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Labor & Employment Briefing

A NEWSLETTER ON EMPLOYMENT, LABOR AND BENEFITS LAW FOR CLIENTS AND FRIENDS OF ANDERSON, MCPHARLIN & CONNERS LLP

Incentive Plan Based on Profitability of Company Upheld *by Colleen A. Déziel*

In Prachasaisoradej v. Ralphs Grocery Co. (2007) Cal.Supreme Court. Ralphs operated an incentive plan for managers and others that allowed an incentive bonus above the regular guaranteed employee compensation. The incentive payments were based on the store's actual profits and as such, all store operating expenses including Workers' Compensation costs, cash or merchandise shortages and any other operating losses were deducted from store revenues. Only thereafter did the manager or other eligible employee receive a percentage of the profit as determined by a prestated formula if present profitability targets were met.

A manager took issue with the fact that deductions took place before the incentive bonus was calculated. He argued that it was against state law for such business costs to be deducted as it forced workers to assume such losses.

The California Supreme Court disagreed. The court held that as stated, the incentive bonus is not a promised wage unless there is a profit. Any such bonus is contingent on the store's profitability which necessarily includes a consideration of losses. The entitlement or expectation to the bonus did not rest until after the store's expenses were subtracted from revenue.

An important fact to the Court was that employees received their regular guaranteed wage they were promised as compensation for carrying out their individual jobs.

Thus, practically speaking, if a company wants to establish an incentive bonus program for its employees wherein business costs are deducted before any such payout, the company should ensure that such program is carefully outlined and defined, and that it is clear it is separate and apart from the regular guaranteed wage of the employee.

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Disabled Employees Must Prove Qualification to Perform Job

by Colleen A. Déziel

The California Supreme Court has handed a victory to employers in regard to proof requirements in disability claims. In Green v. State of California (California Supreme Ct. August 23, 2007), the Supreme Court held that even though the term "qualified individual" is not expressly stated in the Fair Employment and Housing Act, it is the employee who must prove that he is qualified for his position by showing that he is able to perform the essential duties with or without reasonable accommodations.

This burden is the same under the American with Disabilities Act which requires an employee to bear the burden of proving that he is a "qualified individual with a disability."

Disabled employees must prove qualification for position

It is now clear that both Federal and California state law are in line with one another on this issue, and that both limit their protection to disabled employees who can perform the essential duties of the job with reasonable accommodations.

Insurance Claim Adjusters Are Not Exempt

by Colleen A. Déziel

In Harris v. Superior Court, the key issue was whether claims adjusters are covered by the "administrative" exemption under California law. Generally, if persons are employed in such an administrative capacity, they are exempt from overtime compensation requirements.

Administrative employees must be primarily engaged in (i.e., more than 50%), office or non-manual work that is directly related to the management polices or general business operations of an employer.

In Harris, the evidence was that adjusters investigate and estimate claims, make coverage determinations, set reserves, negotiate settlements and identify potential fraud. The court held that these job duties fall under "production" and not "administrative." The court reasoned that the duties encompassed the day to day tasks involved in adjusting insurance claims. The court found that such work did not rise to the level of running the business itself or determining policy.

When does the 90 Day Deadline to File Lawsuit After Receipt of EEOC Right to Sue Notice Really Mean 93 Days?

by Colleen A. Deziel

Right to sue notices say that the claimant has 90 days from "receipt" to pursue the claim in Federal Court. What to do when the date of receipt of the Right to Sue Notice is not known? The Ninth Circuit has recently attempted to answer this question in its holding in Payan v. Aramark Management Services L.P., (August 2, 2007). Therein, the court held that the calculation of the date of receipt, when unknown, begins with the presumption that the notice was sent on the date indicated on the notice. Then, the right to sue letter is presumed to have been received by the claimant three days after this date. Thus, the 90 days would begin to run three days after the date indicated on the notice letter under such circumstances. It should be noted that the U.S. Supreme Court has followed these presumptions for decades.

Proximity in Time Between Complaint and Termination Insufficient to Overcome Legitimate Termination

by Eric A. Schneider

In *Loggins v. Kaiser Permanente International* (May 14, 2007) 2007 WL1395393 plaintiff Dianne Loggins had filed suit alleging that she had been terminated in retaliation for her having complained of racial discrimination. Defendant Kaiser had moved for summary judgment on the basis that it had terminated Loggins for legitimate nondiscriminatory reasons involving, among other things, her using Kaiser time and Kaiser facilities to operate her private business.

