Fenwick Employment Brief

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COURT OF APPEALS AFFIRMS EMPLOYEE'S WHISTLEBLOWING RETALIATION CLAIM, BUT REJECTS SEXUAL HARASSMENT CLAIM

In *Mokler v. County of Orange*, a California Court of Appeal held there was sufficient evidence to support a plaintiff's retaliatory dismissal claim, but rejected her sexual harassment claim as not being sufficiently severe or pervasive to alter the conditions of her employment. The county claimed the plaintiff was terminated for failing to follow bid procedures, thereby favoring some vendors over others. However, the plaintiff alleged there was a gender based hostile work environment in violation of the Fair Employment Housing Act, relying upon three occasions where she was harassed by a board member. Utilizing the "totality of the circumstances test," the court noted (1) the harasser was not the plaintiff's supervisor; (2) one instance involved only "an isolated, boorish comment" regarding the plaintiff's marital status and another did not occur at work; and (3) the last instance involved a brief touching that did not "constitute an extreme act of harassment." These events occurred over a five week period, and, although the behavior taken as a whole was "rude, inappropriate, and offensive," the acts were insufficient to establish a pattern of continuous, pervasive harassment as required under FEHA.

As to the whistleblower claim, the plaintiff had independently contacted a government official at the state department and complained that a proposed reorganization was not in compliance with state department requirements. Her employer argued that she was terminated after an internal investigation showed she breached county procurement procedures by improperly favoring a particular vendor. The court held that a jury could reasonably infer that the proffered reasons were pretextual because the county failed to mention to the employee prior to her termination that she had done anything irregular and it suddenly changed her performance evaluation after her complaint to the state official.

This case shows how retaliation claims can survive an underlying harassment claim and it serves as an important reminder that poor performance by an employee should be well documented and timely communicated to the employee to minimize claims of "pretext."

COURT OF APPEALS HOLDS COMPANY'S DEDUCTIONS FOR ABSENCES DID NOT DEFEAT EXEMPT STATUS

In *Sumuel v. ADVO, Inc.*, a California Court of Appeal affirmed a lower court ruling that there were no triable issues as to whether an employer made impermissible deductions for absences related to illness for employees classified as exempt. In this case, the employer's disability policy required California employees who were absent more than seven consecutive days to apply for State Disability Insurance. While the employer deducted the insurance disability payments from the employee's salary, the total amount the employee received each pay period remained the same. The plaintiff alleged this policy violated the "salary basis test" for exempt employees because the deductions were not made according to a bona fide disability plan. The court rejected this claim, holding that the deductions were taken as part of a bona fide plan, practice or policy of providing compensation for loss of salary occasioned by sickness or disability. Additionally, the plan did not violate the "salary basis test" for "exempt" status because it was communicated to the employees, operated as described to the employees, was administered impartially, was not designed with the intent to evade overtime pay requirements, and complied with the requirements in the DLSE Enforcement Manual.

Because disability policies and wage deductions for exempt employee status can be problematic, employers should carefully examine their own programs to ensure compliance with state and federal requirements.

NEWS BITES

California Appellate Court Affirms Injunction to Protect Employees from Workplace Violence

In *Puthukkeril v. Allen*, a California Court of Appeal upheld the right of an employer to protect its employees from "credible" threats of workplace violence and affirmed a two year injunction prohibiting a former employee from harassing or threatening current employees. The former employee made statements that people were going to die from using the company's product, called the company's hotline after his resignation warning of death, repeatedly called a co-worker and asked her out despite her declining his requests, and made statements that "God's will shall be done" and that "this is bigger than me." Believing the behavior to be threatening, the employer installed security systems in the homes of the individuals contacted by the former employee and notified the local police.

In addition to individual employees who may obtain an injunction for threatened violence, employers may also similarly protect their employees. Employers need to show that there is a "credible threat of violence", *i.e.*, that the individual has made statements or behaved in such a manner that a reasonable person would fear for his or his family's safety.

US Citizenship and Immigration Services Has Revised I-9 Form and Types of Acceptable Documents

In complying with a 1997 regulation, the USCIS revised the I-9 form removing five documents as acceptable and adding one new document that an employer may accept as proof of an employee's identity and employment eligibility. Additionally, the new I-9 form no longer requires employees to provide their Social Security Number if their employer participates in the Department of Homeland Security's E-Verify program, which is the DHS's electronic employment eligibility verification system. USCIS is encouraging employers to start using the new I-9 form immediately for all new employees although it is not required until December 26, 2007. Employers using the old form after that date may be subject to penalties and fines. Employers do not need to complete a new I-9 form for current employees with proper authentication. However, the new form should be used if re-verification of employment eligibility is required. The new I-9 form is available at: http://www.uscis.gov/files/form/I-9.pdf and a useful fact sheet regarding the new I-9 is available at: http://www.uscis.gov/files/pressrelease/FormI9FS110707.pdf.

Federal Court Holds "Prevention Doctrine" Only Applies to Commissions Already Earned

In *Meson v. GATX Technology*, the Fourth Circuit Court of Appeals (Richmond, Virginia) held that a plaintiff is not entitled to commissions under the "prevention doctrine" when the employer's actions merely prevent the employee from "attempting" to earn a commission, rather than prevent the employee from receiving "already earned" commissions.

In this case, the plaintiff was a regional sales manager who sold leases for information technology equipment out of her employer's Virginia office. Commission eligibility required a "commission event," which is a transaction that generated additional revenue. It also required the sales representative to be employed by the company on the date the commission became payable. The plaintiff argued that she was wrongfully denied a commission payment when her company was acquired by another and she was not hired by the purchaser, thereby preventing her from completing commission events on leases in her portfolio. The court held that the sale of the business did not "prevent" the employee from receiving commissions already earned because the employee could not show that she had any leases that were in the middle of a commission event, but merely speculated that such an event would occur.

Federal Court Holds that Termination for Missing Work to Attend Religious Event Violated Title VII

In *EEOC v. Southwestern Bell Telephone, L.P.*, two employees, who were Jehovah's Witnesses, requested one day of leave to attend an annual convention required by their religious beliefs. The employees requested the leave six months prior to the event. The day before the convention, the plaintiffs were informed by the defendant that the leave request was denied, although the defendant had granted similar absence requests in previous years. When the plaintiffs nevertheless attended the convention instead of reporting to work, they were suspended upon their return to work and ultimately fired. The jury found unlawful religious discrimination in violation of Title VII and awarded the plaintiffs $756,000. Title VII requires an employer to accommodate religious beliefs of an employee unless it can show undue hardship to the business. While the employer argued "undue hardship" based on emergency overtime costs incurred when the two employees failed to report to work, this argument was rejected as insufficient hardship.

$4.1 Million Jury Award Upheld Against Former Employees for Unfair Competition and Trade Secret Violations

In *Navigant v. Wilkinson,* the Fifth Circuit Court of Appeals (New Orleans, Louisiana) affirmed a jury award of $4.1 million in damages against two employees who disclosed confidential information in their attempts to profit from the sale of a division of the employer. The employees were accused of procuring an office lease for their employer while at the same time secretly negotiating a deal to sell a division of their employer's business to a company that would occupy the leased offices and employ the defendant employees. Significantly, the employees did not notify their employer of the purchaser's offer to buy the division and, in their proposal to the offering company, they revealed confidential information in violation of their confidentiality agreements.