Fenwick Employment Brief

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EMPLOYER'S IGNORANCE OF EMPLOYEE'S MEDICAL CONDITION LEADS TO DISMISSAL OF FEHA CLAIM BUT SURVIVAL OF CFRA CLAIM

Avila v. Continental Airlines, Inc. is the latest court decision to highlight the often complex intersection between disability and medical leave laws. Continental terminated Plaintiff Avila for excessive absences from work. Avila claimed that his absences resulted in part from his hospitalization for acute pancreatitis, and he sued Continental for disability discrimination under California's Fair Employment and Housing Act (FEHA) and retaliation for taking protected leave under the California Family Rights Act (CFRA).

Avila claimed that he provided Continental with two medical forms confirming his hospitalization and that he had told his close friends at work, but not his supervisors, that he was suffering from pancreatitis. A California court of appeal upheld the dismissal of Avila's disability discrimination claim because the managers who made the decision to terminate Avila did not know of his alleged disability. In reaching this conclusion, the court observed that an employee's hospitalization, without more information, is insufficient to put an employer on notice that the employee is disabled under FEHA. For example, Avila could have been hospitalized for minor elective surgery or for preventive treatment to address a condition that did not rise to the level of a qualifying disability. Moreover, the court rejected Avila's argument that his disclosure of his condition to co-workers constituted notice to the employer, as there was no evidence he had directly informed his supervisors of the condition or that they were otherwise aware of it.

However, the court reversed the dismissal of Avila's CFRA retaliation claim, holding that a factual dispute existed as to whether Continental was on notice through the medical forms that Avila needed CFRA leave for a serious health condition. The court noted that while calling in sick does not by itself put the employer on notice, a form indicating that an employee needs to be, or has been, hospitalized for three or more days may suffice (Avila's forms indicated that he had in fact been hospitalized for three days). The court observed that CFRA does not provide clear guidance as to what constitutes a request for CFRA leave. However, an employee need not explicitly reference CFRA or utter any magic words if the employer is otherwise notified that the employee suffers from a "serious health condition" that necessitates an absence from work. The court concluded that Avila presented sufficient evidence to place Continental on notice that his leave may have triggered rights under CFRA, and to the extent Continental required further information to confirm the applicability of CFRA and whether Avila in fact sought a CFRA leave, the airline bore the burden to inquire further.

This decision confirms that medical leaves, even those of a short duration, must be handled carefully by employers, and supervisors must be aware of the differences between a disability and a serious health condition within the meaning of FEHA and CFRA.

NEWS BITES

DEBARMENT NOW FIRMLY ON THE TABLE AS PENALTY FOR IMMIGRATION VIOLATIONS

Employing unauthorized workers in the United States can have several ramifications, and the federal government has just added to the list. The Department of Homeland Security is considering debarring several companies from entering into federal contracts because of apparent immigration violations. Although debarment is neither a new enforcement tool nor unique to the immigration arena, this appears to be the first time the DHS is considering an actual debarment order as a penalty for employing unauthorized workers.

FAILURE TO WITHHOLD PAYROLL TAXES CAN LEAD TO JAIL TIME

In *United States v. Easterday,* appellant Jack Easterday, the owner of a nursery home chain, failed to convince the Ninth Circuit to overturn his criminal conviction for his repeated and willful failure to pay employee payroll taxes. Easterday claimed that he lacked the financial ability to comply with his tax obligations, therefore his behavior was not "willful" and thus not criminal. The Ninth Circuit disagreed. This case serves as a reminder that the failure to pay payroll taxes can lead to civil and criminal penalties.

COURT CLARIFIES JOINT-EMPLOYER LIABILITY STANDARD RE: APPLICATION OF FMLA

In *Modlendauer v. Tazewell-Pekin Consolidated Communications Center,* the Seventh Circuit Court of Appeals clarified the general scope of joint-employer liability under the FMLA. Denise Moldenhauer worked for Tazcom, a non-profit entity that provided emergency 911 communications. The City of Pekin and Tazewell County created Tazcom. Moldenhauer sued Tazcom as well as the City and County for retaliation for exercising her right to take FMLA leave. Tazcom was too small to qualify as an FMLA employer; however, if the City and County were found to have a joint-employment relationship (such that City and County employees would have been added to the count), Moldenhauer would have been FMLA-eligible. The Seventh Circuit held that for a joint-employer relationship to exist, each employer must have control over the employee's working conditions. Because the City and County did not exhibit control over Moldenhauer's work or working conditions, the court held that the defendants did not jointly employ Moldenhauer.

PRIME CONTRACTOR NOT LIABLE FOR SUBCONTRACTOR EMPLOYEE'S INJURY

In *Madden v. Summit View, Inc.*, a California court of appeal confirmed the general rule regarding prime contractor liability for injuries to subcontractor employees. Plaintiff Madden, an electrician employed by a subcontractor at a construction site, sued the general contractor, Summit View, for injuries he sustained in a fall on the site. The court held that because there was virtually no evidence that Summit View retained control over the general safety conditions at the site and did not contribute to the condition that caused the fall, it was not liable for the injury.

CONTRACTOR PROPERLY CLASSIFIED DESPITE "AT WILL" LANGUAGE

It is prudent to avoid the use of "at will" language in an agreement with an independent contractor. However, in *Varisco v. Gateway Science and Engineering*, a California court of appeal upheld contractor status for, and rejected the wrongful termination and other employment claims of, the plaintiff who claimed that he was misclassified as a contractor based in part on the presence of "at will" language in his agreement with Gateway. Notwithstanding this positive outcome, we continue to recommend that businesses avoid such "at will" language in contractor agreements. However, the decision is a welcome reminder that courts will not rely solely on one factor in assessing proper worker classification, and will look at many factors and the working relationship as a whole in making the determination.

SPLIT OF AUTHORITY CONTINUES RE: VALIDITY OF FMLA RELEASES

We have previously reported on *Taylor v. Progress Energy, Inc.*, [http://www.fenwick.com/publications/6.5.4.asp?mid=26] where the Fourth Circuit Court of Appeals held that an employee may not waive, as part of a separation agreement and release of claims, prospective **or retrospective** FMLA rights absent approval of the release by a court or the federal Department of Labor. Both the Fifth Circuit Court of Appeals, as well as the DOL itself, have taken a different view and held that retrospective FMLA rights can be released even without court or DOL approval. Now, the Seventh Circuit Court of Appeals, in *Butler v. Merrill Lynch,* has joined the Fifth Circuit and DOL interpretation of the applicable FMLA regulations. Thus, we continue to have a split of authority in this area, and the United States Supreme Court has refused to take up the matter (at least in its upcoming term). Proposed new regulations by the DOL to resolve the ambiguity are cycling through the system, but this issue of the enforceability of releases of past FMLA rights clearly remains a moving target. Neither the Ninth Circuit Court of Appeals (covering California and other Western states) nor the California state courts have ruled on this issue.