In opposition to the motion, Loggins claimed that Kaiser terminated her on November 10, 2003 in retaliation for her having filed a complaint with the DFEH in January, 2003 and then further complaining about racial harassment and discrimination by way of a call on August 11, 2003. She asserted that the proximity in time between the August 11 call and the November 10 termination created an inference of a nexus between the two events which must defeat the motion.

The trial court granted the motion, and Loggins appealed. The Fourth District Court of Appeal affirmed the summary judgment. In so doing the court addressed the traditional burden shifting analysis of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 which involves the plaintiff making her prima facie case which shifts the burden to the defendant to demonstrate that there was a legitimate, non-retaliatory reason for the adverse employment action, and then the burden shifting back to the employee to establish that the employer's proffered reasons were either untrue or pretextual.

Timing of termination relative to complaint insufficient in and of itself as a matter of law to prove intentional retaliation

The Appellate Court found that Loggins had satisfied her burden to make the prima facie case, but then determined that Kaiser had met its burden of showing that its actions were based on legitimate, rather than retaliatory reasons.

Loggins then argued that the temporal proximity sufficed to raise a triable issue of fact because a trier of fact could infer, based solely on the timing of the adverse employment action, that Kaiser's articulated reason was pretextual.

The court cited *McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 388 which itself quoted *Yanowitz v. L'Oréal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 to the effect that evidence of the temporal proximity serves only to satisfy the plaintiff's initial burden. Once the employer has shown a legitimate reason for the adverse employment action, as did Kaiser, the presumption of retaliation "drops out of the picture," and the burden shifts back to the employee to prove intentional retaliation. The court then stated:

> We agree with *McRae* that temporal proximity, although sufficient to shift the burden to the employer to articulate a nondiscriminatory reason for the adverse employment action, does not, without more, suffice also to satisfy the secondary burden borne by the employee to show a triable issue of fact on whether the employer's articulated reason was untrue and pretextual. Loggins's contrary argument, if accepted, would eviscerate the *McDonnell Douglas* framework for resolving claims at the demurrer or summary judgment stage, because the same minimal showing required the plaintiff to raise a prima facie case would also suffice to preclude the employer from obtaining summary judgment notwithstanding otherwise unrebutted proof of articulated legitimate reasons for the employment termination. Instead, an employee seeking to avoid summary judgment cannot simply rest on the prima facie showing, but must adduce substantial additional evidence from which a trier of fact could infer the articulated reasons for the adverse employment action were untrue or pretextual.

This is a very favorable development for employers. An employee cannot prevent a motion for summary judgment merely by trumping up a discrimination or harassment claim to defeat a motion for summary judgment where the employer has undisputed evidence of a legitimate, nondiscriminatory reason for effecting adverse employment action.

Google Summary Judgment Overturned as to "Fuddy Duddy" Plaintiff

by Eric A. Schneider

In June, 2002, Google, Inc. hired Brian Reid as director of operations and director of engineering. He was 52 years of age at the time. Less than two years later he was terminated. He filed suit for age discrimination with a number of other causes of action.

The trial court granted summary judgment in favor of the defendant, and Reid appealed.

One year and three months into his employment[1] Google removed Reid from his director of operations position and removed his responsibilities and reports as director of engineering. He was moved into a new role at the company in a new program aimed at retaining engineers by enabling them to obtain masters degrees in engineering by attending courses taught by outside university professors at Google. Reid was assured that work on that project would require another five years. He was not given a budget or a staff to support the program.

Upon Reid being moved into the graduate program two employees, one 15 years younger that Reid and the other 20 years younger, assumed his other duties.

In February, 2004 Reid was told that he was not a "cultural fit" within Google, and that there was no longer a place for him in the engineering department. Reid holds a PhD in computer science and is a former associate professor in electrical engineering at Stanford.

Reid was encouraged to apply for positions in other departments. E-mails among various Google personnel showed however that there was no intention of hiring him in another department. Eventually he was terminated. Google says that it told him that the in-house graduate program was being eliminated, and for that reason he was being terminated, but Reid says that he was never given any reason for his termination other than the lack of "cultural fit."

