Fenwick Employment Brief

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COURT REFUSES TO FORCE HUMAN RESOURCES DIRECTOR TO ARBITRATE DISPUTE DESPITE MISREPRESENTATIONS THAT SHE HAD SIGNED ARBITRATION AGREEMENT

In a seemingly unjust result for the employer, a California court of appeal recently refused to enforce an unsigned arbitration agreement against a human resources director who repeatedly misled her employer into thinking she had signed it. In *Gorlach v. The Sports Club Company*, the employer required all employees to sign a new arbitration agreement as a condition of further employment. Gorlach, the company's HR head, was responsible for collecting employee signatures. In June, she told the COO that everyone except four employees had signed the arbitration agreement, but did not disclose that she was one of the four holdouts. Throughout June and July, Gorlach led company executives to believe she had signed the agreement. On August 6, she resigned without having signed the agreement and brought a lawsuit for, among other claims, sexual harassment and retaliation.

The employer sought to compel arbitration based on Gorlach's verbal statements that she had signed the agreement. Rejecting the employer's argument, the court ruled that, in order to prevail, the employer had to show that it relied on Gorlach's misrepresentations to its detriment, i.e., that it would have terminated Gorlach once it learned that she had not signed. The employer offered no evidence that it would have terminated Gorlach for failing to sign.

This unfortunate result could have been avoided by double-checking to confirm that all employees, including Gorlach, had signed the new arbitration agreement.

CALIFORNIA EMPLOYERS ALLOWED TO ROUND EMPLOYEE TIME TO NEAREST ONE-TENTH OF AN HOUR FOR CALCULATING OVERTIME

In a case of first impression, a California court of appeal ruled that employers may round nonexempt employee time to the nearest one-tenth of an hour for purposes of calculating overtime pay. In *See's Candy Shops, Inc. v. Superior Court (Silva)*, plaintiffs filed a class action lawsuit alleging that See's Candy's timekeeping policy violated California law by rounding employees' in and out times to the nearest one-tenth of an hour. Although there is no California law expressly permitting such a rounding policy, the court adopted the federal Department of Labor FLSA regulation – which does permit time rounding to the nearest five minutes, one-tenth of an hour, or quarter of an hour – as the appropriate standard in California.

The court also noted that the California DLSE Enforcement Policies and Interpretations Manual approved of the federal regulation. Although the DLSE Manual is not binding on courts, the court found the language persuasive guidance concerning California law. Accordingly, the court held that a California "employer is entitled to use the nearest-tenth rounding policy if the rounding policy is fair and neutral on its face and 'it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time actually worked.'" In similar fashion, California employers should continue to be able to round to the nearest five minutes or quarter of an hour.

NEWS BITES

Illinois Supreme Court Holds Employer Liable For Invasion Of Employee's Privacy By Outside Investigator

In *Lawlor v. North American Corporation*, the Illinois Supreme Court ruled that the employer was liable for the actions of its outside investigator who engaged in "pretexting" to obtain a former employee's personal cell phone records. Lawlor, a salesperson, left North American to work for a competitor. Concerned that she was committing unfair competition, the company retained an outside investigator to investigate her activities. Although North American did not specifically ask for her personal cell phone phone records, the vendor

provided those records to North American, and North American reviewed them for calls to North American customers after her termination. Upon learning that North American had accessed her personal telephone records, Lawlor successfully sued for invasion of privacy, and obtained a jury award against North American of $65,000 in compensatory damages, and $1.75 million in punitive damages. The court affirmed the compensatory damages award concluding that the jury could reasonably infer that North American knew that its vendor unlawfully obtained Lawlor's private cell phone records. However, the court reduced the punitive damages award to $65,000, as there was no evidence that North American engaged in an intentional, premeditated scheme to harm Lawlor.

NLRB Upholds Legality Of Employee Handbook At-Will Disclaimers

In two advice memoranda, the NLRB Office of General Counsel opined that two standard at-will disclaimers did not violate federal law. In *Rocha Transportation*, the at-will statement provided that: "No manager, supervisor, or employee of Rocha Transportation has any authority to enter into an agreement … for employment other than at-will. Only the president of the Company has the authority to make any such agreement and only in writing." *Mimi's Café* involved a similar policy: "No representative of the Company has authority to enter in any agreement contrary to the foregoing 'employment at will' relationship." In *Rocha*, the NLRB concluded that the provision was lawful as it did not require employees to refrain from seeking to change their at-will status nor did it require employees to agree that their at-will status could never change. Indeed, the provision explicitly permitted the president to modify the at-will relationship (such as through a collective bargaining agreement with a union). Likewise, the *Mimi's Café* policy simply highlighted that employer representatives were not authorized to modify an employee's at-will status. The provision did not restrict the employees' rights to select a collective-bargaining representative. The NLRB distinguished a highly publicized recent decision by an NLRB ALJ in *American Red Cross Arizona*. There, the at-will policy stated that "the at-will employment relationship cannot be amended, modified or altered in any way." According to the NLRB, the broad language in *Red Cross* "clearly involved" an impermissible waiver of employee rights under the NLRA.

