



Supreme Court Lets Stand Rejection of Employer's Defense In Co-Worker Harassment Case

The United States Supreme Court recently declined to review, and thereby let stand, the Ninth Circuit Court of Appeals' decision rejecting the *Ellerth/Faragher* affirmative defense. The *Ellerth/Faragher* defense applies where the employer exercises reasonable care to prevent and promptly correct harassing behavior, but the employee unreasonably fails to take advantage of these preventative or corrective opportunities. In such a case, the employer would have a defense to a claim of supervisory harassment. However, the court of appeals rejected this defense in *Potomac Corp. v. Swinton*, where an African-American employee alleged that co-workers and a supervisor regularly subjected him to racial harassment that his direct supervisor witnessed and did not correct. A jury returned a verdict for the employee, including \$1 million in punitive damages. The Ninth Circuit affirmed the jury verdict, holding that the *Ellerth/Faragher* defense does not apply to co-worker harassment claims that are based on employer negligence, because, to prove the employer's negligence, the employee is already required to show "that the employer 'either provided no reasonable avenue for complaint or knew of the harassment and did nothing about it.'" The Supreme Court's refusal to hear the case leaves the Ninth Circuit decision as the best guidance in application of the *Ellerth/Faragher* defense to federal claims in California. Moreover, California employers should recognize that California state courts have already rejected the *Ellerth/Faragher* defense and hold employers "strictly liable" for any harassment by supervisors.

Class Certification Denied, But Individual Plaintiffs May Proceed On Implied Contract Claims

In another victory for employers in the wage and hour class action arena, a Louisiana district court rejected the plaintiffs' request to certify a class of present and former Wal-Mart employees. In *Basco v. Wal-Mart Stores, Inc.*, the plaintiffs alleged that Wal-Mart breached implied contracts based on company policies written in employee handbooks and verbally stated by managers during orientations, by providing too few rest and meal breaks and refusing to pay them for all hours worked, including making employees work "off-the-clock." The court denied the request for class certification, holding that facts specific to the existence of individual contracts, the extent of any contract breach, the reasons why individual plaintiffs would work off-the-clock, and Wal-Mart's potential defenses, all predominated over the common issues. The court permitted the named plaintiffs to proceed on their individual implied contract claims, however, holding that factual issues remained as to the apparent authority of personnel managers to contract with employees. While the class certification decision was positive for the employer, the decision on the individual implied contract claims serves as an important reminder that some courts may be inclined to consider handbooks and policy statements

as binding contracts. Employers should therefore review policy statements with that thought in mind.

Employer Fails to Establish Administrative Exemption

A Pennsylvania district court denied an employer's motion for summary judgment on an overtime claim, holding that the employer failed to establish that a project superintendent was covered by the administrative exemption. In *Carpenter v. R.M. Shoemaker Co.*, the employee sought to recover unpaid overtime wages under Pennsylvania law and the federal Fair Labor Standards Act ("FLSA"). The employer claimed the employee was exempt from wage and hour laws under the administrative exemption of the FLSA and not contractually entitled to any overtime wages as required for his state law claim. Although the court granted summary judgment for the employer on the state law claim, it held that the employer failed to establish the applicability of the administrative exemption. The court said there was a factual issue, requiring a trial, as to whether the employee's primary duties were directly related to the management policies or general business operations, or were more production-oriented. A similar production/administrative distinction may apply under California law, and employers should closely scrutinize their employee classifications to determine whether an employee is truly contributing to the administration of the business or, conversely, to the production of the employer's product.

\$27 Million Attorneys' Fees Award Upheld In Microsoft Benefits Dispute

The Ninth Circuit Court of Appeals recently upheld an award of over \$27 million in attorneys' fees in a benefits class action that had settled for almost \$97 million. In *Vizcaino v. Microsoft Corp.*, former freelance workers for Microsoft sued to challenge Microsoft's classification of them as temporary workers who were not entitled to benefits under the company's Employee Stock Purchase Plan. The Ninth Circuit had held in 1999 that as many as 15,000 of these freelance workers were "presumptively" common law employees of Microsoft and, therefore, "presumptively" entitled to receive retroactive benefits. Thereafter, the parties began settlement negotiations and ultimately reached a \$97 million settlement agreement that the trial court approved. Plaintiffs' attorneys sought over \$27 million in attorneys' fees, which the district court granted over the objections of some of the plaintiff class members. The court of appeals upheld the attorneys' fees award, noting that class counsel's extraordinary performance in reviving the case several times, the complexity of the case, and the risk involved justified an award that was 3.65 times greater than the actual value of the legal services provided. This case demonstrates the consequences of a company's misclassifying its employees. Such high fee awards may serve as an incentive for similar class actions.