Fenwick Employment Brief

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COMMERCIAL BUYER NOT LIABLE FOR PRODUCER'S FAILURE TO PAY EMPLOYEE SAYS CALIFORNIA SUPREME COURT

In a favorable decision for business, the California Supreme Court held that the commercial wholesalers who purchased strawberries from a farmer could not be held liable to farm workers who were left unpaid when the farmer entered bankruptcy. In *Martinez v. Combs*, the farm workers urged that the court should hold the commercial buyers liable for the farmer's failure to pay their wages, arguing that the buyers jointly employed the farm workers, based in part on the fact that the buyers instructed the farm workers on the manner in which strawberries were to be packed. Rejecting the workers' arguments, the court ruled that the buyers never supervised nor exercised control over the farm workers as to become an employer. Rather, the farmer had the exclusive power to hire and fire the farm workers, to set their wages and hours of work, and to tell them when and where to report for work. The court also rejected the workers' argument that the buyers should be liable as they benefited from the workers' labor. The court noted that a contrary result would open the floodgates, i.e., imposing liability down from the wholesaler to the grocery store to the ultimate consumer in "potentially endless chains of liability." Rather, the court held that "a business relationship, standing alone, does not transform the purchaser into the employer of the supplier's workforce." By comparison, the next article is an example where the purchaser of a vendor's maintenance services became the potential employer of the vendor's employee by exercising too much control over the work.

JURY TO DECIDE WHETHER VENDOR'S EMPLOYEE BECAME CUSTOMER'S EMPLOYEE

In *Schmidt v. Burlington Northern and Santa Fe Railroad Company*, the federal Ninth Circuit Court of Appeals ruled that a jury must decide whether Burlington Northern was plaintiff's employer liable for his injuries incurred as a welder. Plaintiff was employed by Western Fruit Express, a Burlington Northern contractor that provided maintenance services to the railroad. Reversing the dismissal of the case, the court ruled that a jury must decide whether Burlington Northern had sufficient control over plaintiff as to become his employer. Specifically, plaintiff presented evidence that the railroad's policies regulated how he carried out his welding work, required him to participate in training sessions alongside Burlington Northern employees, his Western Fruit supervisors wore Burlington Northern logos on their work clothing, the Burlington Northern medical officer decided plaintiff was unable to return to work, and plaintiff was paid by Burlington Northern checks. In retrospect, Burlington Northern could have avoided creating an inference of employment by disclaiming any right of control over plaintiff's work and leaving his supervision and compensation to the contractor.

NEWS BITES

$250 Million+ Jury Verdict In Class Action Sex Discrimination Case

A federal jury in New York awarded $250 million in punitive damages to a class of female sales representatives on top of more than $3 million in compensatory damages to 12 named plaintiffs in *Velez v. Novartis Pharmaceutical Corp*. Plaintiffs alleged that Novartis used largely subjective factors in making decisions about compensation and promotions that unlawfully favored men. They also asserted that Novartis failed to respond to repeated complaints about gender discrimination. Next, the court will determine the amount of compensatory damages to award the other 5600 members of the nationwide class of former and current saleswomen.

Race Claim Allowed Years After Applicant Test Administered

In *Lewis v. City of Chicago*, the U.S. Supreme Court ruled that applicants could sue for race discrimination on each occasion that the employer used the results of a discriminatory pre-employment test to make hiring decisions. In 1995, the city administered a test for firefighter candidates that admittedly had a disparate impact on African-American candidates. Through 2002, the city used the test results to select

candidates on 11 different occasions. The lawsuit at issue was filed in 1998. The lower court ruled that the lawsuit was untimely, holding that the statute of limitations commenced to run when the employer made the initial decision to administer the test results in a discriminatory manner. Reversing, the Supreme Court concluded that new potential liability accrued on each occasion the employer used the test results to select candidates for hire.

Wal-Mart Settles California And Oregon Wage Class Actions For Over $90 Million

Following a string of wage and hour class action settlements during 2008 and 2009, Wal-Mart recently settled two additional wage suits for over $90 million. In *Ballard v. Wal-Mart*, plaintiff alleged on behalf of a class of about 232,000 former employees of Wal-Mart and Sam's Club in California that they were not properly paid for accrued unused vacation and personal time off at the time of termination. If approved by the federal district court in Northern California, Wal-Mart will pay a minimum of $43 million but no more than $86 million, depending on the number of claims submitted by class members. In *Klink v. Wal-Mart*, plaintiffs filed two class actions against the retailer in Oregon on behalf of about 28,000 former employees, alleging failure to pay vacation, overtime and other wages upon termination. Wal-Mart agreed to settle these claims for up to $4.4 million.

