Fenwick Employment Brief

July 10, 2008
Daniel J. McCoy Co-Editor 650.335.7897
Allen M. Kato Co-Editor 415.875.2467
Erin Romp Contributor

Fenwick
FENWICK & WEST LLP

### EMPLOYER VIOLATED EMPLOYEE PRIVACY BY ACCESSING PERSONAL TEXT MESSAGES

In *Quon v. Arch Wireless Operating Company*, police officer Quon sued a wireless company and his employer City of Ontario for violating his privacy by accessing his personal text messages sent by way of an employer-provided pager. Quon had signed an employer policy that prohibited personal use of electronic equipment and warned that employees "should have no expectation of privacy or confidentiality when using these [electronic] resources." However, a city administrator told Quon and other officers that management would not audit pager use so long as the employee paid for any "overages," *i.e.*, for excess use. Indeed, Quon paid for overages on several occasions. Later, management audited Quon's messages and found many personal, sexually explicit messages. The court opined that if the employer had followed its written policy, then Quon would have no expectation of privacy in his pager use. However, the city administrator's statement that management would not audit pager use, and Quon's payment for overages effectively vitiated the policy and created an expectation of privacy for Quon under the Fourth Amendment in his use of the pager to send and receive personal text messages. Although this decision involved a public sector employment relationship where Fourth Amendment rights exist, it is a cautionary tale for public and private employers to avoid statements and practices at variance with official policy.

### NO MATCH LETTERS DID NOT GIVE EMPLOYER BASIS TO DISCHARGE EMPLOYEES

In *Aramark v. SEIU*, the Ninth Circuit Court of Appeals affirmed the ruling of an arbitrator that Aramark improperly discharged 33 employees at the Staples Center stadium in Los Angeles for failing to provide proof of a valid Social Security Number ("SSN"). The Social Security Administration had sent "no match" letters to Aramark notifying the employer that the employees' SSNs did not match the government's database. Aramark gave the affected employees three days to provide proof that they had begun the process to correct the problem, and discharged those who did not timely comply out of concern that the employees were not authorized to work in the U.S. In affirming the arbitrator's decision, the court ruled that the three-day deadline was unreasonably short. In support, the court cited the federal regulation (currently subject to an injunction) that provides a safe harbor procedure for employers who receive a no-match letter, *i.e.*, the employer should ask the employee to provide further SSN documentation within 90 days, and even if the employee cannot resolve the SSN discrepancy within 90 days, the employer may satisfy the safe harbor requirements – and thereby avoid prosecution for employing undocumented workers – by completing a new Form I-9 (but with documents that do not depend on the disputed SSN). This is a complex and evolving area of law, and we encourage employers who receive "no match" letter to contact counsel.

### "SAME ACTOR" EVIDENCE DID NOT PREVENT DISCRIMINATION CASE

In *Harvey v. Sybase, Inc.*, a California court of appeal affirmed a jury verdict and held that, contrary to federal law, "same actor" evidence in a state law employment discrimination case was not entitled to any special weight. A manager in Sybase's Human Resources Department, Nita White-Ivy, promoted plaintiff Marietta Harvey several times, increased her pay and gave her outstanding performance evaluations. Allegedly, after White-Ivy learned a member of executive management commented that the HR department resembled "an airport," White-Ivy began expressing an interest in hiring white males (in

order to reduce the number of female and minority employees). The same year, White-Ivy allegedly began reducing Harvey's responsibilities and expressed concerns over Harvey's job performance, eventually terminating her employment. A jury found that Sybase discriminated against Harvey. On appeal, Sybase contended that because White-Ivy was responsible for both the promotion and firing within a short period, a strong inference should arise under the "same actor" rule that no discriminatory motive existed. But the court rejected this contention, and held that same-actor evidence should be treated like all other evidence and afforded no additional weight.

### EMPLOYEE ESTABLISHED CONSTRUCTIVE DISCHARGE IN "PREEMPTIVE" RETALIATION CASE

In *Steele v. Youthful Offender Parole Board*, a California court of appeal affirmed a jury verdict in Lisa Steele's favor that her resignation amounted to a constructive discharge in "preemptive" retaliation after a co-worker complained on Steele's behalf about sexual harassment directed at Steele (Steele herself did not complain). The co-worker had complained that at an off-duty event, the employer's Board Chairman grabbed and kissed Steele. The co-worker later filed a DFEH complaint of retaliation for having complained on Steele's behalf. Steele herself reported that she was not bothered by the kiss. However, purportedly in anticipation that Steele would support the co-worker's retaliation complaint, Steele's supervisor gave her a written warning about her performance, notified Steele that she would be suspended and suggested that Steele needed to seek employment elsewhere. The court held that the employer created intolerable working conditions as to force Steele to resign and allowed Steele to sue for "preemptive" retaliation even though Steele herself had not complained.

