Fenwick Employment Brief
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U.S. SUPREME COURT RULES THAT PHARMACEUTICAL SALES REPRESENTATIVES QUALIFY FOR OUTSIDE SALES EXEMPTION - POSSIBLE IMPLICATIONS FOR CALIFORNIA EMPLOYERS

In a favorable decision for employers, the U.S. Supreme Court in *Christopher v. SmithKline Beecham Corporation* decided that the federal FLSA exemption for an "outside salesman" covered pharmaceutical sales representatives who obtained nonbinding commitments from physicians to prescribe their employer's prescription drugs. The FLSA exempts from overtime and minimum wage those employees who engage in outside sales. The law does not exempt employees who engage in "promotion work." A split developed among the federal circuit courts over whether the pharmaceutical sales representatives fit within the outside sales exemption or performed nonexempt promotion work. Under federal regulation, prescription drugs may only be dispensed with a physician's prescription. In light of this requirement, pharmaceutical manufacturers focus their "sales" efforts on these physicians. The pharmaceutical sales representatives provide information to physicians about the products with the goal of obtaining nonbinding commitments from doctors to prescribe the employer's products.

The federal Ninth Circuit (covering western states including California) ruled that this amounted to "sales" within the meaning of the outside sales exemption. Conversely, the Second Circuit (covering eastern states including New York) concluded that the exemption did not apply as no "sale" occurred. The federal Department of Labor urged that a "sale" requires the transfer of title to the product and there was no sale as the physicians did not directly purchase the prescription drugs from the sales representatives. Rejecting this argument, the Supreme Court held that, within the regulatory environment of the pharmaceutical industry, obtaining a nonbinding commitment from physicians to prescribe the employer's product was the most the sales representatives were legally able to accomplish. Accordingly, this amounted to a "sale" within the meaning of the FLSA. In support of this conclusion, the Court noted that sales representatives were awarded incentive compensation, they were highly compensated (at an average of more than $70,000 per year) and were "hardly the kind of employees that the FLSA was intended to protect."

California employers with out-of-state, outside sales representatives should benefit from this ruling. As to California employees, California defines an outside salesperson as an employee "selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities." State law does not further define the word "selling." California state courts and enforcement agencies may find the Supreme Court's interpretation of the word "sales" persuasive. However, California employers should take care to differentiate outside sales representatives (who are "selling" or "obtaining orders or contracts" and therefore qualify for the outside sales exemption) from employees who perform "promotion work" and would not qualify for the outside sales exemption.

NEWS BITES

Taking Time Off Work To Refill Prescription Does Not Qualify For FMLA Protection

The federal Seventh Circuit Court of Appeal (covering central states including Indiana) held in *Jones v. C&D Technologies, Inc.* that an employee was not protected under the FMLA for time off to obtain a prescription refill and that he was therefore properly discharged for absenteeism. The employer's

attendance policy afforded employees a certain number of points for absences during the preceding four months. Under the policy, FMLA-protected absences were not counted as an absence. Jones was only a 1/2 point away from termination when he was absent an entire shift purportedly for a doctor's appointment. After an investigation, the company concluded the absence was unprotected time off and terminated Jones for excessive absenteeism. In the lawsuit that followed, Jones alleged that his absence was FMLA protected time off and should not have been counted against him. However, Jones admitted he did not have a scheduled doctor's appointment that morning. He visited the doctor's office, signed in, and obtained a prescription refill note from his doctor. In dismissing the suit, the court held that the absence was unprotected time off. Although obtaining medical "treatment" may be protected under FMLA, the court explained that merely picking up a prescription refill note did not amount to treatment as to protect Jones' absence from work that morning.

Same Actor Inference Helps TV Station Defeat Age Discrimination Claim By News Reporters

In *Schechner v. KPIX-TV*, a California court of appeal rejected the age discrimination claims of TV newscasters William Schechner (age 66) and John Lobertini (47). They alleged that KPIX laid them off because of age. KPIX urged that reduced advertising revenues caused by competition from on-line news outlets and the economic downturn forced the company to layoff news reporters. In dismissing the suit, the court relied largely on the same-actor inference. The "same-actor inference" means that when the manager alleged to have discriminated against the plaintiff is the same manager who hired (or promoted) plaintiff into the job, the law will infer that discrimination did not occur (absent more compelling evidence to the contrary). In this case, the court observed that the same company executive who made the decision to layoff Schechner and Lobertini had also earlier accommodated Schechner's request to change to a part-time schedule, and had renewed Schechner's contract on three prior occasions, the last time just months before the layoff. The court ruled that plaintiffs did not offer evidence of discrimination to controvert the same-actor inference.

California Court Rules That Unemployment Benefits Were Properly Denied For Termination Based Upon Employee's Refusal To Sign Disciplinary Memorandum

In *Paratransit, Inc. v. Unemployment Insurance Appeals Board*, an employee appealed the denial of his claim for unemployment insurance benefits where the employer terminated him for refusing to sign a disciplinary warning. Agreeing with the employer, a California court of appeal opined that the employee's "misconduct" justified the denial of benefits. Paratransit operated a transport service for the disabled. The employer received a complaint from a passenger about Medeiros. The employer and the union representing the drivers negotiated and agreed that a written warning was the appropriate discipline for Medeiros' misconduct. In the follow-up meeting with Medeiros to deliver the warning, the supervisor told him that he was required to sign the warning to acknowledge receipt. The document clearly stated that an employee's signature was simply to acknowledge receipt. Medeiros refused to sign for fear of admitting guilt. The supervisor told him that his signature only acknowledged receipt, and again directed him to sign. Medeiros refused. The employer terminated Medeiros for insubordination. In denying Medeiros unemployment benefits, the court held that the employer's directive to sign the warning was a reasonable instruction, and Medeiros' refusal to sign was misconduct disqualifying him from receiving benefits.

