Fenwick Employment Brief

June 10, 2008

Victor Schachter Editor 650.335.7905
Dan Ko Obuhanych Co-Editor 650.335.7887

Fenwick
FENWICK & WEST LLP

U.S. SUPREME COURT DETERMINES THAT CIVIL RIGHTS ACT COVERS RETALIATION CLAIMS

In *CBOCS West, Inc. v. Humphries*, the United States Supreme Court decided (in a 7-2 vote) that 42 U.S.C. § 1981, which was enacted shortly after the Civil War as part of the Civil Rights Act of 1866 to prohibit race discrimination, also encompasses claims of retaliation in employment.

Hedrick Humphries filed a race discrimination and retaliation lawsuit against his former employer, claiming that he was terminated because of his race (African-American) and because he complained to management that an African-American co-worker was also dismissed for race-based reasons. His Title VII claims were dismissed on procedural grounds, but the appeals court allowed his Section 1981 retaliation claim to proceed to trial. After appeal, the Supreme Court held that while Section 1981 does not explicitly prohibit retaliation (like Title VII), its past case decisions and subsequent legislative actions support the position that retaliation is unlawful under Section 1981.

This decision confirms the ability of plaintiffs who allege retaliation claims based on race-based conduct to seek relief either under Title VII or under Section 1981. Section 1981 provides plaintiffs with several advantages to a Title VII lawsuit: (1) Section 1981 claims can be brought directly in court, with no requirement that an individual first file an EEOC (or FEHA) charge; (2) Section 1981 applies to all employers, regardless of size, whereas Title VII only applies to employers with 15 or more employees; (3) Section 1981 claims may be subject to a much longer statute of limitations than Title VII claims; and (4) Section 1981 does not contain any limitations on the amount of damages that may be recovered by plaintiffs under Title VII.

Humphries is a continuation of the Supreme Court's recent cases favorably construing issues of workplace retaliation for plaintiffs, and should be a significant concern to employers. Workplace retaliation claims have been increasing at an alarming rate – in 2007, retaliation claims were included in about a third of all charges filed with the EEOC, and the total amount of retaliation claims filed were the most ever (18% more than the previous year). Employers should be especially vigilant to properly evaluate and address possible retaliation issues and concerns in their workplaces and in their employment decisions.

UNION SPONSORS WAGE AND HOUR LAWSUIT AS MEANS TO ORGANIZE WORKFORCE

A California appellate court upheld the right of a labor union to sponsor a class action wage and hour lawsuit as a means to organize employees, and held that any alleged conflicts between the union's interests in organizing the workforce and the employees' interests in addressing wage and hour violations can be waived in litigation.

In *Sharp v. Next Entertainment, Inc.*, the Writers Guild of America believed that employees of reality television programs were not being properly paid overtime and were not being provided with break periods in accordance with California law. After a series of meetings with the unrepresented employees, the Guild agreed to subsidize the cost of a lawsuit because it believed that the litigation would facilitate the Guild's unionizing campaign. The Guild utilized its regular labor attorneys to pursue the class litigation against the reality television companies.

During the litigation, the employers moved to disqualify the attorneys retained and paid for by the Guild, on the ground that the interests of the Guild (furthering its unionizing activities) conflicted with

the interests of the plaintiffs (maximizing a fair, adequate and reasonable resolution of their wage and hour claims). The court held that no disqualification was necessary because any potential conflicts were properly waived by the Guild and by the plaintiffs. In its decision, the court implicitly validated the union's actions in sponsorship the lawsuit, recognizing that "[w]age and hour litigation is often financed by labor unions to support their members."

This case illustrates that a union will use any actual or perceived violation of law or unfair treatment to attempt to gain a foothold in the workplace, and will engage in various methods to further its organizing activities, even if it means pursuing private litigation in the absence of a collective bargaining agreement.

MERE "TEMPORAL PROXIMITY" INSUFFICIENT TO ALLOW DISCRIMINATION AND RETALIATION CLAIMS TO PROCEED

In *Arteaga v. Brink's Incorporated*, the plaintiff was employed by an armored truck company and was being investigated internally for missing cash. During the investigation, the employee for the first time complained that he suffered from various physical ailments and stress and filed a claim for workers' compensation benefits. Just days after the claim was filed, the employee was terminated due to the cash shortages.

The former employee sued alleging both disability discrimination and retaliation for filing a workers' compensation claim. The California appellate court upheld the dismissal of both claims, finding that the employer's reason for termination – the lost confidence in the employee due to the missing cash – was a legitimate reason for the discharge, and there was insufficient evidence that the termination was "pretextual." Importantly, the court noted that the mere closeness in time between the filing of the workers' compensation claim and the discharge was not enough to allow the claims to proceed to a jury, because there was no other evidence of retaliation or discrimination. The court found that the employer raised questions about the employee's performance before he engaged in protected activity and the subsequent discharge was based on those performance issues.

This involves a rather common scenario – employees who raise "protected" activity or status issues only after being faced with possible termination – and highlights the importance of timely, adequate and consistent internal investigations. As the *Arteaga* court cautioned: "An employee, fearing that his job is on the line, may not raise an old wound as a preemptive strike to escape appropriate discipline or discharge."

