Fenwick Employment Brief

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COURT CONFIRMS LIMITED LIABILITY OF OWNERS, OFFICERS AND MANAGING AGENTS FOR UNPAID WAGES

In a victory for employers, a California appellate court confirmed owners, officers, and managing agents' limited personal liability under California law for a corporation's failure to pay wages. In *Bradstreet v. Wong*, the California Labor Commissioner, joined by several employees and organizations ("Interveners"), sued the former owners, officers, and managing agents of three corporations (collectively, "Wins Corporations") for various unpaid wages, penalties associated with those wages, and penalties for bad payroll checks. The trial court ruled in defendants' favor, and the Labor Commissioner and Intervener Yan Fan Mei appealed.

Following *Reynolds v. Bement* (August 12, 2005 Employment Law Alert) and *Jones v. Gregory* (March 27, 2006 FEB Publication), which held that agents acting within the course and scope of their employment are not generally "employers," the court confirmed the defendants were not personally liable for the corporation's failure to pay wages or vacation or for the requested penalties. The court also concluded the individuals were not "deemed employers" under California Labor Code section 2677, which imposes liability on persons who do business with an unregistered garment manufacturer, because mere ownership interest in a company did not create such liability.

The court further rejected Interveners' attempt to recover the unpaid wages from the defendants personally under California's Unfair Competition Law ("UCL"). Under the UCL, plaintiffs may seek restitution of amounts unlawfully taken or withheld from them. Here, restitution from the individual defendants would have been improper where: (i) *Wins Corporations* was the employer, (ii) *Wins Corporations* received the benefit of the labor, and (iii) there was no evidence the defendants had underfunded the company or misappropriated corporate funds for their personal use.

While this case confirmed limitations on the liability of individual officers and directors for unpaid wages under **California** law, employers should be aware of two additional facts. First, the individuals were liable under **federal** law for unpaid minimum wages and overtime, and agreed to a stipulated $500,000 judgment in a federal action. Second, in the state action, the court did not address (because the plaintiff and Interveners did not timely bring) a claim for civil penalties under Labor Code section 558. That section expressly imposes liability for civil penalties on any "other person acting on behalf of an employer," which could include owners, officers, and managing agents.

NO FMLA INTERFERENCE WHERE MEDICAL CERTIFICATIONS UNTIMELY

An employer did not interfere with a married couple's rights to federal Family and Medical Leave Act ("FMLA") leave where each spouse was terminated after failing to provide timely medical certification for their absences. In *Townsend-Taylor v. Ameritech Services, Inc.*, the plaintiffs sued Ameritech following their terminations for excessive absenteeism and the denial of retroactive applications for family leave. Ameritech's FMLA policy required the employee to submit a medical certification to the company within 15 days by fax or email, the minimum time employers must afford employees under FMLA; in practice, the company allowed 20 days before the certification was deemed untimely. When an employee missed that deadline, the company allowed an employee an additional 15 days to submit proof of extenuating circumstances to justify the untimely filing, consistent with the FMLA's recognition that the time limitations imposed are not always practicable and that an employer should notify and allow an employee a reasonable opportunity to cure insufficient medical certifications.

Although Ameritech provided each spouse a medical certification form, the couple failed to comply with either deadline. The husband purportedly missed several days to care for their sick child but Ameritech did not receive his certification. Further, neither

the doctor's letter indicating he had completed and submitted the forms to the employer and/or the employee three times nor the employee's explanation that he had used the wrong form explained or justified the failure to provide appropriate certification. The wife allegedly missed three days for back problems. She procrastinated on submitting the form to her doctor, and Ameritech received the certification a day late. Neither the doctor's explanation that her reduced schedule sometimes caused delays nor the employee's claim that she delivered the form on her first day off justified the late submission or the employee's failure to use diligent efforts to comply with the deadline.

Recognizing that both spouses were "problem employees," the Seventh Circuit Court of Appeal (covering Illinois and other midwestern states) observed "Ameritech was not required to exhibit more patience than the law and its own rules required" and dismissed the lawsuit.

As this decision demonstrates, an employer may place – and enforce – lawful, reasonable time limits on an employee's submission of FMLA medical certifications. Absent timely submission of that certification – or evidence that extenuating circumstances prevented compliance – an employer may treat the time as an unapproved absence and, in appropriate circumstances, impose discipline up to and including termination.

MANAGER FIRED FOR VIOLATING POLICY, NOT INTERRACIAL RELATIONSHIP

The Seventh Circuit Court of Appeals recently ruled in favor of UPS on a former manager's claims that UPS discriminated against him because he was involved in an interracial relationship. In *Ellis v. United Parcel Service*, UPS maintained a nonfraternization policy that prohibited managers from dating hourly employees. Fully aware of the policy, Gerald Ellis, an African-American UPS manager, secretly dated a Caucasian hourly employee. After three years, management learned about the relationship, and warned Ellis that he was violating UPS's nonfraternization policy and needed to "rectify the situation." But Ellis continued the relationship; in fact, the couple got engaged three days later and married a year after that. When management learned of the ongoing relationship, UPS fired Ellis for violating the policy and for dishonesty.

