



FENWICK & WEST LLP

Fenwick Employment Brief

November 22, 2005

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FEATURED CASE NOTES

CHANGING INTO AND OUT OF PROTECTIVE GEAR IS WORK TIME THAT MUST BE PAID

The U.S. Supreme Court held in *IBP v. Alvarez* that, under the federal Fair Labor Standards Act, an employee's work time at a meat packing plant included time spent walking to an employee's workstation after changing into protective gear. The employer argued that such time was not compensable work time but time spent preparing to start work. However, the Court concluded that the employees' compensable work time started when they commenced donning protective gear and ended when they completed taking off the gear. Conversely, in a companion case, *Tum v. Barber Foods*, the Supreme Court clarified that the employees' time spent waiting in line at the employer to pick up protective gear was not work time. Employers who have employees change into protective gear and/or uniforms at the worksite should ensure that their pay practices comply with these new cases.

INADEQUACY OF DOCTOR'S NOTE NOT A BAR TO EMPLOYEE'S REINSTATEMENT FROM FMLA LEAVE

The federal Sixth Circuit Court of Appeals (covering Kentucky, Michigan, Ohio and Tennessee) recently expanded an employee's right to reinstatement following a medical leave of absence in *Brumbalough v. Camelot Care Centers, Inc.* There, the employee's doctor sent the employer a letter, which stated in its entirety "[Linda Brumbalough, the employee] may return to work on 8/13/01. She should only work a 40-45 hour work week

and limit her out of town travel to 1 day per week."

The employer argued that the employee had no right to reinstatement under FMLA because the letter did not specify that the employee could perform the essential functions of the job. The court disagreed and explained that the regulations merely require the employee to provide a statement from her doctor that the employee can return to work. According to the court, though the employer may require more information from the employee and the employee's doctor, the employer cannot delay the employee's reinstatement once such a note is received. In general, if the employer reasonably believes the employee presents a threat to health or safety, the employer may lawfully refuse to reinstate until the danger is resolved. Conversely, where there is no health or safety threat but where the employer reasonably doubts the employee's ability to perform the essential job functions, the employer should reinstate the employee and require him/her to provide the required information and/or submit to a medical examination by the employer's doctor.

NEWS BITES

EMPLOYER PROPERLY DID NOT INVESTIGATE COMPLAINT OF SEXUAL HARASSMENT

In a favorable decision for employers, the Ninth Circuit recently explained that an employer does not always need to conduct an investigation in response to a complaint of sexual harassment under Title VII. *Hardage v. CBS Broadcasting*. The court opined that though an

employer is often obligated to conduct an investigation, the employer was under no duty to investigate because the employee, a male, made only vague assertions about sexual harassment by a female manager.

EMPLOYEE TERMINATED FOR LYING IN OFFICIAL INVESTIGATION, WINS RETALIATION CLAIM

The Fourth Circuit affirmed a jury verdict in favor of an employee who was improperly terminated under Title VII after participating in a sexual harassment lawsuit brought by a co-worker. *Martin v. Mecklenburg*. Though the employee was terminated for admittedly lying during the harassment investigation, the court ruled that a reasonable jury could find that retaliation at least partly motivated the employer's actions.

DEFAMED EMPLOYER RECEIVES OVER \$1 MILLION JURY AWARD

An employer Roger Hughes, the owner of a construction company, successfully alleged that the Northern California Carpenters union defamed him during an organizing campaign by mailing flyers to residents and businesses in Sonoma County that included a police report filed against him. The jury awarded Hughes damages, including \$1,000,000 in punitive damages.

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