Fenwick Employment Brief

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ACCOUNT EXECUTIVES NOT EXEMPT ADMINISTRATORS UNDER CALIFORNIA LAW

A California appellate court rejected an employer's affirmative defense that account executives were exempt administrative employees because their work did not relate to the management policies or general business operations of the employer or its customers. In *Pellegrino v. Robert Half International, Inc.*, Maria Pellegrino and other plaintiffs, former account executives and a staffing manager for Robert Half International, Inc. ("RHI"), sued RHI for Labor Code violations involving overtime, commissions, meal periods and wage statements, and for unfair competition. As to the overtime claim, RHI claimed Plaintiffs were exempt administrative employees.

At RHI, account executives were responsible for recruiting, interviewing and evaluating candidates as potential RHI temporary employees; filling job orders with RHI candidates and assisting customers with their staffing needs; and new business development. RHI provided a "recipe" by which account executives accomplished their duties on a three-week rotating basis: (1) a "sales week" in which they were expected to make 125 "connects" with customers, conduct about 15 customer visits and attend networking events; (2) a "desk week" in which they handled incoming telephone calls and took job orders from customers; and (3) a "recruiting week" in which they were expected to interview 15-25 potential candidates for potential inclusion in RHI's inventory of temporary staffing. RHI also required account executives to conduct, at least twice daily, "white board meetings" to list daily goals and chart their progress.

After RHI presented its evidence at trial, Plaintiffs moved for judgment arguing they were not exempt administrators because they performed in a production or sales role and did not impact management policies or general business operations of RHI or RHI's customers. The trial court granted the motion and, on appeal by RHI, the appellate court affirmed this ruling.

While there was no dispute that Plaintiffs performed office or non-manual work, the evidence showed that Plaintiffs' "work as account executives did not directly relate to management policies or general business operations of RHI or of RHI's customers." Instead, the court found that their duties comprised "sales work" on the basis of the following evidence adduced at trial:

- At RHI, direct sales occurred when an account executive placed a candidate with a customer;
- Account executives were trained in sales, were primarily responsible for selling RHI's temporary employee services and were evaluated based on sales production levels;
- When not selling services or filling customer orders, account executives were recruiting candidates to fill RHI's "inventory" of temporary employees;
- Account representatives did not supervise the temporary employees after placement with a customer and had no hiring or firing authority over RHI staff; and
- Account executives did not develop policy, but instead followed RHI's "recipe" for a three-week rotation of duties noted above.

This decision serves as an important reminder that exemption classifications must be thoughtfully considered and consistently applied. Simply because an employee performs what may appear to be an administrative function as part of their job does not mean that the employees' *position* meets the stringent test for the administrative exemption from overtime requirements.

NO "GROSSLY INFLATED" ATTORNEYS' FEES ON $11,500 RETALIATION VERDICT

The California Supreme Court recently upheld a trial court ruling denying a plaintiff's request for $871,000 in claimed attorneys' fees for various lawsuits against his employer. In *Chavez v. Los Angeles*, after a tortured history of federal and state actions against his employer for discrimination, harassment, retaliation and a variety of other torts, a jury ultimately awarded the plaintiff $11,500 – $1,500 in damages and $10,000 for emotional distress – for one act of retaliation under the Fair Employment and Housing Act ("FEHA"). Typically, prevailing plaintiffs may recover their attorneys' fees for successful FEHA claims, but the trial court denied the plaintiff's $871,000 request.

The California Supreme Court recognized that the trial court acted within its discretion in denying the request for two reasons. First, the request was "grossly inflated" in light of the plaintiff's limited success on a single claim, the limited damages awarded and the amount of time an attorney might reasonably spend pursuing such a claim.

Second, as cited by the trial court, California allows plaintiffs to file claims of less than $25,000 as limited civil actions, which are subject to streamlined and more cost-efficient procedural rules. When a plaintiff recovers less than $25,000 but failed to bring the action as a limited civil action, the California Code of Civil Procedure authorizes the trial court to deny costs to the prevailing plaintiff. The California Supreme Court held that requests for attorneys' fees under FEHA, in appropriate circumstances, fall within this provision and a court may even deny a fees request, as in *Chavez*, so long as its decision takes into account the policies and purposes of the FEHA.

While it is always important for attorneys to realistically consider their clients' claims and damages, the California Supreme Court's recognition of the discretion afforded trial courts in awarding attorneys' fees will hopefully temper a common assumption that successful FEHA plaintiffs will automatically receive all of their claimed attorneys' fees. This, in turn, should provide employers with some ammunition to resist exorbitant demands for attorneys' fees during settlement negotiations.

