Fenwick Employment Brief

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CALIFORNIA EMPLOYER ALLOWED TO PURSUE DEFAMATION ACTION AGAINST PROTESTING EMPLOYEES

In a recent California Court of Appeals ruling, an employer was allowed to proceed with a defamation lawsuit seeking damages and injunctive relief against former employees and a community activist who publicly claimed that the employer was racist when it used social security number discrepancies as pretext to terminate its older Hispanic and Latino workers. In *Overhill Farms, Inc. v. Lopez*, the IRS had conducted a revenue and payroll audit of Overhill, and, based on the results, informed the company that 231 of its employees had provided invalid social security numbers, which could result in substantial penalties and even criminal liability. In addition, the IRS informed Overhill that it could not continue to employ any employee who was unable to provide a valid social security number. As a result, the company notified the affected employees by letter of the IRS' findings and requested that each employee provide a valid social security number within 30 days. Some employees voluntarily resigned or confessed they provided false social security numbers, and were terminated. Most of the affected employees ignored the letter despite receiving a follow up letter granting them an additional 30 days to respond. Upon failing to receive a response from the affected employees, Overhill terminated them.

In response to the terminations, a community activist and several of the terminated employees staged protests in front of Overhill's plants and at one of its customer's premises. In advance of the protests, they issued a press release stating that Overhill had engaged in racist firings that had a disparate impact on "immigrant women." Furthermore, protest materials such as signs, leaflets, and handbills claimed that the discrepancy in social security numbers was merely a "pretext" to eliminate older Hispanic and Latino workers, characterizing Overhill's conduct as "racist and discriminatory abuse against Latina women immigrants."

The company sued for defamation and sought injunctive relief to prohibit future misconduct, claiming that the employees made false assertions that Overhill was a racist employer that discriminated against older Hispanic and Latino workers. The defendants argued that the statements contained in the press release and protest materials were a form of protected expression of opinion. The appellate court held that Overhill established a "prima facie" showing that the employees made "a provably false assertion of fact" when they asserted that Overhill was a racist employer that terminated its employees for racially-motivated reasons. In holding that the employer could proceed with its claim for defamation, the court opined that the protestors' attacks were "not merely a hyperbolic characterization of Overhill's black corporate heart – it represent[ed] an accusation of concrete, wrongful conduct." In a somewhat rare case, this court's ruling strengthens the right of employers to protect their reputation and take legal action against defamatory attacks.

PAYROLL COMPANY NOT AN EMPLOYER UNDER THE CALIFORNIA LABOR CODE OR FLSA

In *Futrell v. Payday California, Inc.*, a California appeals court held that a payroll processing company was not liable for wage and hour violations by its client company under the California Labor Code or Fair Labor Standards Act ("FLSA"). In this case, Futrell filed a class action lawsuit against a television production company (Reactor Films) and Payday for various state and federal wage and hour violations arising out of crowd control services Futrell provided to Reactor. The issue on appeal was whether Payday, which simply provided payroll processing services for Reactor, could be considered an employer under state and federal law and thus be liable for wage and hour violations.

In analyzing whether Payday was an employer, the court applied various tests under both state and federal law, including the FLSA economic realities test, the common law employment relationship test, and the definition of "employer" contained in an Industrial Welfare Commission ("IWC") Wage Order applicable to the motion picture industry. Although these tests are quite similar, the crux is exercise of control over the employment relationship. The court noted that Payday could not hire or fire Futrell; it did not have any control over his work activities; it did not exercise control over his wages, hours, and working conditions; it did not have the power to cause or prevent Futrell from working; it did not direct or supervise him at the production sites; it did not provide any tools or a place to work; it did not set his pay; and the services provided by Futrell were not for Payday's benefit, nor were they an integral part of its regular business.

The fact that contracts between Payday and Reactor contained language indentifying Payday as the employer and stating that Payday "becomes the employer and handles all payment to employees," was not dispositive. The court held: "[t]he parties' use of a label to describe their relationship does not control and will be ignored where the evidence of their actual conduct establishes a different relationship exists." In analyzing whether a company may be held to be an employer under state or federal law, the control exercised over the employment relationship continues to be of paramount importance.

NEWSBITES

PAGA Claims On The Rise – Suitable Seating Just One Of Many Possible Violations Subject To Penalties

In two recent California Court of Appeals cases, *Bright v. 99¢ Only Stores* and *Home Depot U.S.A., Inc. v. Superior Court*, plaintiffs were allowed to proceed with Private Attorneys General Act ("PAGA") claims for alleged violations of IWC Wage Order No. 7-2001, which requires employers to provide suitable seating for their workers. Although this decision may seem to affect limited jobs, the implications are more far reaching and troublesome than they appear. If plaintiffs can pursue PAGA claims for suitable seating, they can maintain lawsuits, on behalf of themselves and others, against employers for the many other requirements contained in Wage Orders and the Labor Code for which civil penalties do not already exist. This underscores how important it is for employers to conduct internal audits of their practices to identify and remedy any possible violations that could subject them to PAGA claims.

Disabled Telecommuting Employee Lawfully Denied Promotions Under The ADA When Presence In The Office Was An Essential Job Function

In *McEnroe v. Miscrosoft Corporation*, a Washington State federal district court held that the ADA disability discrimination and other related claims of a disabled telecommuting employee failed because presence at the office was an essential function of each promotional opportunity denied her. The plaintiff (McEnroe) provided administrative support for recruiters in the state of Washington. She suffered from panic disorders, agoraphobia, major depression, irritable bowel syndrome, and other related conditions. Microsoft had allowed McEnroe to work from home full-time even before she informed the company that she was disabled. However, she was not hired for any positions she later applied for because they required her presence in Microsoft's Redmond, Washington office.