Human Resources Manager Held Not Liable For Causing Employer To Retaliate Against An Employee In Violation Of Civil Rights Act § 1981

In a case of first impression, the federal Seventh Circuit Court of Appeals (covering central states including Illinois) allowed an employee to pursue his claim against an individual manager for retaliation in violation of Section 1981 of the Civil Rights Act. In *Smith v. Bray*, Smith's employer was bankrupt. His only hope for recovery of damages was against individual managers. Smith settled with the supervisor who allegedly harassed him on account of his race. He pursued his suit against Bray, the human resources manager who had a role in the company's termination decision. Smith alleged that Bray retaliated against him on account of his complaints of discrimination. While acknowledging an employee's right to pursue his claim against an HR manager who had a role in the termination decision, the court nonetheless dismissed the claim as Smith presented no evidence that Bray had any retaliatory motive in recommending his termination. She had recommended Smith's termination for an unauthorized absence.

Newspaper Delivery Workers Denied Class Action Status Over Alleged Misclassification As Independent Contractors Because Individual Issues Predominated

Newspaper delivery works failed to obtain class certification of their claims that they were misclassified as independent contractors. In *Sotelo v. MediaNews Group, Inc.*, a California court of appeal refused to allow the case to proceed as a class action where too many individual issues predominated. MediaNews engaged the workers as independent contractors to deliver newspapers seven days a week. In their suit, plaintiffs alleged that they should have been classified as employees and were owed wages for overtime and for denial of meal and rest breaks. Rejecting the plaintiffs' request to pursue the claims as a class, the court opined that there were insufficient common issues to allow class treatment. The court found a wide range of work practices among the news carriers. Like true independent contractors, some carriers operated a delivery business and delivered newspapers for different publishers (and not just the defendant). Several employed other workers to cover multiple routes.

Employer Not Required To Conduct Background Check, And Not Liable To Customer Who Was Pistol-Whipped By Employee

In *Harris v. KFC U.S. Properties, Inc.*, a federal district court in Pennsylvania ruled that the operator of a Kentucky Fried Chicken outlet in Philadelphia was not liable to a customer who was pistol-whipped by a store clerk. Harris placed his order for Kentucky Fried Chicken but hesitated in selecting his side orders. The employee told Harris to "hurry up" and asked "do you want the [expletive] chicken or not?" Taken aback by the employee's rude conduct, Harris hesitated even more. In response, the employee pulled out a gun. Harris put up his hands and asked: "You going to shoot me over a bucket of chicken?" When another store employee yelled at the clerk and distracted him, Harris attempted to escape. Before he could leave the store, the employee pistol-whipped Harris, causing him a concussion and other injuries. In the lawsuit that followed, Harris claimed that KFC was negligent in not conducting a background check, and should have known that the assailant had a propensity for violence. KFC had a policy prohibiting employees from bringing guns or other weapons to the workplace. It conducted criminal history checks only of candidates for management positions. Rejecting Harris' claim, the court held that KFC was not legally required to conduct a criminal history check for store clerks. Further, if KFC had conducted a background check, the records would have revealed that employee had two prior convictions for nonviolent crimes from over five years ago. Under such circumstances, KFC was not legally on notice that the employee would bring a gun to work and pistol-whip a customer.

Rite Aid To Pay Almost $21 Million To Settle Class Action Suits For Unpaid Overtime By Assistant Store Managers

A federal district court in Pennsylvania gave preliminary approval in *Craig v. Rite Aid Corporation* to a settlement of fifteen wage and hour class action lawsuits brought by assistant store managers and co-managers against Rite Aid in 30 states and the District of Columbia. Plaintiffs alleged that they were misclassified as exempt from overtime. The $20.9 million settlement amount includes attorneys' fees not to exceed one-third of the settlement fund.

Federal Immigration Law Preempts State Law Making It A Crime For Unauthorized Worker To Obtain Employment

The U.S. Supreme Court recently overturned an Arizona statute that made it a crime for unauthorized workers to obtain work in Arizona. In *Arizona v. U.S.*, the court held that federal immigration law ("IRCA") preempted and barred the state law. The court reasoned that IRCA was a comprehensive national law imposing various sanctions on aliens who engaged in unauthorized work (such as deportation). As Congress made a deliberate choice not to impose criminal sanctions on unauthorized workers who obtained work, the court held that the states are not allowed to make such conduct a crime.

$168 Million Jury Award To Hospital Employee For Alleged Sexual Harassment

A federal jury in Sacramento, CA awarded almost $168 million in damages to the plaintiff in *Chopourian v. Catholic Healthcare West*. Ani Chopourian worked as a physician's assistant. She alleged that she was subjected to daily sexual advances and other sexual conduct that created a hostile environment. Chopourian alleged that she was wrongfully terminated after complaining about such actions, and making other complaints concerning patient safety and the abuse of other women. Further, she asserted that the employer made false statements about her professional qualifications to prospective employers that prevented her from obtaining subsequent employment. The jury award included over $40 million in punitive damages.

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