploiting his services to enhance its operations abroad. The court reversed the judgment that had been entered in the company's favor, and the case will now proceed to trial.

## Takeaways

Companies should think carefully before engaging employees based on promises of an "aggressive expansion," a new title, or job promotion opportunities. To minimize exposure to claims, employers should take a moment to evaluate their marketing and recruiting policies and procedures. Below are some of the many measures that employers should consider:

- **Ensure that all job descriptions and job postings are accurate and up-to-date.** First impressions

matter. Employers should periodically review all public-facing job descriptions and advertisements to ensure they accurately represent the actual, day-to-day responsibilities of the position for which they are hiring. To the extent possible, have your job postings and descriptions reviewed by an experienced employee familiar with the operational needs to be addressed by the prospective employee and make changes as necessary.

- **Review all offer letters and, when possible, exchange any follow up communications in writing.** Understanding that not all conversations can be done by email, employers nonetheless should try to always follow up on any conversations regarding the job opening in writing. In your communications, remind employees regarding the terms of the job position and also clarify what the position *does not* guarantee a future at the Company, or employment for a specific period of time). Include language in your offer letters allowing for changes in job duties commensurate with the position and in accordance with the changing needs of the company.
- **Train your recruitment team to stick to a script.** When it comes to recruiting efforts, less is more. Caution interviewers not to make promises about pay, benefits, or opportunities that the company may not be able to keep. Some employers may find it helpful to prepare a general outline of questions and answers, or even a script, to follow when interviewing job applicants. This will help you minimize the possibility of any misunderstanding between the company and the applicant as to what's on the table.
- **Integration clauses and “at will” notice.** Every employment agreement and offer letter should include language stating that the terms set forth in those documents “supersede any other promises, offers, or discussions regarding the job position.” And unless the offer is for a definite term of employment, the offer letter should state that

employment is “at will.” This will help you counter any claims later on that certain promises were made regarding the position at the time of hire that the employer failed to provide.

For questions regarding marketing and recruitment policies and practices, contact your Akerman attorney.

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