Fenwick Employment Brief

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RECENT FEDERAL CASES IN CALIFORNIA LIMITING WAGE AND HOUR CLASS ACTIONS

A series of recent cases demonstrate a growing tendency among federal courts in the Northern District of California towards greater scrutiny and limitation of wage and hour class actions. For example, in *Lu v. AT&T Services, Inc.*, the federal court upheld a clause in a severance agreement barring plaintiff, a former employee, from participating in or initiating any Fair Labor Standards Act ("FLSA") collective action, or any individual or class actions under the California Labor Code or other state laws, against his former employer, AT&T.

Lu filed an action against AT&T under the FLSA, and on behalf of himself and a class under California wage and hour law, for unpaid wages, unpaid overtime, and various wage-related claims. AT&T filed a motion to dismiss the lawsuit, asserting that a waiver of Lu's claims (signed in his severance agreement) barred him from pursuing the lawsuit. Lu opposed, claiming that the FLSA collective action waiver violated public policy, and was unconscionable and unenforceable. The court held that, although an employee's rights under the FLSA generally cannot be waived, this restriction only applies to the employee's substantive (not procedural) rights, and the right to bring a collective action under the FLSA was a procedural right.

Further, the court rejected Lu's unconscionability argument because he had a voluntary choice whether to sign the severance agreement containing the waiver, and the waiver explicitly stated that it did not release any claims that could not be released as a matter of law. Thus, the court held that the collective action waiver was enforceable and granted the employer's motion to dismiss Lu's claims.

In another recent Northern District case, *Hill v. R + L Carriers, Inc.*, the court granted the employer's motion to decertify a FLSA collective action of trucking dispatchers who asserted claims for misclassification, failure to provide meal and rest breaks, and failure to provide proper wage statements. Because the class members were not similarly situated, and individual inquiries would be required to determine whether they were properly classified, the court concluded class treatment was not proper. It noted that plaintiffs had conceded that two of the three types of dispatchers within the class were properly classified as exempt. As to the third type of dispatcher, the court found that these dispatchers exercised differing levels of discretion and that the circumstances of each dispatcher's employment varied significantly.

For almost identical reasons, the Northern District decertified two more FLSA collective actions in *Beauperthuy v. 24 Hour Fitness USA, Inc.* stating that the class members were not similarly situated and the employer's defenses required individualized inquiries. The two classes consisted of: (1) personal trainers who claimed they were required to perform off-the-clock work and were not compensated for personal-training related "session hours" and (2) managers who alleged they were misclassified as exempt and denied overtime pay. The court found the members' duties, responsibilities, and training substantially varied, and that the allegedly improper overtime practice in issue only affected about half of the class members. Moreover, the court was further persuaded to decertify because the employer's defenses (i.e., the class members would qualify for various exemptions from overtime given the wide range of differing duties and responsibilities) would have required individual inquiries.

These cases signal that the Northern District is taking a closer look at the appropriateness of class action claims in the wage and hour context, realizing that inherent factual disparities may render class treatment improper. While such careful judicial scrutiny is emerging, employers should be cautious recognizing that state courts are still more likely to allow such class actions to proceed.

CONFIDENTIALITY PROVISION IN EMPLOYMENT AGREEMENT VIOLATES EMPLOYEE CONCERTED ACTIVITY RIGHTS UNDER NLRA

Mention the National Labor Relations Act ("NLRA" or "Act") and many instantly think of unions, strikes, pickets, and protests. However, the NLRA has long been applied to other areas of employment law, especially where the rights of employees to engage

in concerted activity are involved. Under Section 7 of the NLRA, employees have the right to engage in concerted activity for the purpose of "mutual aid or protection" to improve their terms and conditions of employment.

A prime example of this is the recent federal decision in *NLRB v. Northeastern Land Services, Ltd.* (First Circuit (Boston)), where the court enforced a National Labor Relations Board ("NLRB" or "Board") order holding that a confidentiality provision in an employment agreement prohibiting disclosure of the terms of employment, including compensation, violated the Act by restraining protected, concerted activity. In that case, Dupuy worked for Northeastern, a temporary employment placement agency that paid its employees directly. Dupuy complained frequently to his employer about various late payment and reimbursement disputes he had with Northeastern. Further, while on an assignment with El Paso Energy for Northeastern, he asked El Paso whether he could work for the company through a different placement agency since Northeastern had delayed in paying him. El Paso declined Dupuy's request. When a subsequent reimbursement dispute arose between Dupuy and Northeastern (namely, a reduction in his daily laptop reimbursement fee), Dupuy sent an email to a Northeastern representative and copied his contact at El Paso requesting that El Paso offset the reduction in the reimbursement fee in issue. Soon after Dupuy sent this email, Northeastern terminated him, claiming he violated the confidentiality provision in his employment agreement by sharing details of his compensation with El Paso.