In his opposition to the summary judgment motion, Reid introduced evidence that he was told that his ideas were "obsolete" and "too old to matter;" that he was "slow," "fuzzy," "sluggish," "lethargic," did not "display a sense of urgency," and "lacked energy." He also said that some of his colleagues referred to him as an "old man," and "old guy," and an "old fuddy-duddy."

The Court of Appeal applied the standard McDonnell Douglas[2] analysis with regard to resolution of discrimination claims, including those involving age. The plaintiff must first establish his or her prima facie case of discrimination (that the plaintiff was a member of a protected class, that he or she was qualified for the position sought or was performing competently in the position held; that he or she suffered an adverse employment action; and that there were some other circumstances suggesting discriminatory motive). Once the employee satisfies that burden, there is a presumption of discrimination, and the burden then shifts to the employer to show that the action was motivated by legitimate, nondiscriminatory reasons. Citing Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 358, the court defined "legitimate" as "factually unrelated to a prohibited bias, and which if true, would preclude a finding of discrimination."

Then, if the employer has met that burden, the employee must show that the stated reasons were pretexts for discrimination or must produce other evidence of intentional discrimination.

The Reid court then stated:

> In the employment context, a finding of discriminatory motive may be reached without ever finding that the cited reason was "pretextual," because the "ultimate issue" is *what really happened*, not whether one of the parties is lying about it. If an employer offers an innocent reason for his actions and there is no evidence to the contrary, then he is entitled to summary judgment. But if there *is* evidence to the contrary, the question of pretext is at best incidental; the issue is whether his conduct was in fact motivated entirely by the stated reason or whether the discriminatory animus was a but-for cause of that conduct.

Then, in discussing summary judgment in age discrimination cases, the court stated:

> Once the employer meets its burden in a summary judgment motion, "the employee must
>
> demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory *animus*, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action." (Cucuzza v. City of Santa Clara (1992) 104 Cal.App.4th 1031, 1038.

In this case Reid sought to raise a triable issue of material fact as to pretext. In that regard the court noted that the issue of pretext does not address the correctness or desirability of the reasons offered for the employment decision, but whether the employer honestly believed in those reasons. In that regard the employee's rebuttal obligation is not satisfied by merely showing that the employer's decision was "wrong, mistaken, or unwise" but he instead "must reasonably demonstrate such weakness, implausabilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder *could* rationally find them unworthy of credence, . . . and hence infer that the employer did not act for the [asserted] nondiscriminatory reasons," citing Morgan v. Regents of the University of California (2000) 88 Cal.App.4th 52, 75.

In this case, Reid has asserted a combination of evidence that did serve to create a triable issue of material fact both as to the company's stated reason of job elimination being pretextual and the discriminatory comments made by the co-workers. The court also found persuasive Reid's statistical evidence of an adverse relationship between the age of the Google employees, their performance ratings, and their bonuses.

As a consequence the summary judgment was reversed.

Bad Advice by DFEH Results in Relief Being Granted to Employer

by Colleen A. Déziel

Holland v. Union Pacific Railroad involved the untimely filing of an administrative complaint. Specifically, the plaintiff failed to file his administrative complaint within the one year required under the Fair Employment and Housing Act. However, evidence was presented which reflected that this failure was the result of bum advice from an employee of the Department of Fair Employment and Housing. Based on this faulty advice, the court found that an exception to the one year filing requirement had been met, in that the plaintiff was reasonably misled through no fault of his own.

Bottom line: Even if employee fails to timely file his/her charge, the matter may not necessarily be over.

19 Day Delay in Reporting Incident to Employer Not Unreasonable Delay

by Colleen A. Déziel

In Craig v. M & O Agencies, Inc. the United States Court of Appeal for the Ninth Circuit has held that an employee, who was complaining of sexual harassment, was not unreasonable in waiting 19 days from a complained of incident to report the matter to the employer. In Title VII cases, an employer has an affirmative defense to such claims if it can establish a two prong test. The first prong is that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and the second prong is that plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by he employer (i.e., the Faragher defense). While the court did not outline a bright line test as to exactly what was an "unreasonable delay" in taking advantage of corrective opportunities, it did find that 19 days was not it.

