FENWICK & WEST LLP

Weekly Employment Brief

October 17, 2003

Dan McCoy	Contributor	650.335.7897
Shawna Swanson	Co-Editor	415.875.2487
Trey Wichmann	Co-Editor	415.875.2418

Worker Terminated for Shopping During Sick Day May Take FMLA Interference Claim to Trial

An Iowa federal district court recently held that a worker terminated when her employer learned she went shopping on a sick day may take her claim of interference with a protected leave to trial. In *Jennings v. Mid-American Energy Co.*, Wendy Jennings worked for Mid-American ("MEC") as a customer service associate. During her employment, Jennings developed several autoimmune disorders, including rheumatoid arthritis, which caused swelling and discomfort in her hands. During one shift, the swelling in Jennings' hand became unbearable, and she asked for and received a one-day leave of absence. On her way home from work, Jennings stopped at a toy store to purchase a gift for a co-worker's baby shower the next day. Co-workers observed Jennings at the toy store and reported their observations to MEC management. MEC gave Jennings the option to resign or be terminated for misuse of leave. Jennings chose to resign, then filed suit against MEC for interference with intermittent leave under the Family and Medical Leave Act ("FMLA").

To succeed on a FMLA interference claim, a plaintiff must prove that: (1) she was entitled to intermittent leave because of a serious health condition that renders her unable to perform her essential job functions; (2) she took leave for its intended purpose; and (3) upon returning from leave, her employer refused to reinstate. In its motion to dismiss, MEC argued that it did not interfere with Jennings' leave because she did not use her leave for its intended purpose, as evidenced by her admitted trip to the toy store. The court denied MEC's motion, and accepted Jennings' argument that a reasonable jury could conclude she was unable to perform the essential functions of her job, but that she was nevertheless "capable of stopping at a store to purchase one item on her way home." Indeed, the court concluded; "[t]he FMLA contains no requirement that an individual on intermittent medical leave must immediately return home, shut the blinds, and emerge only when prepared to return to work."

The *Jennings* decision serves as a stark reminder to employers to proceed cautiously with terminations and/or forced resignations based on alleged misuse of protected leaves. Although evidence that an employee engaged in other activities during a sick leave may seem like a sufficient basis to terminate, employers must investigate such evidence thoroughly before taking severe adverse action.

Employer's Threats Support Finding of Willfulness and Additional Year of Overtime Damages

The Ninth Circuit Court of Appeals (encompassing California and other western states) recently held an employer's blunt statements to employees regarding overtime compensation supported the imposition of an additional year of damages against the employer. In *Chao v. A-One Medical Services*, Labor Secretary Elaine Chao brought a Fair Labor Standards Act ("FLSA") overtime claim on behalf of eight employees of two separate home health care agencies in Washington state. The affected employees worked for both agencies but were not paid overtime because they did not work over 40 hours a week at one particular agency. On the Secretary's motion for summary judgment, the district court concluded the two separate home health care defendants were "joint employers" for purposes of FLSA liability, and awarded the affected employees back wages and liquidated damages for violation of overtime laws. The court also ruled the employers willfully violated the FLSA's overtime provisions, which resulted in the recovery of three rather than two years of overtime compensation. On appeal, the Ninth Circuit affirmed the liability determination as to some of the affected employees, as well as the willfulness finding. The court's discussion of willfulness is instructive.

The FLSA entitles workers to recover overtime compensation earned during the two years prior to filing a complaint. However, courts will extend the damages period to three years if the employer willfully violated the FLSA's overtime provisions. In *Chao*, the home health care agencies were closely aligned in terms of supervision, operation and finances. These facts, together with testimony that employees provided services on behalf of both entities, supported both courts' conclusions that the defendants were joint employers. One affected employee testified she complained to her manager about being denied overtime, and the manager responded that she "was technically working for two different companies," and would have to "work over 40 hours a week at each company to receive [overtime] pay." Another employee made a similar complaint, to which her manager responded: "[you should] think of all the blessings [you are] getting," and that the company "would go broke if [it] had to pay the nurses . . . for their overtime." Yet another employee made informal demands for overtime, and a defendant told her if overtime wages "ever became a problem, [it] would file for bankruptcy." The Ninth Circuit concluded the statements supported a finding of willfulness, and a third year of damages (based, in part, on the defendants' failure to controvert the damning testimony).

This decision amplifies the risks employers (especially start-ups, where resources are typically severely constrained) face when they make candid admissions to employees that their tenuous financial situation prohibits compliance with overtime laws. Indeed, the employers in *Chao* may have thought they were giving "good faith" explanations for their inability to pay overtime, when in fact they were building a record for the court to find a willful FLSA violation. Employers should treat all informal/internal complaints about overtime and other wage issues with respect and care, and avoid the cavalier statements that doomed the employers in *Chao*.

Governor Davis Helps Businesses With Veto of Ban on Employment Arbitration

In his five years in office, Governor Davis has enacted a substantial body of legislation deemed "pro-employee" and "anti-business" by many. Thus, it came as a surprise when Davis recently vetoed legislation that would have invalidated employer/employee agreements to arbitrate California Fair Employment & Housing Act ("FEHA") claims. Given that the majority of employment discrimination claims filed in this state are FEHA claims, and in light of the increasing popularity of workplace arbitration agreements, the legislation, if passed, would have dealt a serious setback to employers' efforts to reduce litigation costs and streamline their dispute resolution processes.

Now, the veto allows employers to continue to implement and enforce workplace arbitration agreements that meet state and federal law requirements. Specifically, a valid agreement to arbitrate FEHA claims must: (1) provide that the employer agrees to pay those arbitration costs (but not attorney fees) the employee would not have incurred by filing the lawsuit in court; (2) mutually bind (with some exceptions) the employer and employee to arbitrate all workplace disputes; (3) give employees a right to take reasonable discovery to prepare their claim for a hearing; and (4) not limit the type or amount of recovery an employee could otherwise seek in court for a FEHA violation. These primary requirements, established by the California Supreme Court in 2000, have been strictly scrutinized by the courts over the past few years. As a result, employers must be vigilant as they draft and amend their agreements to comply with state law.