Fenwick Employment Brief

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CALIFORNIA COURT OF APPEAL SIGNIFICANTLY EXPANDS PREGNANCY LEAVE RIGHTS

In a case of first impression, a California court of appeal has applied the California Fair Employment and Housing Act ("FEHA") to significantly expand the leave rights of employees disabled by pregnancy. In *Sanchez v. Swissport, Inc.*, Ana Sanchez was diagnosed with a high-risk pregnancy shortly after becoming pregnant, and her physician recommended bed rest for the duration of her disability. The employer allowed her time off for the four months provided under the California Pregnancy Disability Leave Law ("PDLL") plus several additional weeks off for accrued, unused vacation time – a total of almost five months. At the conclusion of her approved leave, Sanchez requested additional months off until after the birth of her child. The employer denied her request and terminated her employment because she was unable to return to work.

Sanchez sued claiming that the employer failed to reasonably accommodate her pregnancy disability under the California FEHA by refusing to afford her additional months off until delivery of her child. The lower court dismissed the lawsuit concluding that the employer had fully satisfied its obligations to Sanchez under the PDLL, and was not required to allow her additional time off under the FEHA.

On appeal, the California court of appeal reinstated the lawsuit, holding that even after Sanchez exhausted her PDLL leave, the employer was required to consider allowing her additional time off as a reasonable accommodation of her pregnancy disability. The court noted that on remand the employer would be allowed to show that the requested additional time off was unreasonable and/or would amount to an undue hardship.

In light of this case, where a pregnant employee exceeds her allotted four months of PDLL leave, the employer must consider allowing her additional time off as a disability accommodation under the California FEHA so long as the additional time off would be reasonable and not create an undue hardship.

NEW YORK EMPLOYER'S FLEX-TIME POLICY PRECLUDED HOLDING EMPLOYEE ACCOUNTABLE FOR TARDINESS

Flex-time policies are fairly common among U.S. employers, and allow employees to arrive and leave work within a defined time range, instead of having to arrive and leave at a precise start and end time. As a cautionary tale, in *McMillan v. City of New York*, such a flex time policy precluded the employer from holding the employee accountable for tardiness. The employee, Rodney McMillan, had schizophrenia, but his mental disability was controlled with medication. Despite his disability, he worked successfully for ten years as a case manager for the City of New York. The City's flex time policy allowed employees to arrive at work anytime between 9:00 and 10:00 a.m. Employees were considered late if they arrived after 10:15. McMillan often arrived late to work, sometimes after 11:00 a.m. He attributed his tardiness to drowsiness caused by his schizophrenia medication. For ten years, the City tolerated his tardiness.

However, a new manager began to hold McMillan accountable for arriving on time. The City commenced a disciplinary process for McMillan's continued tardiness. As a result, McMillan formally requested accommodation for his disability, including a later flex start time that would permit him to arrive at work between 10:00 and 11:00 a.m. The City rejected the request as unreasonable, and placed McMillan on 30-day suspension without pay for repeated tardiness.

McMillan sued for violation of the federal ADA. In defense, the City urged that arriving at work by 10:15 was an essential function of the job and that McMillan was not a qualified worker covered by the ADA because of his history of tardiness. The federal district court agreed and dismissed the suit.

On appeal, the federal Second Circuit Court of Appeals remanded the case for a jury trial, holding that although courts will normally give considerable deference to an employer's determination that arrival at work at a particular time is an essential requirement, "the fact that the City's flex-time policy

permits all employees to arrive and leave within one-hour windows implies that punctuality and presence at precise times may not be essential." Further, in this case, McMillan's late arrivals were tolerated for a decade before the City decided to take disciplinary action. Accordingly, the court ruled that a jury must decide whether arriving at a specific time was an essential function of the job, and whether McMillan's request for a later start time was reasonable or an undue hardship. Employers with companywide flex-time policies should evaluate whether to exclude positions that require punctuality and presence at work at precise times.

NEWS BITES

Washington Employer Must Reinstate Employee After FMLA Leave Despite Having Doubts About Employee's Ability To Perform Job

In *Chaney v. Providence Health Care*, Robert Chaney worked as a hospital radiologic technician in the State of Washington. Chaney was instructed to undergo drug testing when he sounded incoherent at work, and he tested positive for methadone. Chaney produced a prescription for methadone to treat back pain, and his doctor's certification that he was fit for duty. Not satisfied, the employer required Chaney to undergo an examination by a second physician who concluded that Chaney was unfit for duty, after which the employer unilaterally placed Chaney on FMLA leave. When Chaney's own physician again certified Chaney as fit for duty and that he could return to work, the employer-selected physician continued to insist that Chaney was unfit for duty. Relying on the employer-selected physician, the employer discharged Chaney. In the suit that followed, the Washington Supreme Court held that the employer violated the FMLA as a matter of law, and instructed the trial court to issue a directed verdict in Chaney's favor. The court explained that if the employee's physician certifies that the employee is fit for duty, failure to return the employee to work is a *per se* violation of the FMLA. If the employer is uncertain or has questions about the employee's fitness for duty, the employer "may ask the treating physician for clarification but may not delay the employee's return to work." Accordingly, employers should immediately reinstate the employee from FMLA leave once the employee provides a fitness for duty certification from the employee's physician; the employer may seek clarification from the physician *after* reinstatement. Employers should consult with counsel where reinstating the employee to active duty would pose a direct threat to the health or safety of himself/herself or others.

