Fenwick Employment Brief

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ATTACK ON OUTSIDE SALES EXEMPTION COULD NOT BE LITIGATED AS CLASS ACTION

Offering hope that the tide may be turning against overtime class actions, in *Duran v. U.S. Bank*, a California court of appeal rejected a $15 million award in favor of employees and decertified a class of bank employees. In *Duran*, the court had certified a class of 260 business banking officers. Each employee worked with one to four bank branches selling financial services to the bank's small business customers. The plaintiffs alleged that the bank failed to pay them for overtime hours. The bank urged that the employees were exempt outside sales personnel. In California, the outside sales exemption requires the employee to work "more than half the working time away from the employer's place of business," selling the employer's products or services. The trial court decided the case by randomly selecting 20 of the 260 employees to testify about their work. The bank was not allowed to present testimony of other employees who signed declarations that they worked the majority of time outside the office. The trial court ruled that all the employees were nonexempt. Reversing the decision, the appellate court held that such a random selection of witnesses and "trial by formula" violated the bank's right to due process to present evidence that many of the class members were properly classified as exempt. Decertifying the class, the court ruled that the bank must be allowed to present evidence of its exemption defense against each individual claimant. The decision reflects the increased willingness of courts to require individualized assessment of each employee's exempt status and to not allow class-wide determination of liability.

INDIVIDUAL SUPERVISOR MAY BE LIABLE FOR FMLA VIOLATION

In *Haybarger v. Lawrence County*, the federal Third Circuit Court of Appeal (covering Pennsylvania) held that managers may be personally liable for FMLA violations. Defendant William Mancino was a director of a county probation and parole department and plaintiff's supervisor. Plaintiff had various physical ailments that required her to take frequent time off. In plaintiff's performance evaluation, Mancino criticized her absences and notified her that she needed to "improve her overall health" and reduce her absences "due to illness." As plaintiff's attendance did not improve, Mancino placed her on six-month probation. As there was no further improvement, Mancino recommended plaintiff's termination and obtained approval from human resources and the next-level manager. Mancino met with plaintiff to notify her of the termination and wrote the termination letter. The plaintiff then sued both the county and Mancino for interference with her FMLA rights. Reversing the trial court's dismissal of Mancino from the lawsuit, the court held that on these facts a jury must decide whether Mancino could be held liable for an FMLA violation (along with the employer-county). Further, the fact that human resources and a higher-level manager also approved plaintiff's termination did not relieve Mancino from possible liability.

There is a split of authority among federal courts whether individual managers may be held liable for FMLA violations – a split that will ultimately have to be decided by the U.S. Supreme Court.

NEWS BITES

NLRB New Poster Regulation Upheld In Part

In *National Association of Manufacturers v. National Labor Relations Board* ("NLRB"), a federal district court in the District of Columbia rejected a challenge to the NLRB regulation requiring most private-sector employers (including non-union employers) to post a notice notifying employees of their rights under the National Labor Relations Act ("NLRA"). Absent further court or regulatory action, the requirement is set to go into effect on April 30, 2012. While validating the posting requirement, the court struck down a portion of the regulation establishing that an employer's failure to post the notice constitutes an unfair labor act. Rather, the NLRB must decide

in each case whether an employer's failure to post the notice interfered with employee rights so as to constitute an unfair labor practice.

New FMLA Regulations Expand Scope Of Military Leave

The federal Department of Labor issued new regulations implementing amendments to the FMLA. Military "qualifying exigency leave," previously limited to family members of National Guard and Reserve service members, is now expanded to cover family members of Regular service members. "Covered active duty" is service during deployment to a foreign country. The definition of "serious injury or illness" for "military caregiver leave" includes a pre-existing condition that was later "aggravated in the line of duty." A "covered service member" for purposes of military caregiver leave includes a veteran who was a service member at any time during the previous five years. According to DOL, the new military caregiver regulations do not take effect until the regulations become final. The qualifying exigency leave regulation took immediate effect.

Meal And Rest Break Penalties Reduced For Employer's Good Faith Efforts To Comply

In *Thurman v. Bayshore Transit Management, Inc.*, a California court of appeal held that penalties for meal and rest break violations were properly reduced where the employer instituted good faith steps to comply. There, a union filed a representative action on behalf of its member bus drivers alleging that the employer failed to provide meal and rest breaks. Although the court awarded penalties during the period of noncompliance, the court reduced the penalties after the employer took its obligations "seriously and attempted to comply with the law" beginning January 1, 2003 (leading to full compliance by July 2003). The court noted that the plaintiff-union made no previous effort to enforce meal and rest breaks on behalf of its members, the employer began to enforce meal and rest break rules over the objections of the drivers and the union, and the union did not respond to nor did it cooperate with the employer's efforts to enforce meal and rest breaks.

