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Ninth Circuit Reverses Leading California Wage/Hour Case

In a decision which could impact how California employers classify customer service positions for overtime eligibility, the Ninth Circuit has reversed one of California's leading federal wage and hour cases. In *Bothell v. Phase Metrics, Inc.,* the plaintiff was a field service engineer who was responsible for installing, troubleshooting and maintaining Phase Metrics' products at customer sites. The company classified the position as exempt, but Bothell sued for overtime compensation. The key issue in the case was whether Bothell's "primary duty" while employed at Phase Metrics involved the performance of non-manual work directly related to management policies or general business operations of Phase Metrics. The lower court had granted Phase Metric's summary judgment motion, holding that Bothell's customer service work was ancillary to Phase Metrics' main activities (and therefore was not production work) and was of substantial importance (and therefore was administrative). Noting that not all customer service work is exempt, the Ninth Circuit held that both of the lower court's conclusions were premature. The court found that Bothell had presented evidence which could support a finding that he was simply a highly-skilled repairman, in which case he did not engage in "running the business itself or determining its overall course or policies." Moreover, if he was simply a repairman, the court held that Bothell's work could not be considered "substantially important to the management or operation of the business." Because these factual issues remained in dispute, the court reversed the grant of summary judgment and remanded the case for trial. This decision significantly impacts employers making classification decisions regarding their administrative employees—particularly those employees engaged in customer service. Employers cannot rely on the fact that an employee provides customer service as determinative of the issue of exempt/non-exempt status, but must do an in-depth analysis of the duties of each position to see whether it is eligible for exempt status.

Court Considers Employees of Foreign Affiliate to Determine if U.S. Company Meets Title VII Size Threshold

The Ninth Circuit has held that a U.S. company with fewer than 15 employees may nonetheless be covered by Title VII if the company operates a foreign corporation with a sufficient number of employees. In *Kang v. U. Lim Am., Inc.,* a Korean employee of a California-based company with six employees sued for national origin discrimination and harassment. The district court granted the company's summary judgment motion because the company did not meet the 15-employee threshold for application of Title VII. The appellate court reversed, finding that the California company and a 150-employee Mexican company that it owned and operated constituted an "integrated enterprise," thereby triggering application of Title VII. In making this ruling, the court looked at the two companies' interrelation of operations, common management, centralized control of labor relations and common ownership and financial control. The court noted that the fact that the employees at the Mexican company are Mexican citizens who are not entitled to protection under Title VII did not preclude counting them for purposes of determining whether Title VII applied to the U.S. arm of the company. Small U.S. companies with additional foreign operations should take special note of this decision, which extends the scope of Title VII.

Importance of Job Function, Rather Than Time Spent Performing the Function, Determines If It Is "Essential" Under ADA

In a decision that clarifies what is an "essential" job function under the Americans with Disabilities Act (ADA), a federal appellate court recently upheld the termination of an employee who was unable to perform several functions which, though infrequently required, were critical to the safe performance of his job. In *Dropinski v. Douglas County,* the County placed a truck driver on leave after his physicians advised him to avoid frequent bending, twisting, squatting or lifting more than 40 pounds following a work-related injury. When he could not return to work unrestricted after 15 months, the County terminated his employment. The driver filed ADA and state law claims, alleging that the specific tasks he could not perform were "marginal" tasks which could, as a reasonable accommodation to him, be allocated to other employees. The court rejected his arguments, holding that when determining whether certain aspects of a job description are "essential functions," one should look at the consequence of not requiring the employee to perform those tasks, rather than the amount of time actually spent doing the tasks. Because the driver was often required to work alone, the County could not guarantee that help would always be available to him, and he would pose a safety risk if unable to handle problems that arose. This case reminds employers that when determining whether a particular job duty is "essential," they should consider not only the time spent doing the task, but also the potential consequences should the worker be unable to perform the task when necessary. It further reaffirms that employers are not required to assign other workers to assist disabled employees in performing essential job functions.

Federal Court Holds that Rehabilitation Act Covers Federal Contractors Regardless of Size

A federal appellate court has ruled that even small employers that receive federal funding are subject to the provisions of section 504 of the Rehabilitation Act of 1973, which prohibits disability discrimination by federal contractors. In *Schrader v. Fred A. Ray, M.D.,* an employee with cancer alleged that the employer terminated her employment because of her disability. The district court had granted the employer's summary judgment motion on the basis that the company was not subject to liability because it employed less than 15 employees, which is the threshold coverage requirement for the Americans with Disabilities Act (ADA). The Tenth Circuit Court of Appeal reversed,

holding that although the Rehabilitation Act incorporates the ADA's standards for disability discrimination, the ADA's 15-employee threshold does not extend to the Rehabilitation Act. Rather, the court held that the Act applies to all entities that receive federal funds, regardless of their size. Thus, it remains important for small employers that receive federal funds to be aware of and comply with the provisions of the Rehabilitation Act with respect to disabled workers.

Fenwick & West to Present Breakfast Briefings on Recent Developments in Employment Law

The Fenwick & West Employment and Labor Group invites you to attend one of two informative seminars that will focus on "hot issues" in employment law, including the recent rise in employment-related unfair competition suits, investigating retaliation and sexual harassment cases and the impact on employment law of the new Sarbanes-Oxley securities law. The seminars will run from 8:00-10:00 a.m. on September 10th at the Santa Clara Marriott, and September 12th at the Palace Hotel in San Francisco. For questions or registration information, please e-mail: registration@fenwick.com or call our registration hotline at 650.858.7800.