DOL May Require Employers To Maintain Written Classification Analyses

The federal Department of Labor announced proposed changes to FLSA regulations that will include requirements that employers perform a classification analysis of each position they intend to classify as exempt and provide employees written notice of said analysis. This is the latest in a series of measures and proposed measures by the DOL to crack down on alleged worker misclassification.

Polo Ralph Lauren Settles Off-The-Clock Wage Claim for $4 Million

In *Otsuka v. Polo Ralph Lauren Corp.*, a federal district court in Northern California approved a $4 million class action settlement for unpaid wages. Plaintiffs alleged that, as part of the retailer's loss prevention program, they were required to submit to inspections of their personal bags and belongings before exiting the store. However, the inspections occurred after the employees had already clocked out. The settlement will compensate as many as 6,700 class members for the off-the-clock time waiting for and submitting to these bag inspections.

Failure To Investigate Is Not Actionable Retaliation

In *Fincher v. Depository Trust & Clearing Corp.*, the federal Second Circuit Court of Appeals held that an employer's decision not to investigate an employee's complaint of race discrimination was not, in and of itself, an adverse employment action as to give rise to a retaliation claim. Plaintiff, an auditor, had complained that she was "set up to fail" on account of her race. The company's employee relations director purportedly told her the complaint would not be investigated. The court explained that in order to constitute actionable retaliation, the employer must engage in "affirmative efforts" to punish the employee for having complained. Plaintiff had not suffered any "punishment." The court cautioned, however, that the failure to investigate might, in some contexts, constitute actionable retaliation (for *e.g.*, the failure to investigate a death threat made after a complaint of discrimination).

NY Karate Instructor's Weight Bias Claim May Go To Trial

In *Spiegel v. Schulman*, a former karate instructor alleged that he was unlawfully discharged by the "Tiger" Schulmann Karate School on account of his weight. Rejecting the federal and state disability claims, the federal Second Circuit Court of Appeals held that plaintiff failed to show that he was medically incapable of losing weight as to be legally disabled. However, the court directed the lower court to consider whether obesity alone constituted a covered disability under the New York City ordinance. If so, the court also ruled that the plaintiff could introduce evidence that Schulman and another school owner had made comments about plaintiff's weight.

In California, obesity alone is not a protected disability and instead must be linked to a medical condition such as high blood pressure.

No Retaliation For Terminating Employee Seven Months After Sexual Harassment Complaint

In *Burkhart v. American Railcar Industries Inc.*, the federal Eighth Circuit Court of Appeals dismissed a plaintiff's claim that she was terminated for having complained about sexual harassment seven months before her termination. The employer offered evidence

of "an extensive written disciplinary record" culminating in an inventory audit that revealed several thousands of dollars in errors attributable to plaintiff. Seven months earlier, plaintiff had complained about hostile work environment harassment by her supervisor arising out of sexual emails and photographs. The supervisor was suspended, and there was no evidence of subsequent harassment. On these facts, the court held that no reasonable jury could conclude that plaintiff's termination was in retaliation for her sexual harassment complaint.

Contradictory Performance Evidence Allows FMLA Claim To Proceed To Trial

In *Goelzer v. Sheboygan County*, an administrative assistant on several occasions took an FMLA leave for surgery and to care for family members. In May of the year she was terminated, plaintiff requested two months leave for foot surgery to commence in September. Within weeks of the start of her leave, the employer notified her of her termination. The supervisor expressed dissatisfaction with plaintiff's job performance and that he wanted to replace her with someone with better skills. Reversing the dismissal of the case, the federal Seventh Circuit Court of Appeals held that a jury must decide whether plaintiff was lawfully terminated. Plaintiff had offered evidence of positive performance evaluations and a promotion that called into question the employer's dissatisfaction with plaintiff's performance.

Employee Properly Terminated For Insulting Customers

Goble v. Speedway SuperAmerica offers an important reminder that certain forms of misconduct will render an employee ineligible for employment benefits. There, a Minnesota court of appeal affirmed the denial of plaintiff's claim for unemployment insurance. The employer had terminated plaintiff, a gas station attendant, for using the outdoor intercom at a gas station to insult customers. In one incident, he angered a customer by asking: "Why don't you clean your whole car with our squeegee?" In the final incident, a customer commented that, with President Obama's election, racism was going to stop. Plaintiff responded that: "Obama sucks."

California Garment Manufacturer Penalized For "Brazen Disregard" Of Wage Laws

In *Solis v. Best Miracle Corp.*, a federal court in Southern California ruled a garment manufacturer liable for over $200,000 in unpaid overtime, interest and penalties. The court found that the employer "brazenly disregarded" wage laws by forcing employees to falsify time cards and threatening to report employees to immigration authorities. Interestingly, the federal Department of Labor conducted parking lot surveillance to establish the violations by showing that employees parked at the plant far longer than the employees' time cards indicated they had worked.