NEWS BITES

Arbitration Agreement with Discovery Limitation Enforceable

In *Dotson v. Amgen, Inc.*, a California appellate court confirmed that mandatory arbitration agreements with discovery limitations are enforceable provided that they also give the arbitrator the authority to allow further discovery upon a showing of need. Darrell Dotson, Amgen's former in-house attorney, challenged the enforceability of the arbitration agreement he signed at inception of employment claiming that its limitation that each party could take only one deposition, and other clauses, rendered the agreement unconscionable. The court rejected Dotson's argument, citing the California Supreme Court's prior observation that "discovery limitations are an integral and permissible part of the arbitration process" and the fact the arbitrator retained the discretion to allow additional discovery "upon a showing of need."

No Mixed Motive Claims Under ADA

Plaintiffs may not bring discrimination claims under the federal Americans with Disabilities Act ("ADA") unless the plaintiff's disability is the "but for" cause of the challenged action, according to the Seventh Circuit Court of Appeals (covering Illinois, Indiana, and Wisconsin). *See Serwatka v. Rockwell Automation, Inc.* Causation in discrimination claims can take multiple forms; in mixed motive claims under federal Title VII, an employer may still be liable to an employee where an employee's protected characteristic played a role in causing the challenged decision, even though the employer would have made the same decision regardless of the characteristic. Citing *Gross v. FBL Financial Services* (in which the court rejected mixed motive claims under the federal Age Discrimination in Employment Act, reported in the July 2009 FEB), the court determined the ADA, like the ADEA, lacks statutory support to allow mixed motive claims and reversed the plaintiff's award.

Corporate Owner Personally Liable for Unpaid Payroll Taxes

In *Erwin v. United States*, the Fourth Circuit Court of Appeals (covering Maryland, Virginia, North and South Carolina, and West Virginia) held Charles Erwin, founder, director, secretary, treasurer, vice-president and partial owner of GC Affordable Dining, Inc. ("GCAD"), personally liable for GCAD's unpaid payroll taxes. Applying a multi-prong test, the court determined Erwin was "responsible" for the collection and payment of GCAD's taxes because he had substantial and active involvement in GCAD, exercised supervisory control over the management team, determined which creditors to pay when GCAD resources were limited and decided to keep GCAD afloat by paying other expenses even after he learned about the unpaid payroll taxes. The court further found that the failure to collect and pay the taxes was willful because, at a minimum, Erwin knowingly used GCAD's resources to keep the business open rather than pay the back taxes. The court rejected Erwin's attempt to share or shift blame to others within GCAD, noting liability rests with "all" responsible persons, not the "most" responsible person.

$1.5 Million Verdict After Supreme Court Revived Retaliation Claim

A Tennessee jury awarded former school payroll administrator Vicky Crawford $1.5 million after she was terminated in retaliation for reporting, during an internal investigation, a manager's sexually inappropriate conduct toward her. The award consisted of $420,000 in compensatory damages, $408,762 in back pay and $727,496 in front pay. The verdict follows a year after the United States Supreme Court held that such participation was protected "opposition" to unlawful conduct under Title VII, thereby reviving her claim. *See Crawford v. Metropolitan Government of Nashville* (reported in the February 2009 FEB).

$42 Million Settlement in Overtime Action

Staples has reportedly agreed to pay $42 million to settle claims by former and current assistant store managers that it misclassified them and failed to pay them overtime. Staples currently faces 13 wage and hour suits, pending in various federal and state courts across the country. Recently, a New Jersey jury found Staples liable to its assistant managers resulting in a $4.9 million judgment against the company. The global settlement, which still requires court approval, would resolve claims of assistant stores managers who work in any state in which Staples does business, except California (Staples settled claims for California workers for $38 million in 2007).

Department of Labor Issues Model COBRA Notices

On December 19, 2009, President Obama signed the 2010 Department of Defense Appropriations Act ("DOD Act"), which extended the availability of the COBRA health care continuation coverage premium subsidy original enacted in early 2009 by the American Recovery and Reinvestment Act. The Department of Labor has now posted updated guidance and model COBRA notices on its website as follows: the DOL's explanation of the updated notices, updated model general COBRA notice; and COBRA premium assistance extension notice. For further details about the COBRA premium subsidy extension in the DOD Act, *see* 01/04/10 Employee Benefits Alert: Congress Extends COBRA Premium Subsidy.