Retaliation Against Employee For Filing Worker's Compensation Claim Does Not Support California Wrongful Termination Claim

In *Dutra v. Mercy Medical Center Mt. Shasta,* the employee sued alleging, among other claims, that the hospital wrongfully terminated her in violation of public policy in retaliation for having filed a workers' compensation claim. She relied on California Labor Code section 132a as the public policy support for her wrongful termination suit. In dismissing the claim, the court explained that Section 132a provides an exclusive administrative remedy for a violation before the Workers' Compensation Appeals Board. Accordingly, Section 132a could not be used as the basis for a common law tort claim for wrongful termination.

Settlement Approved Of Class Action Over Requirement That Footlocker Employees Wear Athletic Shoes Purchased At Employee Expense

In *Kullar v. Footlocker*, a California court of appeal approved a settlement of a class action lawsuit for almost $1.3 million covering about 18,000 employees arising out of, among other claims, an employer requirement that the employees wear athletic shoes to work that had to be purchased at the employee's expense. The plaintiffs argued that the shoes were part of an employer-required "uniform." If part of a uniform, the shoes costs would need to be reimbursed by the employer. Footlocker had urged that the shoes were common street shoes and not part of a uniform. The court ruled that the settlement, albeit not a 100% recovery for the employees, was a fair settlement under the circumstances.

Arbitration Agreement With Independent Contractors Ruled Not Applicable To Employment-Law Disputes

In *Elijahjuan v. Superior Court (Mike Campbell & Associates, Ltd.)*, a class of newspaper delivery workers classified as independent contractors brought suit alleging that they should have been classified and paid as employees. The newspaper delivery company

attempted to enforce an arbitration agreement with the workers. Refusing to enforce the agreement, the California court of appeal ruled that the agreement, requiring the arbitration of any dispute regarding the "application or interpretation" of the contract, did not encompass statutory claims for employment-law violations.

Employee Properly Discharged After Misrepresenting That A "Pterodactyl" Collided With Her Delivery Truck

In *Barnette v. Federal Express Corporation*, a federal district court in Florida dismissed plaintiff's gender discrimination suit concluding that the employee was properly discharged for falsifying an accident report. Barnette had reported that a "pterodactyl" or "some kind of big bird" had collided with her FedEx vehicle. However, an investigation revealed that plaintiff had hit and damaged the gate outside a gated community, and brown paint from the gate matched scrape marks on the vehicle. Further, there was no evidence that male drivers were not discharged for similarly falsifying work records.

WASHINGTON STATE DEVELOPMENTS:

No Protection From Mistaken Perception Of Homosexuality Under Washington State Law

In *Davis v. Fred's Applicance, Inc.*, a store manager referred to plaintiff as "gay." Plaintiff was heterosexual. When plaintiff complained, the company ordered the manager to apologize. The apology did not go well, and plaintiff was ultimately discharged after an outburst of anger. Plaintiff sued alleging that the company discriminated and retaliated against him based on the perception that he was homosexual. Rejecting the claim, a Washington court of appeals held that, while Washington state law prohibits discrimination because of sexual orientation, the statute does not protect an employee based on the perception of homosexuality.

Washington Supreme Court Rules That Employers Must Pay Overtime For Missed Rest Breaks

In *Washington State Nurses Association v. Sacred Heart Medical Center*, the hospital's collective bargaining agreement with nurses allowed nurses a paid 15 minute rest period for each four hour work period. If, due to the press of business, the employee missed a break, the employee was paid an amount equivalent to 30 minutes of straight time pay (i.e., 15 minutes of pay for the paid rest period plus 15 additional minutes for working during the rest period). No overtime was paid because, according to the employer, the total hours worked for the day did not exceed eight hours, even including the time worked during the rest period. The nurses union sued for alleged unpaid overtime. The Washington Supreme Court agreed. Washington law requires a 10 minute rest period on the employer's time for every four hours worked. The court held that the 10 minutes of missed rest period was overtime that had to be compensated at the overtime (and not straight time) rate.

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