## NEWS BITES

### EMPLOYER MUST PROVE REASONABLE FACTORS OTHER THAN AGE IN FEDERAL ADEA DISPARATE IMPACT CASE

In *Meacham v. Knolls Atomic Power Laboratory*, the U.S. Supreme Court, analyzing the burden of proof in a disparate impact age discrimination claim under the federal ADEA, placed the onus on employers to prove that reasonable factors other than age ("RFOA") guided selection decisions in a layoff. Knoll laid off 31 employees, and 30 of the 31 affected employees (including plaintiff Meacham) were 40 years old or older. Meacham alleged disparate impact age discrimination and offered expert testimony that the fact so many older employees were laid off could not have occurred by chance. The lower court ruled in Knolls' favor, concluding that Meacham bore the burden of proof to establish that RFOAs did not exists, and he did not meet his burden. Reversing, the Supreme Court held that Knolls, not Meacham, bore the burden of proof to establish the RFOA defense, and sent the case back to the trial court for further proceedings to assess whether employee "flexibility," among other factors, constituted a RFOA. (The court's decision is consistent with existing California case law.)

### UNION REPRESENTATIVE MUST RETURN SALARY AFTER LAUNCHING COMPETITIVE UNION WHILE STILL EMPLOYED

In *Service Employees Int'l. Union, Local 250 v. Colcord*, a California court of appeal ruled that a California union representative who secretly created a new labor union while he was employed by Service Employees International Union Local

250 must return the salary he received during the period of his disloyalty. The court held that Colcord violated a fiduciary duty by making plans to create a competing union. Knowing a union contract was about to expire, the court found that Colcord and two other union representatives intentionally stalled negotiations and secretly made extensive preparations for the new union while employed by Local 250, including meeting with legal counsel and drafting a decertification petition, constitution and other documents. Shortly after resigning from Local 250, Colcord announced his competing union, began campaigning against Local 250 for the vote of covered employees and won the coveted collective bargaining election.

### LOST WAGES RECOVERABLE UNDER FMLA, BUT NOT EMOTIONAL DISTRESS OR PUNITIVE DAMAGES

In *Farrell v. Tri-County Metropolitan Transportation District of Oregon*, the Ninth Circuit Court of Appeals explained that Congress did not intend the FMLA to allow the recovery of emotional distress or punitive damages. However, the court affirmed a jury verdict of $1110 to cover plaintiff's lost wages for days of work missed because of the employer's FMLA violation. Plaintiff Farrell convinced the jury that denial of his request for FMLA leave caused him to miss several days of work because of the "stress" resulting from the wrongful denial of FMLA leave.

### UPS DRIVER ALLOWED TO PROCEED WITH DISABILITY CLAIM ARISING OUT OF HEART CONDITION

In *Gribben v. UPS*, Gribben, a UPS Driver, complained that UPS failed to provide him an air conditioned vehicle to accommodate his heart condition, in violation of UPS's duty under the ADA to implement reasonable accommodations for disabled employees. The trial court dismissed the complaint because Gribben did not provide any comparative evidence about an average person's ability to work in hot weather, and therefore did not establish that his impairment limited a major life activity. The federal Ninth Circuit Court of Appeals allowed plaintiff to proceed with his ADA claim, holding that Gribben's testimony (that he had trouble breathing and experienced chest pain when working in temperatures above 90 degrees) was sufficient, without further comparative evidence, to require a jury trial of his disability claim.

### CITY'S PRE-EMPLOYMENT DRUG TESTING UNCONSTITUTIONAL

The Ninth Circuit Court of Appeals held in *Lanier v. City of Woodburn* that the City of Woodburn could not rescind an offer of employment to Janet Lanier because she declined to be tested under the City's pre-employment drug and alcohol screening policy. The court affirmed a summary judgment in Lanier's favor, and a declaratory judgment that the City's policy was facially unconstitutional because it was unsupported by any special need that outweighed the reasonable expectation of privacy. The court opined that, in contrast to Lanier's job as a library page, drug testing could be required for some city jobs that required operating machinery or working directly with children. Importantly, California law permits drug testing of applicants in the private sector.

### NLRA PREEMPTS CALIFORNIA LAW PROHIBITING USE OF STATE FUNDS TO OPPOSE UNION ORGANIZING

In *Chamber of Commerce of the United States of America v. Brown*, the U.S. Supreme Court struck down a California statute that prohibited employers that received state grants from using the funds to "assist, promote, or deter union organizing." The court held that the federal National Labor Relations Act occupied the field of union organizing and preempted any state regulation of such activity.

### HAYWARD LIVING WAGE ORDINANCE APPLIED TO CONTRACTOR'S EMPLOYEES OUTSIDE OF CITY

In *Amaral v. Cintas Corporation No. 2*, a California court of appeal rejected Cintas' constitutional challenge to a City of Hayward living wage ordinance that applied to employees of city contractors who worked both **in and outside** the city. The court held that the ordinance constituted a lawful exercise by Hayward of extraterritorial power to contract, and otherwise passed constitutional muster. The court also observed that Cintas had the choice not to contract with the city if it found the minimum wage requirements too onerous.

### SECRETARY MAY PURSUE HARASSMENT AND RETALIATION SUIT BASED UPON BOSS'S PORNOGRAPHIC VIDEO HABIT

The federal Second Circuit Court of Appeals ruled that a Fordham University secretary could pursue sexual harassment and retaliation claims under Title VII because of her boss's sexual activities. In *Patane v. Clark*, Eleanora Patane alleged that her boss, a Fordham professor, watched hardcore pornographic videos in his office (within her eyesight), and required Patane to open mail containing pornography. Patane complained to Fordham's EEO director repeatedly. After her supervisor learned of her complaints, he allegedly removed virtually all of her job functions, refused to speak with her, intentionally kept her ignorant about departmental business, and gave her negative performance evaluations.