After she sued for a slew of disability-related causes of action, the court held that McEnroe's claims failed because she "[could not] show that an exclusive teleworking arrangement would have been a reasonable accommodation for the positions sought because in-person attendance was an essential function of each of the three positions." Further, the court opined that: "[p]laintiff's subjective belief as to what a job's essential functions are comprised of is not evidence."

New California Organ Donor Law Provides For Paid Leave Of Absence

Governor Schwarzenegger recently signed the Michelle Maykin Donation Protection Act, which is effective as of January 1, 2011, whereby an employer with 15 or more employees must permit employees who are organ or bone marrow donors to take a paid

leave of absence of up to thirty days and five days respectively in a one-year period. The employer may require the employee to use up to two weeks of earned but unused sick or vacation leave for organ donors and five days for bone marrow donors. Further, the employer must pay for continued coverage under the company group health plan during the leave. This leave can be taken in one or more periods of time, shall not be taken concurrently with any FMLA and/or CFRA leave, and the employee must be restored to his/her former position upon return from leave unless the failure to restore is unrelated to the employee's exercise of his/her right to take leave. Moreover, the leave shall not constitute a break in service for the purpose of salary adjustments, sick leave, vacation, annual leave, or seniority. In order to qualify for the leave, the employee must provide the employer with a written certification that he or she is an organ/bone marrow donor and that there is a medical necessity for such donation. Finally, an employer cannot discriminate against an employee for taking donor leave.

Salesperson's Inability To Fly To Attend Conference Did Not Constitute A Substantial Work Limitation Under The ADA

The First Circuit Court of Appeals (Boston) recently held in *Faiola v. APCO Graphics, Inc.* that a sales representative did not make "the required threshold showing of disability" under the Americans with Disabilities Act ("ADA") by informing her employer that she was not "up to" attending a conference in another state. During her employment, Faiola had been diagnosed with mild depression, but was never diagnosed with "classic depression" or any anxiety disorders. Following a decline in her performance, she was terminated. Immediately prior to her termination, Faiola informed her supervisor that she was "going through a personal crisis" and was not sure she would be "up to" attending the out-of-state conference since she was going through a "rough time." At no time did Faiola mention that flying to the conference would cause her undue stress.

The court held that there was no evidence to support Faiola's claim that her impairments substantially limited any alleged major life activities. Moreover, the court stated that the inability to attend the sales conference did not constitute a substantial limitation as to work because "[a]n 'inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.'"

Employer Victory In FedEx Driver Misclassification Cases

In yet another victory for parcel delivery giant FedEx, a federal district court in Indiana ruled that most of the current and former FedEx drivers involved in consolidated misclassification class actions were properly classified as independent contractors (*FedEx Ground Package Sys., Inc. Emp't Practices Litig.)*. In August, the court held that drivers in Kansas were independent contractors. The court emphasized that state laws only differ slightly when analyzing whether a worker is an employee or independent contractor, and that the right to control the methods and means by which individuals perform their work is the central issue. In the Kansas decision, the court held that "customer-based constraints on the drivers are results-oriented controls that don't indicate employee status." Thus far, the court has granted summary judgment in favor of FedEx in 20 of the 28 class actions pertaining to this misclassification issue.

$175 Million Settlement In Novartis Sex Discrimination Class Action

A federal district court in New York gave final approval to a $175 million settlement of a sex discrimination class action against Novartis Pharmaceuticals Corp., *Velez v. Novartis Pharm. Corp.*, on behalf of a class of more than 6,000 current and former female sales representatives. $152.5 million will be allocated to back wages, benefits, and adjusted wages; service payments to named plaintiffs; and attorneys' fees and costs. $22.5 million will account for nonmonetary relief representing the company's commitments to revise its employment policies and eliminate gender discrimination in pay and promotions.

FLSA Now In Line With California Law Regarding Lactation Accommodation

The Patient Protection and Affordable Care Act, which is currently effective, provides for an amendment to the FLSA requiring employers to provide "reasonable break time" and an adequate place for nursing mothers to express breast milk at work for their infants up to one year after birth. Although California law already provides for lactation accommodation within the Labor Code, the FLSA will now be in line with requirements for California employers.

OFCCP To Discontinue I-9 Audits During Onsite Investigations

A Department of Labor spokesperson has confirmed that the Office of Federal Contract Compliance Programs ("OFCCP") will no longer review I-9 forms during onsite investigations. Despite this announcement, employers should continue to complete and maintain I-9 forms for each employee in compliance with the 1986 Immigration Reform and Control Act and be prepared to provide these forms upon request to inquiring enforcement agencies such as the U.S. Immigration and Customs Enforcement's Office of Homeland Security Investigations.

Employee Files Lawsuit Against Employer For Waterboarding During "Motivational Exercise"

File this under common sense for employers: do not waterboard your employees. The Utah Supreme Court in *Hudgens v. Prosper, Inc.*, held that an employee could proceed with a lawsuit against his employer for assault and battery, among other claims, as a result of being waterboarded at work. In this case, a company supervisor took employees to a nearby offsite location and asked for volunteers for a "new motivational exercise" during which the supervisor waterboarded the employee. Coworkers were instructed to hold the employee down, and the supervisor told the employees that they should "work as hard at making sales as Mr. Hudgens had worked at trying to breathe." In the past, the supervisor had used other questionable, but less physically invasive, motivational tactics to increase revenue. Although it should come as no surprise, regardless of whether waterboarding or other such "motivational" tactics increase revenue, any such coercive conduct will not be tolerated by the courts.