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Fenwick Employment Brief

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FEATURED CASE NOTES

APPEALS COURTS DIFFER ON LIABILITY PERIOD FOR MEAL AND REST PERIOD VIOLATIONS

In recent weeks, three separate California courts of appeal have weighed in on the question of whether the one hour of pay to which an employee is entitled when he or she is denied a meal period constitutes a wage payment or a penalty. The distinction is important because a claim to recovery penalties is subject to a one year statute of limitations, while a wage claim is subject to a three year statute of limitations. Thus, characterizing the recovery as a penalty will greatly lessen an employer's potential exposure in the many contemplated and existing meal period class actions.

The statute at the center of this debate is California Labor Code §226.7, which provides that "no employer shall require any employee to work during any meal or rest period mandated by an applicable [wage order]." Further, if an employer fails to provide such meal periods, "the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." Two courts of appeal have held that the recovery under Labor Code §226.7 is a penalty (*Murphy v. Kenneth Cole* and *Mills v. Bed Bath & Beyond*), while one court has held that it is a wage (*National Steel v. Superior Court*). The split amongst the courts suggests that the California Supreme Court will grant review of one or more of the three decisions and resolve the penalty versus wage debate once and for all. In the meantime, employers should re-examine their meal and rest period policies and practices to ensure that, regardless of the outcome of this legal debate, they reduce their exposure to individual and/or class action claims.

MULTI-MILLION DOLLAR SEXUAL ORIENTATION HARASSMENT VERDICT STANDS

In a case illustrating the importance of prompt and meaningful corrective action in response to harassment complaints, a California appellate court recently upheld a $2 million jury verdict for sexual orientation harassment. *Hope v. California Youth Authority*. Hope worked as a cook in a state youth correctional facility and claimed he was harassed by fellow employees for five years because he was gay. Witnesses testified that Hope's immediate supervisor called him a "faggot" and a "homo," while other employees repeatedly referred to Hope in even more derogatory terms. Hope's repeated complaints led to nothing more than a half-hearted reprimand that the harassing employees "shouldn't do it again." Moreover, the court noted that it took over a year for the defendant to remove the worst of the harassing employees. On these facts, the court of appeals upheld the jury's $2 million verdict.

NEWS BITES

CALIFORNIA SUPREME COURT TO REVIEW MEDICAL MARIJUANA CASE

The California Supreme Court has agreed to review a case addressing whether use of medical marijuana may constitute a reasonable accommodation under California's Fair Employment and Housing Act. *Ross v. Ragingwire Telecommunications, Inc.* In *Ross*, a lower court ruled that because medical marijuana use is illegal under federal law, an employer could not be required to accommodate such use under the state's disability laws. A decision is expected this year.

U.S SUPREME COURT TO RESOLVE CIRCUIT SPLIT OVER RETALIATION

The U. S. Supreme Court will resolve a split among the circuit courts as to how to define "adverse action" in retaliation claims. Some circuits define adverse action to mean only "ultimate employment decisions" such as hiring and firing, while others, including the Ninth Circuit, apply a broader standard, whereby adverse action is any action "that is reasonably likely to deter" employees from engaging in oppositional activity. The Supreme Court's decision in *Burlington Northern & Santa Fe R. Co. v. White*, expected this year, will apparently resolve this split.

GOOGLE PREVAILS IN AGE DISCRIMINATION CASE

Google convinced a California court to dismiss the age discrimination claim of a 54 year old former employee who claimed he was criticized and terminated for "not [being] compatible" with the company's youthful culture. *Reid v. Google*. The plaintiff argued age discrimination based in part on the fact that less than two percent of Google's employees were over age 40. However, Google presented compelling evidence that plaintiff's supervisors were unhappy with his performance, tried to help him improve, and even hired an executive coach to work with him – all to no avail. This decision reaffirms the importance of contemporaneous, meaningful performance management when opposing charges of discrimination.

EMPLOYER NOT REQUIRED TO TOLERATE EMPLOYEE'S CARELESS, INSUBORDINATE BEHAVIOR WHEN CONSIDERING DISABILITY ACCOMMODATIONS

The U. S. Supreme Court denied review of a failure to accommodate case filed by a legally blind employee. In *Hammel v. Eau Galle Cheese Factory*, the plaintiff/factory worker, who sought accommodations for his blindness, unsuccessfully argued that the trial and appellate courts should not have considered evidence of the plaintiff's poor attitude, carelessness, insubordination and otherwise irresponsible behavior in connection with their decision that he was not qualified to perform the job in issue.