Dupuy filed an unfair labor practice charge against Northeastern claiming that it violated his rights under the NLRA by enforcing an overbroad and unlawful confidentiality clause that discouraged employees from engaging in protected concerted activity. The NLRB agreed, and when the company appealed to the federal court, the court held that the confidentiality provision had a "chilling effect" on the right to engage in concerted activity (i.e. to protest his wages and pay), and enforced the NLRB order.

This decision underscores the importance of considering the NLRB's historically aggressive defense of Section 7 rights when drafting employment agreements and policies, including confidentiality provisions, using caution to ensure such provisions are not drafted too broadly. It is also important to remember these protections apply in both a union and non-union workplace environment.

NEWS BITES

Denny's Restaurant To Pay $1.3 Million For Strictly Applying Maximum Medical Leave Policy And Alleged Disability Bias

In June, Denny's Restaurant settled an Americans with Disabilities Act ("ADA") bias class action lawsuit filed by the Equal Employment Opportunity Commission ("EEOC"), involving 34 claimants, for $1.3 million. According to the EEOC's complaint, Denny's discriminated against a class of aggrieved employees due to their disabilities by discharging them after refusing to provide additional time off beyond the company's maximum medical leave policy. Denny's policy limited all employees' medical leaves to a maximum of 26 weeks, or in some cases, 12 weeks, and it did not allow for additional medical leave as a reasonable accommodation for disabled employees.

This case serves as a reminder to employers that they should not mechanically implement policies that limit the amount of medical leave an employee may take. Under the ADA, an employee may be entitled to additional unpaid leave as a reasonable accommodation of a disability. This leave can last beyond 12, or even 26, weeks, although an employer need not provide an indefinite leave of absence as an accommodation. Further, the mere existence of a maximum medical leave policy does not entitle employers to refuse to engage in the interactive process to ascertain what may be a reasonable accommodation in the form of additional leave exceeding prescribed policy maximums.

References To Monkeys, Stray Remarks, And Display Of Confederate Flag On Coworkers' Clothing Insufficient To Proceed With Title VII Race Claim

In *Ellis v. Corrections Corporation of America*, four African American nurses filed various claims, including racial discrimination and hostile work environment under both Title VII and 42 U.S.C. § 1981, against their employer, a private "corrections" company that operated a jail. Specifically, as to the hostile work environment claim, plaintiffs alleged that: (1)

their supervisor had a book in her office entitled *The One Minute Manager Meets the Monkey,* which made repeated references to monkeys; (2) coworkers made two "stray comments" about monkeys over the intercom system; (3) a jail physician made a racially offensive comment about the skin color of an inmate; and (4) two coworkers wore clothing that displayed the Confederate flag.

The Seventh Circuit federal court (Chicago) affirmed summary judgment in favor of the company on all claims, finding that a reasonable person would not view the references to monkeys in the supervisor's book as objectively hostile or abusive. In fact, the court pointed out that the book clearly analogized monkeys to workplace problems, not people. Further, the court found the hostile work environment claim could not survive on the remaining isolated incidents and stray comments, as they were not severe enough to support an inference of harassment.

While this case certainly should not be read to encourage such offensive and inflammatory behavior, it demonstrates that the threshold requirement must be met to successfully prevail on such a claim, i.e., sufficiently severe or pervasive misconduct to constitute a hostile work environment.

NLRB Announces Proposed Rules To Expedite Union Elections

On June 21, 2011, the NLRB proposed comprehensive rules that would dramatically change the timing of union representation elections. Currently, it is not uncommon for workers to vote six to eight weeks after a union files a representation petition with the Board for an election. The proposed rules would shorten that period by: (1) allowing electronic filing of petitions and other documents; (2) setting pre-election hearings to begin seven days after a petition is filed; (3) deferring litigation of eligibility issues in certain circumstances until after the election; (4) eliminating pre-election appeals; and (5) requiring employers to provide electronic lists of eligible voters within two, instead of seven, days.

