Fenwick Employment Brief

August 14, 2009

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**California Supreme Court Clarifies Workplace Privacy Limits In Video Surveillance Case**

Balancing employee privacy rights and an employer's right to monitor its workplace is a challenge. In *Hernandez v. Hillsides, Inc.*, the California Supreme Court clarified the law in this area and articulated important principles regarding workplace privacy.

The defendant employer ran a nonprofit residential facility for neglected and abused children. When the facility director learned that company computers were being used after hours to view pornography, he installed a hidden video surveillance system in the shared office of the two female plaintiffs in an attempt to catch the offender. The plaintiffs' office was chosen for surveillance because one of their computers had been used for prohibited web surfing; however, neither plaintiff was suspected of any inappropriate conduct. On three occasions over a three week period, the director activated the video surveillance system after the plaintiffs left work for the day, and disabled the system before they returned the next day. The plaintiffs were not at risk of being monitored or recorded and were never actually filmed.

The plaintiffs later discovered the hidden video surveillance system, and sued Hillsides for invasion of privacy. The trial court dismissed the case. However, a court of appeal reversed, finding that the mere presence of the surveillance equipment in plaintiffs' office created a triable issue on their privacy claims. The California Supreme Court reversed and dismissed the case, holding that, under the circumstances, "no reasonable jury could find in plaintiffs' favor."

To succeed on an invasion of privacy claim, a plaintiff must prove that he or she had a reasonable expectation of privacy, and an intrusion on that privacy occurred that was highly offensive to a reasonable person. In *Hillsides,* the court first confirmed that within the workplace, employees may possess certain privacy rights. For example, an enclosed, lockable office with blinds that can be drawn "generates legitimate expectations that not all activities performed behind closed doors would be clerical and work related." In that regard, the court found that Hillsides intruded upon the plaintiffs' reasonable expectation of privacy because the plaintiffs could not have expected that they would "be the subject of televised spying and secret filming by their employer."

However, the court also found that the intrusion was not highly offensive. First, the intrusion was limited, as the camera was aimed only at a desk and computer workstation, access to the surveillance equipment was both secure and limited and the surveillance occurred outside of regular business hours. Second, Hillsides had legitimate business reasons for conducting the monitoring, including its effort to curb abuse of company computers and Internet access, which in turn could expose the company "to legal liability from various quarters." The court also held that Hillsides was not required to use "less intrusive means" (such as software filtering programs or heightened enforcement of its password protection policy) to accomplish its objectives.

Despite finding no invasion of privacy in this case, the court was quick to point out that it appreciated the "dismay" the plaintiffs felt upon discovery of the surveillance system, and that the decision is "not meant to encourage such surveillance measures, particularly in the absence of adequate notice to persons within camera range that their actions may be viewed and taped."

Employers must be particularly careful when undertaking any activities that may infringe upon work areas where employees may have a reasonable expectation of privacy. Monitoring of any kind should be supported by legitimate business reasons, and employees should receive clear notice that such monitoring may occur.

**Company's Bankruptcy Does Not Prevent Personal Liability For Wage Violations**

Companies in severe financial distress often seek refuge in bankruptcy. However, while bankruptcy may offer the company-debtor protection against claims of unpaid wages, it does not insulate individual officers, directors and managers from personal liability under the Fair Labor Standards Act ("FLSA") for such claims. In *Boucher v. Shaw*, the Ninth Circuit Court of Appeals determined that a bankrupt casino's managers – its Chairman and CEO, Chief Financial Officer, and a third manager – could be individually liable for FLSA violations even though the casino had commenced bankruptcy proceedings.

The plaintiffs in *Boucher* were three former employees of the Castaways Hotel, Casino and Bowling Center in Las Vegas. During the plaintiffs' employment, Castaways filed for Chapter 11 bankruptcy reorganization but continued to operate. Six months after filing for reorganization, the plaintiffs were discharged, and a month later, Castaways ceased operations. The plaintiffs sued the managers personally, seeking to recover unpaid wages for themselves and a class of former Castaways employees.

Under the FLSA, individuals who exercise "control over the nature and structure of the employment relationship" or "economic control" over the relationship are "employers" and thus subject to personal liability. The defendants did not dispute that they were "employers" under the FLSA. However, they argued that because the company was protected against wage claims by bankruptcy, they were entitled to the same protection.

