Fenwick Employment Brief

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CALIFORNIA LABOR COMMISSIONER ALLOWS EMPLOYERS TO DEDUCT FROM EXEMPT EMPLOYEE LEAVE BALANCE IN LESS THAN HALF-DAY INCREMENTS

To properly classify an employee as exempt, an employer must satisfy the salary-basis test by paying a salary, "without deduction," regardless of how many or how few hours the employee works during the pay period. Courts and agencies, however, have allowed employers to deduct from an employee's vacation or sick leave balance in full-day increments without violating the test. Then, in *Conley v. PG&E* (2005), a California court of appeal approved an employer policy that called for partial-day deductions from an employee's vacation for absences of four hours or more. Now, the California Labor Commissioner, through a November 2009 Opinion Letter, has opined that employers may deduct from an employee's vacation or sick leave balance in less than half-day increments so long as the employee receives full pay for the day in any combination of vacation/sick pay and/or salary (for *e.g.*, two hours of vacation pay and six hours of salary). However, if the employee does not have sufficient vacation or sick leave accrual to cover a partial-day absence, the employer must ensure that the employee receives full salary for that day in order to satisfy the salary basis test.

The Labor Commissioner also opined that where an employee is absent for personal reasons for a full day but lacks sufficient accrued vacation to cover the entire day (*e.g.*, the employee has only two hours of accrued vacation), the employer may require the employee to exhaust the two accrued hours and not pay the employee any salary for the remainder of the day. However, where an employee is absent a full day due to sickness but lacks sufficient accrued sick leave to cover the entire day (*e.g.*, the employee has only seven hours of accrued sick time), the employer may reduce the employee's sick leave balance to zero but must not reduce the employee's salary for the remaining hour, i.e., the employer must pay the employee full salary for the day.

The letter addresses, in unusual detail, several scenarios along these lines. While the Opinion Letter is expressly limited to the specific facts and circumstances described in the letter and does not have the force of law, it does signal that the California Labor Commissioner will afford employers greater latitude in the administration of their leave policies. To take advantage of this increased flexibility, employers should modify leave policies to allow for deductions from vacation and/or sick leave accruals in one-hour or greater increments.

EMPLOYEE COMPLAINT ABOUT UNPAID OVERTIME, ALBEIT MISTAKEN, SUPPORTED WRONGFUL DISCHARGE CLAIM

In *Barbosa v. IMPCO Technologies,* plaintiff, a lead carburetor assembler, complained to payroll that he and others in his work unit were underpaid their overtime pay and asserted that perhaps the time clock was wrong. The company paid the additional overtime wages in response to the complaint. However, a further investigation revealed that plaintiff and his co-workers could not have worked the claimed overtime. Acknowledging his mistake, plaintiff said he was confused and offered to pay the money back. Instead, the employer discharged plaintiff for falsifying company records. Plaintiff sued under California law for wrongful termination in violation of public policy (a so-called *Tameny* claim). Reversing a nonsuit in the employer's favor, the court held that an employee's good faith, albeit mistaken complaint about unpaid overtime is protected activity as to support a *Tameny* claim. The court remanded for a jury to decide whether plaintiff acted in good faith, or attempted to cheat the employer. Although it remains lawful for an employer to discharge an employee for falsifying company records, employers must act with caution when disciplining an employee who has complained about unpaid wages.

NEWS BITES

U.S. Supreme Court To Review Text Message Privacy Case

The U.S. Supreme Court will decide whether a police officer had a reasonable expectation of privacy in text messages sent on an employer-issued pager in *City of Ontario v. Quon*. The court will review the decision of the federal Ninth Circuit Court of Appeals, initially reported in our February 2008 FEB Update [http://www.fenwick.com/publications/6.5.4.asp?mid=31], that plaintiff had an enforceable expectation of privacy based upon a city administrator's statement that the city would not audit pager use so long as the employee paid for any excess use. The statement was contrary to a written employer policy that employees should expect no privacy in their use of the employer's electronic resources.