Most unions are supportive of these changes and believe they will usher in a streamlined approach to prompt elections and increase the probability of a successful outcome. However, employers fear this shortened election timeline will impair their ability to exercise their free speech and identify the disadvantages of unionization. The Board's lone Republican, Brian Hayes, perhaps summed up the employer sentiment best in his dissent: "Make no mistake, the principal purpose for this radical manipulation of our election process is to … effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining."

The Board will take 75 days to review comments and replies prior to deciding whether to adopt the proposed rules.

Connecticut Becomes First State To Mandate Paid Sick Leave

Effective January 1, 2012, employers with 50 or more "service workers" in Connecticut must provide up to 40 hours of paid sick leave under a new Connecticut law. A "service worker" is an employee who is paid by the hour and works in one of the 68 occupations defined by the federal Bureau of Labor Statistics Standard Occupational Classification System. Service workers will earn one hour of paid sick leave for every 40 hours worked, with a cap of five days per year, and can carry up to 40 hours of sick leave into the next calendar year. However, they cannot use more than 40 hours of leave in any year. The statute exempts certain industries and nonprofit organizations. In what appears to be an emerging trend, Connecticut joins San Francisco and Washington D.C., both of which require paid sick leave. Similar legislation is anticipated in Philadelphia and Seattle.

Same-Sex Sexual Harassment Claims Fail Because Harassment Was Not Based On Sex

Recently, the California Court of Appeal in *Kelley v. Conco Companies* affirmed the dismissal of a male employee's sexual harassment claim because there was no evidence that the alleged harassment was based on his gender. Kelley, an ironworker, complained to his employer that his male supervisor and coworkers made sexually explicit and demeaning comments and gestures towards him. Further, Kelley alleged that he suffered retaliation from coworkers after he complained.

The comments made by Kelley's supervisor included calling Kelley his "bitch"; telling him that he had a "nice ass" and he would "look good in little girl's clothes"; and making explicit, vulgar comments regarding homosexual sex acts when Kelley was bent over or on his knees to perform work-related tasks. Kelley's coworkers engaged in similar conduct, including telling Kelley that he should perform sexual acts on them and calling him a homosexual epithet, as well as a "bitch" and a "snitch," for complaining to management.

Kelley sued Conco for sexual harassment under the California Fair Employment and Housing Act. While conceding that the conduct and comments were "graphic, vulgar, and sexually explicit," the court held there was no evidence that Kelley's supervisor or his coworkers were homosexual, that the harassment was "motivated by sexual desire," or that the comments were due to Kelley's actual or perceived sexual orientation. Thus, the court dismissed Kelley's claim for sexual harassment, but allowed him to proceed with his retaliation claim. This case demonstrates that although the alleged conduct may be severe or repugnant, courts will steadfastly uphold the essential requirement that the harassment be gender based.

The Happiest Place On Earth? Disney Privacy Class Action

In February 2011, a class encompassing more than 20,000 California Disney employees filed a lawsuit against Disney in the Central District of California for violations of privacy and related causes of action in connection with employee identification cards. These cards contained the encoded social security numbers of each employee/cardholder. Allegedly, Disney was aware that a simple barcode scanner could reveal the social security number contained on each identification card. Further, Plaintiffs alleged that managers kept the cards on their desks and in other places where they could be easily accessed or stolen, thus leaving employees vulnerable to identity theft. Although the matter was dismissed in May, this case reiterates the importance of careful use and display of social security numbers, especially in light of California Labor Code section 226 and California Civil Code section 1798.85 et seq. restricting disclosure of such information.

New OFCCP Directive To Govern Functional Affirmative Action Programs

Under a new Office of Federal Contract Compliance Programs ("OFCCP") directive, effective June 14, 2011, federal contractors and subcontractors may once again use Functional Affirmative Action Programs ("FAAPs") following a 2010 suspension by the Department of Labor ("DOL") of this practice. Under federal law, each covered nonconstruction contractor must develop and maintain an Affirmative Action Plan ("AAP"). Some mutli-establishment contractors have large business or functional units, such as research and development units, which span across the United States or in various regions. Under FAAPs, the functional or business units may establish an AAP to assure OFCCP compliance.

The new directive also outlines certain FAAP requirements, including that the OFCCP Director must approve an agreement to develop and operate under a FAAP. Moreover, to be considered suitable for a FAAP, the functional or business unit must: (1) currently exist and operate autonomously; (2) include at least 50 employees; (3) have its own managing official; and (4) have the ability to track and maintain its own personnel activity. To access the full DOL announcement, please visit: http://www.dol.gov/ofccp/regs/compliance/directives/dir296.htm.

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