NEWS BITES

CALIFORNIA "HANDS FREE" CELLULAR PHONE LAW IS HERE

Effective July 1, 2008, California drivers over the age of 18 will be required to use a "hands-free device" when using their cell phones. With the addition of penalty assessments and court costs, fines for violations can be around $75 for a first offense and $175 for a second offense. The law contains limited exceptions when a wireless telephone needs to be used for emergency purposes and for certain agricultural vehicle drivers who use two-way radio devices. Drivers under the age of 18 cannot use a cellular phone even with a "hands-free device."

At a minimum, employers should carefully reexamine their employee handbooks and company policies to ensure compliance. Employers who should also consider prohibiting the use of all cell phones while driving on company time or for company business, or alternatively, provide hands-free devices to employees, if they do not do so already. The California Department of Motor Vehicle has posted a FAQ on the new law at: http://www.dmv.ca.gov/cellularphonelaws/.

PREMIUM HOLIDAY PAY MAY BE "CREDITED" AGAINST OVERTIME

While not required by law, many employers provide premium pay (such as "time and a half" or "double time") to employees who work on designated holidays. In *Advanced-Tech Security Services, Inc. v. Sup. Ct.*, a California appellate court determined that for purposes of calculating overtime for hourly employees, under California law premium holiday pay need not be included in computing an employee's "regular rate" and can be credited against any overtime obligation for that workweek.

For example, if an hourly employee works 8 hours on a holiday at 1.5 times the regular hourly rate, and works a total of 2 hours of overtime during that workweek, the premium holiday pay earned by the employee during that workweek (8 hours) can be "credited" against the overtime pay (2 hours). In this example, no overtime would be owed to the employee.

Employers should be cautious to avoid creating any "contractual" rights in their handbooks and policies which would otherwise preclude them from crediting premium holiday pay against overtime.

REMINDER FOR EMPLOYERS WHO HIRE UNPAID INTERNS OR TRAINEES

Now that summer is officially here, many employers may be considering hiring unpaid student interns or trainees. Please remember California's especially strict requirements in this area.

Generally, for an intern or trainee to be free from the requirements of California's wage and hour laws (including minimum wage), the position must be an essential part of an established course of an accredited school or of an institution approved by the government to provide training for licensure or to qualify for a skilled vocation or profession. The program: (1) may not be for the benefit of any one employer; (2) a regular employee may not be displaced by the trainee; and (3) the training must be supervised by the school or a disinterested agency.

If any California employer plans to hire an unpaid intern or trainee, the company should enter into: (1) an agreement with a school which meets the requirements of the law and which indemnifies the company should any legal issues arise about the classification of the intern or trainee; (2) an agreement with the intern or trainee which disclaims any employment relationship; and (3) a nondisclosure agreement with the intern or trainee which prohibits the improper use or disclosure of trade secrets, proprietary and confidential information.

Employers who hire minors for the summer should also be aware that minors are limited in the number of hours they may work, may only work during specified times, and employers must maintain work permits for minors.

NEW FEDERAL GENETIC DISCRIMINATION LAW

On May 21, 2008, President Bush signed the Genetic Information Nondiscrimination Act, which among other things: (1) prohibits employers subject to Title VII from discharging, refusing to hire, or otherwise discriminating against employees or job applicants on the basis of genetic information; (2) prohibits employers from collecting genetic information and allows workplace genetic testing in only very limited circumstances; and (3) requires genetic information possessed by employers to be safeguarded. The employment-related provisions of the law go into effect on November 21, 2009.

While California law already prohibits genetic discrimination in employment, this new law contains additional requirements regarding the safeguarding of genetic information by employers. Multistate employers should also take note of the possible impact of this law on operations outside of California.

ABORTION DISCRIMINATION PROHIBITED BY EMPLOYMENT DISCRIMINATION LAWS

In *Doe v. C.A.R.S.*, the Third Circuit Court of Appeal (which has jurisdiction over several northeastern states) recently determined that the Pregnancy Discrimination Act prohibits discrimination against a female employee because she has exercised her right to have an abortion, finding that abortion is medical condition "related" to pregnancy. In *C.A.R.S.*, the plaintiff was allowed to proceed with her claim because there was evidence that her termination was due to her having an abortion: she was terminated only 5 days after having a surgical abortion; her boss suggested that he disapproved of her abortion (*i.e.*, he made the comment that "[s]he didn't want to take responsibility" for her actions); and the employer had a separate set of leave rules for every employee.

While this case doesn't have any binding precedential value in California, California courts would likely similarly hold that abortion discrimination is prohibited under both Title VII and state law. This case also stresses the importance of having uniformly applied leave policies, as a lack of consistency can be used to infer discrimination or retaliation.

CALIFORNIA "KIN CARE" LAW APPLIES TO NON-TRADITIONAL SICK LEAVE POLICIES

California's "kin care" leave law, Labor Code § 233, requires employers to allow employees to use their accrued and available sick leave to attend to the illness of a child, parent, spouse or domestic partner, in an amount not less than what would be accrued during six months of employment.

In *McCarther v. Pacific Telesis Group*, the employer had a collectively bargained "sickness absence" policy in which eligible employees did not accrue or "bank" any particular number of sick days, but were permitted to take "sickness absences" for their own illness or injury for up to 5 days during in a 7 calendar day period. Each time an employee returned to work following an absence, he or she would be entitled to further leave in accordance with the policy. On appeal, the court held that the kin care law applied to this sickness absence policy. Given the *McCarther* court's expansive view that even non-traditional, non-accrual based sick leave policies are subject to the kin care law, California employers should carefully examine their sick leave practices to ensure compliance with Section 233.