The Ninth Circuit disagreed, and held that bankruptcy protection extended only to the debtor (*i.e.*, the company) and not to the individual managers. The court viewed the managers' liability as independent and not merely derivative of the company's FLSA liability. However, the court suggested that if the managers' FLSA liability affected the bankruptcy estate – such as by a requirement that the company indemnify the managers or by payment of the liability from a director's and officer's insurance policy – it may be necessary for plaintiffs to proceed against the managers through the bankruptcy proceedings.

In this difficult economic climate, the *Boucher* decision is significant to both companies in financial difficulty and their management-level employees who control decisions about wages. The payment of unpaid wages should always be a top priority for faltering companies, and careful planning with respect to reserving sufficient cash to pay wages will minimize the risk of personal liability in this area.

## NEWS BITES

### PG&E Overtime Settlement Includes Restriction On Lowering Pay Following Reclassification

A large class of current and former Pacific Gas & Electric employees and their attorneys will receive $17.25 million to settle their overtime claims against the utility. Through the settlement, PG&E will reclassify several positions from salaried exempt to hourly non-exempt. Notably, the settlement prohibits PG&E from reducing certain of the reclassified workers' base pay to offset the potential future overtime pay. As a result, those workers will be compensated at a base hourly rate commensurate with their pre-reclassification salary, in addition to overtime pay. The issue of whether a reduction in base pay in connection with such a reclassification constitutes retaliation or is otherwise unlawful is unsettled under California and federal law.

### Federal Appeals Court Suggests Private Employers May Be Bound By Their FMLA (Mis)Representations

In *Nagle v. Acton-Boxborough Regional School District*, the First Circuit Court of Appeals held that a former school district employee, who had not worked enough hours to be FMLA eligible, could not pursue a FMLA interference claim despite an allegation that a deputy superintendent orally approved the FMLA leave. The court held that a government employer like the school district is not bound by such misrepresentations except under the most unusual circumstances.

However, the court opined that similar misrepresentations by a private employer, if the employee reasonably relied on them, could support a FMLA interference claim. *Nagle* joins a few other federal courts which have also suggested that private employers may be bound by their FMLA misrepresentations. These cases emphasize the need for manager training regarding FMLA and other protected leave laws.

**FLSA Liquidated Damages Proper Where Company Aware Of Extra Work**

Overtime violations under the FLSA trigger liability for both the unpaid overtime as well as liquidated damages, *i.e.*, a penalty equal to the amount of unpaid overtime. An employer may avoid liquidated damages if it acted in good faith and had reasonable grounds to believe that its actions were lawful. However, a recent case confirms that ignorance of the facts or the law will not support such a defense.

In *McGrath v. Central Masonry Corp.*, a Colorado federal court held that an employer was liable for liquidated damages because management was aware that the plaintiff was performing extra work without compensation, even though the plaintiff had not formally recorded the work on his time sheets and the employer claimed that it was not aware that the work constituted overtime. The court also rejected the employer's argument that it mistakenly thought that its policies complied with the FLSA, noting that the employer never consulted with a lawyer or other expert in personnel matters to ensure compliance. The court stated that the company's unlawful practices and lack of expert consultation warranted a jury's finding that the employer's conduct was either willful or in reckless disregard of the law, thus justifying a liquidated damages award.

**Washington Arbitration Agreement Enforceable Despite Unconscionable Provisions**

In *Walters v. AAA Waterproofing, Inc.*, the plaintiff sued his former employer in Washington state court for unpaid overtime compensation. The former employer moved to compel arbitration based on an arbitration clause in the employee's employment contract, and the plaintiff opposed, alleging that the clause was unconscionable and unenforceable. A Washington court of appeals agreed that portions of the arbitration agreement were unconscionable; specifically, a provision requiring the arbitration hearing to be conducted in Colorado (where the former employer was headquartered and incorporated) and a requirement that the prevailing party be awarded attorney fees and costs (which conflicted with state law). However, because the agreement contained a severability clause and the unconscionable provisions were not "pervasive," the court held that the unconscionable provisions could be stricken and enforced the remainder of the arbitration agreement.

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