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Fenwick Employment Brief

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SUPREME COURT RULES THAT USE OF WORD "BOY" MAY SUPPORT RACE CLAIM

The U.S. Supreme Court recently held that a manager's occasional use of the word "boy" to refer to African-American employees may constitute sufficient evidence of race discrimination. In *Ash v. Tyson*, the African-American plaintiffs sued their employer, Tyson Foods, after management allegedly passed them over for promotions in favor of two white males. At trial, the plaintiffs testified that the plant manager responsible for promotion decisions referred to the plaintiffs as "boy" on several occasions, and the plaintiffs relied on these references as evidence of the manager's discriminatory intent. The trial court ruled that the use of the word "boy," absent an additional, specific reference to race, was not evidence of race discrimination. The Supreme Court reversed, holding that the jury could rely on the derogatory term to find discrimination. Although a term like "boy" will not always constitute discrimination, this decision serves as a sobering reminder to managers of the inherent risks associated with such a term.

MOVING HARASSER 100 FEET FROM VICTIM MAY NOT CONSTITUTE SUFFICIENT CORRECTIVE ACTION TO SHIELD EMPLOYER FROM LIABILITY

An employer's decision to move an alleged harasser 100 feet away from the victim/plaintiff may not be a reasonable response to shield the employer from Title VII liability. In *Papay v. New Canaan*, a decision from a Connecticut federal district court, the plaintiff alleged hostile work environment sexual harassment based on claims that a co-worker glared, grabbed, held, trapped, and made inappropriate sexual comments to her. She complained to her employer informally and through her attorney. Eventually, the employer responded by physically separating the complainant and the alleged harasser. The employer moved to dismiss the claim on the ground that it took prompt corrective action in response to the harassment. In denying the motion, the court held that the employer's separation of the workers did not, as a matter of law, constitute a reasonable response to the plaintiff's many complaints, and that a jury should decide the issue. The decision emphasizes the need for both creative and prompt action by employers in response to harassment complaints.

CALIFORNIA SUPREME COURT TO RESOLVE CONFLICT OVER WHETHER COMPENSATION FOR MISSED MEAL BREAK IS A "WAGE" OR "PENALTY"

In our February 8, 2006 edition of the FEB, we reported on *Murphy v. Kenneth Cole* and two other California court of appeal decisions, which addressed the question of whether the compensation employees receive for missed meal and rest breaks constitutes a wage or a penalty. Not surprisingly, the California Supreme Court granted review of the *Murphy* decision, and will resolve the split of authority on this issue. The court's ruling will clarify whether the statute of limitations for claims to recover such compensation is one year (for penalties) or three years (for wages). The ruling will have a significant impact on the many threatened and pending meal period class actions in California.

CLEAR AND CONVINCING STANDARD APPLIED TO SARBANES-OXLEY WHISTLEBLOWER

The federal Department of Labor adopted a "clear and convincing" standard to determine whether an employer had legitimate business reasons to terminate a SOX whistleblower despite the protected activity. In *Halloum v. Intel*, the DOL's Administrative Review Board affirmed a ruling in favor of Intel and against an Intel employee who, shortly before his termination, complained to the SEC that his supervisor improperly instructed him to delay paying invoices. The DOL concluded that Intel clearly and convincingly established that it terminated the employee because he failed to sufficiently integrate at Intel, and not because he complained about SOX violations. Notwithstanding the positive outcome for Intel, employers should be mindful that the clear and convincing standard is a more burdensome standard to meet, as compared to the "preponderance of the evidence" standard that applies in most discrimination and retaliation claims.

COMPUTER PROFESSIONAL EXEMPTION WAGE INCREASED TO $47.81

Are your exempt engineers in California properly compensated for purposes of the state's computer professional exemption? We remind employers that a recent amendment to the exemption (set forth in California Labor Code 515.5) requires employers who rely solely on that exemption to compensate their computer workers either on an hourly basis (at no less than $47.81 per hour), or on an equivalent salary basis ($99,444.80). However, even if employers avail themselves of the salary option, they must ensure that the computer workers receive no less than $47.81 for **each** hour worked. Alternatively, computer workers may fall within the learned or artistic professional exemption, so long as the workers satisfy both the salary and duties test of that exemption. We are available to advise employers about these complex classification issues.