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Fenwick Employment Brief

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Discrimination Claims Not Released by Standard Form Workers' Compensation Release Agreement

In a ruling generally unfavorable for employers, the California Supreme Court nonetheless ended confusion for employers created by earlier conflicting lower-court decisions by holding that a *standard form* release of workers' compensations claims does not also release employment discrimination and other civil claims. In *Claxton v. Waters*, Claxton filed a workers' compensation claim for, among others, alleged injury to her psyche caused by sexual harassment. About a year later, she filed a civil lawsuit for sexual harassment in violation of the Fair Employment and Housing Act ("FEHA"). Later, the parties settled the workers' compensation claim for $25,000. Claxton signed a preprinted compromise and release form that released "all claims and causes of action, whether now known or ascertained, or which may hereafter arise or develop as a result of said injury." The release made no mention of the civil lawsuit. The trial court ruled that the workers' compensation release covered the civil claims for sexual harassment and dismissed the lawsuit. On appeal, the Supreme Court held that the preprinted form used in settling workers' compensation claims only releases claims within the scope of the workers' compensation system and does not apply to claims asserted in separate civil lawsuits. The court further opined that the employer must obtain a separate release of the civil claims by a settlement and release agreement. Accordingly, employers desiring a "global" release of civil and workers' compensation claims must obtain a very specific release or releases, covering both the workers' compensation and the civil claims.

Alleged Acts of Harassment Occurring Outside of the Actionable Time Period May Be Knitted Together with More Recent Incidents to Support Hostile Environment Claim

In *Porter v. California Department of Corrections*, the federal Ninth Circuit Court of Appeals (covering California and other Western states) reversed the trial court's dismissal of Porter's sexual harassment claim on the ground that it was time-barred. Porter initially filed a complaint with the federal Equal Employment Opportunity Commission alleging that, over several years, two supervisors retaliated against her for refusing their demands for sex, and created a hostile work environment by a variety of verbal and physical conduct. The more severe conduct occurred in the earlier period. Some minor offensive conduct occurred within the period covered by the Title VII statute of limitations. In reversing the dismissal of Porter's suit (and allowing it to proceed to a jury trial), the Ninth Circuit held that it is appropriate for a Plaintiff to knit together evidence of alleged harassment occurring outside the 300 day "timely filing period" (that Title VII prescribes) with such other acts of alleged harassment occurring during the timely filing period to establish a hostile environment.

Significantly, the Ninth Circuit concluded that, standing alone, the timely acts of alleged harassment were not sufficiently severe or pervasive to support a hostile environment claim. Knitting together both the untimely and timely acts of alleged harassment under a so-called "continuing violation" theory, however, allowed Porter to proceed to trial on the hostile environment claim. To further justify the connection of

the untimely and timely acts of alleged harassment, the Ninth Circuit also found that the untimely and timely acts of alleged harassment were the "same type" of intimidating and demeaning conduct by the same supervisors.

While generously knitting untimely and timely acts together to find a current timely violation, the Ninth Circuit was nonetheless clear that the employer would not be liable for any acts of harassment occurring more than 300 days before Porter had filed her charge of discrimination. Also at trial, the court observed that the employer will be able to present evidence that Porter failed to avail herself of the complaint resolution procedure. In Title VII cases, a plaintiff's failure to use the existing complaint procedure may be a defense to the claim. The *Porter* case is a stark reminder of the risk employers face for events that occurred years ago where supervisors engage in continuing harassment. To avoid such exposure, employers should implement a sexual harassment policy (including a complaint resolution procedure) and train all employees about the policy.

Farmers Insurance Settles Class Action Overtime Suit for $210 Million

A long-running legal battle between Farmers Insurance and a class of insurance adjusters ended with Farmers's agreement to pay $210 million to settle the case. In *Bell v. Farmers Insurance Exchange*, the plaintiffs claimed they were misclassified as exempt and therefore entitled to overtime. The case was the subject of two reported appellate decisions that broke new legal ground regarding the scope of the administrative exemption in California, concluding that the Farmers insurance adjusters were not exempt. At trial, the jury awarded plaintiffs $90 million for unpaid overtime wages. Plaintiffs were also entitled to another $80 million for attorneys' fees, costs and interest. The other $40 million of the $210 million settlement covered unpaid overtime for the remaining period of time since the original trial. The *Bell* case settlement is a wakeup call for California employers who have not carefully reviewed and audited their job positions to ensure that all exempt employees are properly classified. It is also worth mentioning that one of the Farmers insurance adjusters has filed a legal malpractice lawsuit against the plaintiffs' attorneys alleging that they should have obtained an even larger award under the state's unfair competition law.

Employer Compels Disclosure of Internet Critic's Identity in Unfair Competition Case

In an unpublished case of first impression, an employer was allowed to learn the identity of a former employee who anonymously criticized the company on an internet bulletin board. In *ViroLogic v. "Doe*," a California Court of Appeal in San Francisco ordered the disclosure because the employer's claim that the employee may have misappropriated trade secrets outweighed the former employee's right of privacy and "free speech." Much of the court file is "sealed" and not available for public review. In general terms, the employer alleged the employee posted proposed business and financial strategies on the Internet. Specifically, the company asserted trade-secret theft by virtue of Doe's posting of company revenue information. In response, Doe disputed the confidential nature of the information he disclosed and asserted that he exercised his free-speech rights on a matter of public interest. Ruling in the employer's favor, the court ordered Doe's identity disclosed to the employer so that it could proceed against him or her with the claim for misappropriation of trade secrets. The *ViroLogic* decision is a significant "win" for employers confronted by anonymous disclosures of trade secrets on the Internet. Unfortunately, the decision is unpublished and may not be cited to the courts in other matters.

"Forged" Warning Documentation Leads to $2 Million+ Jury Verdict

Overly aggressive steps to "document" an employee's performance problems as a prelude to his termination proved the downfall for an employer in a recent jury

trial. In *Halloran v. Pilkington*, plaintiff was a manager of raw materials at the employer's glass and glazing manufacturing plant in Lathrop, CA. The company terminated Halloran in 2001 for unsatisfactory performance after 32 years of service with Pilkington and its predecessor. Halloran sued the employer, his managers and the head of human resources for, among other claims, age discrimination. Halloran asserted that the plant manager had instructed other managers to get rid of him because of his age. He further asserted that his signature and that of his supervisor were forged on the negative performance review used as the basis of his termination. Halloran accused the head of human resources of the forgery, stating that she was the only person with access to his personnel file. During trial, Halloran's supervisor admitted the signatures were forged. The jury in Stockton, CA (a comparatively favorable forum for employers) decided in the employee's favor and awarded him over $2 million for economic, emotional distress and punitive damages. In addition, the court awarded plaintiff over $700,000 in attorney's fees, costs and interest. The employer has filed an appeal. Generally, for a warning to be valid, employers do not need an employee's signature on the warning or other performance documentation. Employers commonly seek an employee's signature as acknowledgment of receipt. If an employee refuses to sign, the manager should handwrite a note on the documentation that the employee refused to sign, and sign and date the note. Employers should never forge a signature.