Without deciding whether an employee may sue for discrimination under Title VII based on interracial dating, the court rejected Ellis's discrimination claim, based in part on evidence that UPS treated a manager in a same-race relationship similarly and on the fact that Ellis offered no evidence to challenge UPS's legitimate business reasons for his termination – violation of company policy and dishonesty.

Central to UPS's success was its past consistent enforcement of the nonfraternization policy, and the early involvement of HR in the disciplinary process.

NEWSBITES

Transgendered Applicant May Bring Discrimination Claim

California law expressly protects transgendered individuals from discrimination in the workplace; federal law (Title VII) does not. However, in *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, a Texas federal court recognized that, under Title VII, a transgendered individual may bring a discrimination claim, not for being transgendered, but based on adverse action against the individual for failing to comport with gender stereotypes. Accordingly, Izza Lopez, who was born a biological male, could pursue her claim against River Oaks for withdrawing its employment offer allegedly because she misrepresented herself as female during the application process. The court's ruling led to a settlement of the lawsuit.

Newspaper Carriers Were Employees for Purposes of Workers' Compensation

In *Antelope Valley Press v. Poizner*, a California appellate court confirmed that newspaper carriers were employees of Antelope Valley Press ("AVP") for purposes of determining AVP's workers' compensation premiums. Although the individuals signed contracts identifying themselves as independent contractors and "self-employed, independent distributors," AVP retained significant control over the manner and means of newspaper

delivery. The court cited AVP's use of financial penalties, customer complaints, and visual surveys to supervise the carriers' work and AVP's control over the prices customers paid. Further factors supporting the employee status included: AVP's right to discharge a carrier at will, that carriers were not engaged in a distinct delivery business, the extended tenure of carriers with AVP, and the court's conclusion that AVP was in a better position to distribute the risk and cost of the injury than carriers whose annual earnings rarely exceeded $10,000. The court's decision will lead to a dramatic upward adjustment of the newspaper's workers' compensation premiums.

This case underscores what little weight independent contractor labels carry. Whether for purposes of workers' compensation, assessment of withholding obligations, or wage and hour compliance, courts and administrative agencies look to the duties of the position and whether (and to what extent) the contracting agent retains control over the performance of those duties to determine whether one is truly an independent contractor.

$4 Million Verdict for "Lobstergate" Whistleblowers

In *Patterson v. City of Long Beach*, a jury unanimously awarded over $4 million to three employees who suffered retaliation after reporting their colleagues' illegal activities – diving for lobsters while on duty, or "lobstergate" as the scandal became known. Two officers were called snitches, denied job opportunities, and subjected to various harassment, including punctured tires, stolen equipment, and (as to one officer) having feces wiped on his locker room towel. The jury awarded the two officers over $1.3 and $1.5 million. After trying to protect the two officers, a sergeant was forced into early disability retirement despite his 14 years' of demonstrated ability to work. The jury awarded him $1.1 million.

Employer Not Liable for Employee's Auto Accident During Personal Errand

In *Miller v. American Greetings Corporation*, a California appellate court ruled that American Greetings was not liable for an auto accident occasioned by its employee's negligence. As part of the employee's duties, he regularly visited customer sites and, when not visiting stores, spent a significant amount of time on his cell phone. To prove the accident occurred within the course and scope of his duties, the plaintiff offered the employee's cell phone records to show he completed a work-related call eight minutes before the accident. The trial court rejected the argument, holding the evidence showed the employee was on a personal errand to visit a probate attorney and any connection to his employment was *de minimus*.

Although American Greetings prevailed, this decision serves as an important reminder on two levels. First, companies whose employees drive as part of their duties should, if practicable, implement a policy governing whether and to what extent cell phone usage is permitted while driving. Second, effective July 1, 2008, California law requires drivers to use a hands-free device, and employers should consider making such equipment available to employees whose duties require them to use a cell phone while driving.

Labor Commissioner Imposter Sentenced to 16 Months

A disgruntled employee who posed as a deputy labor commissioner to extort money from his former employer was sentenced to 16 months in prison, according to a California Division of Labor Standards Enforcement ("DLSE") press release. Gabriel Holguin allegedly demanded by email and phone calls that his former employer, Jayco, pay him $600 for hours worked or face legal action. After paying Holguin a portion of the demanded wages, Jayco contacted the DLSE based on its suspicion of a shakedown. Holguin was arrested two days later, and he recently pled no contest to obtaining funds through false pretenses.

Employers should be aware that fraudulent schemes come in many shapes and sizes – including impersonators of state and federal agencies. If a communication from an agency raises concerns, employers should confirm the validity of the demand by contacting the agency (as Jayco did) or counsel.