Iowa Employee Lawfully Terminated For Absences After Failing To Notify Employer Of Need For FMLA Leave

In *Bosley v. Cargill Meat Solutions*, Tanya Bosley worked for Cargill for several years. During that time, she missed work on occasion and called in using the employer's automated call-in procedure to inform the company of absences. The call-in policy provided that an employee must call in each day, and that three consecutive violations of the call-in procedure would result in termination as a voluntary quit. On February 1, however, Bosley was absent and did not call in; indeed, she missed work the entire month and never used the call-in procedure at all. In late February, Bosley's new supervisor contacted Human Resources to inquire about her, and discovered that no one had any information regarding her absence. As a result, Bosley's employment was terminated on February 27. On March 3, Bosley returned and requested retroactive FMLA leave for the month of February. The employer rejected the request, and Bosley sued alleging violation of the FMLA claiming that she was incapacitated by depression and unable to notify her employer of her need for leave until March 3. She admitted during deposition, however, that she was no longer incapacitated around February 15. In dismissing her suit, the federal Eighth Circuit Court of Appeals held that Bosley failed to provide adequate notice of her need for FMLA leave, and she offered no extraordinary circumstances to justify her delay in notice.

Minnesota Employee Complaint That Employer Unlawfully Direct-deposited Employees' Paychecks Did Not Protect Employee From Termination For Poor Job Performance

In *Wood v. SatCom Marketing*, Wood worked as a Human Resources assistant to the head of HR. During the course of an audit of personnel documents, Wood reported that the files were in order when, in fact, they were unorganized and out of date. Wood was instructed to correct the deficiencies. At about the same time, Wood raised concerns that the employer's practice of requiring electronic direct deposit of employee wages might be illegal. Wood was

subsequently placed on a performance improvement plan for thirty days, and immediately delivered a letter to the employer listing various alleged legal violations including the direct deposit policy. That same day, Wood was discharged for violating the terms of her action plan. Wood sued for, among other claims, retaliation for complaining about unlawful pay practices. In dismissing the suit, the federal Eighth Circuit Court of Appeals held that, while Wood had engaged in legally protected activity in complaining about the direct deposit policy, the employer lawfully discharged Wood for legitimate, non-retaliatory reasons, i.e., her repeated failures to perform her job duties, and disregard for explicit instructions to organize and update the HR files.

Wisconsin Employees Who Voluntarily Quit Before Plant Closure Were Not Entitled To Severance Pay

In *Reddinger v. SENA Severance Pay Plan*, employees of a paper mill were notified of the closure of the plant, and were offered severance pay if they stayed until the plant closure in May. The two plaintiffs accepted the severance offer. However, within two weeks, the employer notified employees that the plant closure was delayed until later in the year. Plaintiffs worked until the original termination date in May, and then left to start new jobs. The employer had warned them that, by leaving early, they would not receive severance. Both sued alleging they were entitled to severance under the original terms of the severance offer. In dismissing the suit, the federal Seventh Circuit Court of Appeals held that the severance plan only authorized severance pay for employees where were involuntarily terminated. According to the court, plaintiffs stopped working in May of their own accord, and their termination was therefore voluntary.

24 Hour Fitness Settles Overtime Claims By Trainers And Managers For $17.5 Million

The operator of a national chain of fitness centers agreed to settle the wage claims of over 860 trainers and managers for about $17.5 million. In *Beauperthuy v. 24 Hour Fitness*, the trainers alleged that they were required to work off the clock without pay, and were also not paid for overtime. The managers alleged they were misclassified as exempt and were also owed overtime. Up to $6.6 million of the settlement will go towards attorneys' fees and costs. The settlement must be approved by the federal district court for the Northern District of California.

Kansas Employee Entitled To Workers' Compensation Benefits For Injuries Sustained During Company-Sponsored Go-cart Race

In *Douglas v. Ad Astra Info. Sys. LLC*, a software company in Kansas sponsored an off-site social event at an amusement facility that included go-cart racing. Employees were allegedly told that the event was wholly voluntary, and employees could either attend, or stay at the office and continue to work. At the event, employees were divided into teams to compete for prizes. During the go-cart race, Douglas swerved to avoid a collision, crashed into a barrier and was thrown from the vehicle. He sustained multiple injuries, including a fractured rib and injury to a lung that required surgery. When Douglas sought workers' compensation for his injuries, the employer argued that workers' compensation should not cover a voluntary recreational event. Douglas claimed that he felt pressured to attend since his only other option was to stay back and continue to work. The Kansas Supreme Court ruled that the employer may be liable under such facts. Note that California employers are required to post a notice that workers' compensation does not cover voluntary recreational or social events. Further, employers should not pressure employees into participating in such events.

Former Yahoo Executive Sues Over Termination Weeks Before Vesting Of $1.35 Million Retention Bonus

In *Katz v. Yahoo*, Michael Katz entered into a retention bonus agreement as part of Yahoo's purchase of Interclick. The first tranche of $1.35 million in bonus payments vested in January 2013. However, in December 2012, Yahoo terminated his employment. The suit, filed in New York state court, alleges among other claims that Katz was terminated to deprive him of the benefits of his bonus agreement.

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