Employee Fails To Establish Sexual Harassment Or Retaliation

In a favorable decision for employers, a California court of appeal affirmed the dismissal of a plaintiff's claims for sexual harassment and retaliation, where the alleged misconduct did not establish a hostile work environment,

and where plaintiff's performance counseling was based on poor sales, not her harassment complaint. In *Haberman v. Cengage Learning, Inc.*, plaintiff was a sales representative for a textbook publishing company. The court found that plaintiff's evidence of harassment fell "far short" of establishing a pattern of continuous, pervasive harassment. Many of the verbal comments and actions, while offensive to plaintiff, were not sexual at all (for instance, the supervisor told a customer that plaintiff was "amazing and had five children with no father in the picture"). Further, the alleged instances of sexual conduct occurred over two to three years. These incidents were "brief and isolated" and often "trivial" comments that did not amount to a legal violation (for instance, a supervisor described plaintiff as "drop dead gorgeous"). The court also dismissed plaintiff's retaliation claim, concluding that the employer placed her on performance improvement plan for failing to meet sales goals for three years. Plaintiff failed to submit evidence that would link the performance improvement plan to her earlier complaint of harassment.

Federal ADA Retaliation Claim Does Not Permit Recovery Of Damages

In *Alvarado v. Cajun Operating Co.*, the Ninth Circuit held that the ADA does not allow a claimant to recover compensatory or punitive damages for alleged retaliation for having complained about disability discrimination. Plaintiff, a cook at a Church's Fried Chicken franchise in Tucson, Arizona, was allegedly discharged after complaining about disability discrimination. The court held that only equitable relief was available, and that plaintiff did not have a right to a jury trial or damages. California employers should note that, under state law, such a complaint followed by termination could support a common law claim wrongful termination claim, which would allow the plaintiff to seek monetary damages.

UPS Settles Delivery Driver Wage Claims For $12.8 Million

In *LaBrie v. UPS*, a federal district court in Northern California approved a $12.8 million settlement of claims brought by some 660 UPS package delivery drivers in California and other states. The drivers alleged that they were misclassified as independent contractors, and should have been paid wages and employee benefits, including overtime pay. UPS reportedly continues to consider the drivers to be independent contractors but has made changes in response to the lawsuit.

Strong Evidence of Performance Deficiencies Defeats Age and Religious Discrimination Claims

In two separate opinions, the federal Seventh Circuit Court of Appeals affirmed the dismissal of age and religious discrimination lawsuits, where the plaintiffs could not overcome significant evidence of non-discriminatory performance problems as the basis for their terminations.

In *Senske v. Sybase*, the court held that a 58-year old sales manager failed to show that his age was a factor in his termination. The court ruled that, despite the fact that plaintiff was the company's top earner in North America the previous year, there was a "virtual avalanche of documentation" showing that the next year plaintiff fell consistently short of the employer's performance expectations, achieving only 20% of his annual quota. Although plaintiff had two major deals in the fourth quarter, the company "convincingly" showed, and plaintiff could not rebut, that they were "bluebird" deals for which plaintiff performed little or no work.

In *Patterson v. Indiana Newspapers*, two newspaper editorial writers claimed religious discrimination because of disagreements with management over their "traditional Christian" beliefs about homosexuality. The court held that the writers failed to show that religion was a factor in their termination. One writer repeatedly violated the newspaper's overtime policy and did not meet other legitimate performance expectations, and the newspaper repeatedly warned the other writer about poor writing and errors.

Non-Exempt Loan Underwriter Involved In "Production" Work

In *Whalen v. J.P. Morgan Chase & Company*, the federal Second Circuit Court of Appeals reversed the dismissal of an overtime lawsuit ruling that a loan underwriter was not exempt from overtime under FLSA. The employer urged that plaintiff, an underwriter in the bank's home equity group, was covered by the administrative exemption. However, the court ruled that the job of underwriting loans was "production" work, unrelated to setting management policies or general business operations necessary for the FLSA's administrative exemption.

Federal Defense Contractors Barred From Requiring Employment Arbitration

The President signed into law a bill prohibiting covered defense contractors from requiring employees to sign agreements that mandate arbitration of claims of sexual assault, harassment or other covered claims. However, mandatory arbitration will be allowed in cases where the Secretary of Defense provides an exemption in the interests of national security. Further, the restriction only applies to companies that have defense contracts of $1 million or more.