Employer Must Be Allowed To Present Evidence That Psychologist Was Unlicensed

In *Brown v. County of Los Angeles*, a clinical psychologist's favorable jury verdict for wrongful termination in retaliation for her complaints about alleged health and safety violations was overturned based on improper exclusion of evidence. When hired, the county gave plaintiff a five-year waiver of the requirement that she be licensed on the condition that she pass the license examination. During the five years, plaintiff twice attempted unsuccessfully to pass the examination. In September of the final year, the county notified plaintiff that the license waiver would expire in October and that the county would attempt to obtain another waiver. Later that month, plaintiff made her safety-related complaints. In November, the state rejected the county's application for another waiver. In December, the county terminated plaintiff for not having a license. At trial, the court refused to allow the county to tell the jury that it terminated plaintiff because she was unlicensed. Reversing the verdict, the appellate court held that the county must be allowed to present evidence of plaintiff's unlicensed status as a legitimate nonretaliatory reason for her termination.

Employer Must Provide Copy Of Arbitration Forum Rules Or Where Rules Can Be Found

In *Mayers v. Volt Management Corporation*, a California court of appeal refused to enforce an employment arbitration agreement for, among other reasons, the failure of the employer to provide the employee with a copy of the arbitration rules or how to find them. Although the arbitration agreement provided that the arbitration would be governed by "AAA rules," the agreement also failed to identity which of the several sets of AAA rules would apply.

Migraine Caused By Good Faith Personnel Action Not Compensable Injury Under Workers Compensation Act

In *County of San Bernardino v. Workers' Compensation Appeals Board*, a California court of appeal rejected an employee's claim that his migraine headaches were caused by the stress arising out of friction with his supervisor. The evidence established that the friction

arose out of the supervisor's good faith personnel actions to address the employee's unsatisfactory performance.

$168 Million Jury Award To Hospital Employee For Alleged Sexual Harassment

On February 29, a federal jury in Sacramento, CA awarded almost $168 million in damages to the plaintiff in *Chopourian v. Catholic Healthcare West*. Ani Chopourian worked as a physician's assistant. She alleged that she was subjected to daily sexual advances and other sexual conduct that created a hostile environment. Chopourian alleged that she was wrongfully terminated after complaining about such actions, and making other complaints concerning patient safety and the abuse of other women. Further, she asserted that the employer made false statements about her professional qualifications to prospective employers that prevented her from obtaining subsequent employment. The jury award included over $40 million in punitive damages.

Inability To Work More Than Eight Hours A Day Or 40 Hours A Week Not ADA Disability

In *Boitnott v. Corning Inc.*, the federal Fourth Circuit Courts of Appeal (covering Virginia) held that a worker able to work eight hours in a day and 40 hours a week was not disabled under the ADA. Corning operated its plant 24-hours a day, and employees worked 12-hour shifts, alternating every two weeks between day and night shifts. After a heart attack and diagnosis of leukemia, plaintiff's physician restricted him to working eight hours a day and 40 hours a week. As part of the interactive process, the employer created a new position for plaintiff that limited his hours to only day-shift work of eight hours a day plus overtime. Plaintiff sued for alleged failure to "reasonably accommodate" him by requiring overtime on occasion. Dismissing the case, the court held that the inability to work overtime is not a protected disability. As a cautionary note, California defines disability more expansively than the federal ADA so that a California court might possibly reach a different result under the same facts.

SOX Not Applicable To Employee Of Privately-Owned Employer That Contracts With SOX-Covered Company

In *Lawson v. FMR LLC*, the federal First Circuit Courts of Appeal held that the Sarbanes-Oxley Act ("SOX") does not protect alleged whistleblowers employed by privately-owned employers even though the employer contracts with a publicly-traded company covered by SOX. Plaintiff worked for a private company that provided management services to the Fidelity family of mutual funds. She was allegedly constructively discharged after making complaints about accounting practices. In dismissing the suit, the court held that SOX does not cover contractors of a SOX-covered entity.

Decision To Deny Bonus Not Reviewable

In *Chambers v. The Travelers Companies*, the federal Eighth Circuit Court of Appeal (covering Minnesota) rejected an employee's breach of contract claim for an unpaid bonus. The employer's written bonus program stated that "awarding of bonuses is within the discretion of Travelers." The court observed that the employer's decision to deny plaintiff a bonus was "virtually unreviewable."

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