Is One Who Was Not Available for Work Due to a Non-Industrial Illness Entitled to Back Pay and Reinstatement on a Finding of a Wrongful Demotion? No Way

by Eric A. Schneider / Colleen A. Déziel

Davis v. Los Angeles Unified School District (June 28, 2007) 2007 WL 1839285) involves a demoted employee who brought two petitions for preemptory writs of mandate relating to a demotion. In Davis v. LAUSD Personnel Com., the plaintiff was demoted from his position with LAUSD. However, before he learned he was being demoted, he was already on disability leave for reasons unrelated to his employment. Some time later, while the plaintiff was still on this leave, it was determined by the Personnel Commission for the LAUSD that the demotion was wrongful. However, the Commission also found that the plaintiff was not entitled to back pay, and was not entitled to immediate reinstatement.

Significant about the case is the holding by the Court of Appeal. The Court upheld the Commission's findings, that even where the demotion was improper, the employee is not entitled to reinstatement if he or she cannot return to active duty, and that the employee is not entitled to back pay where the employee would not have appeared for work because of his non-work related employment. The Court reasoned that back pay is a make-whole remedy which is intended to restore the employee to the financial situation that would have existed but for the employer's wrongful conduct. As such, an employee is not entitled to earnings he or she would not have received in any event.

Summary Judgment Upheld on a Grab Bag of Claims Which Include Sexual Harassment, Discrimination, Retaliation, Assault and Battery

by Colleen A. Déziel

Kim Jones had been fired after 20 years as a correction officer at a penal institution. She presented a multitude of different claims including that she had been sexually harassed, subjected to a hostile work environment based on her gender, was discriminated against on the basis of her gender and race (African American), and had been assaulted and battered. Despite all of these claims, the Superior Court granted summary judgment in favor of the defendants, and the Fourth District Court of Appeals affirmed.

Several of Jones's claims stemmed from an incident where there was a dispute regarding the use of a wheelbarrow. According to the plaintiff, another officer "grabbed her arm and started 'banging her body around and stuff.'" She left on medical disability the same day and never returned to work. The Appellate Court affirmed the trial court ruling as to that claim on the basis that her claims for assault, battery, and intentional negligent infliction of emotional distress were barred by workers' compensation as the exclusive remedy.

Jones also claimed race and gender discrimination and sexual harassment. It is not clear exactly what the basis of these claims were other than the wheelbarrow incident. The Appellate Court affirmed the grant of summary judgment on this cause of action on the basis that the wheelbarrow incident was wholly unrelated to her gender or race. The court also affirmed as to this claim on the basis that she had answered in the negative about whether certain comments and complaints made about her had been prompted by her gender or race.

The court further concluded there had been no nexus shown between the conduct of her co-workers and her gender or race, and that there was no evidence the employer's proffered reasons for its employment decisions were merely pretext for discriminatory conduct.

Finally, Jones's claim for retaliation was tossed on an assertion that she had been unfairly criticized, that false accusations were made about her to inmates, and a variety of other things of a similar ilk. The court found that irrespective of whether those allegations were true, none served to materially alter her work conditions thus defeating her claim for retaliation.

The lesson to be learned from this case is that even where a claimant falls into numerous protected categories, that in and of itself does not mean that he or she will prevail.

Jones v. R.J. Donovan Correctional Facility (June 14, 2007) 2007 WL 1705671

by Colleen A. Déziel

Statute of Limitations/Administrative Complaint

McDonald v. Antelope Community College (2007) 151 Cal.App.4th 961, review granted August 15, 2007, S153964/B188077.

The California Supreme Court recently granted review on this matter. The Court will address the issue of whether the one year statute of limitations for filing an administrative complaint with the Department of Fair Employment and Housing set forth in Government Code section 12960, is subject to equitable tolling while the employee pursues an internal administrative remedy.

Another Potential Strike Against Provisions in Arbitration Agreements

In Gentry v. Superior Court (2006) 135 Cal.App.4th 944, the California Supreme Court recently decided whether an arbitration provision that prohibits employee class actions in litigation concerning alleged violations of California wage's hour laws is enforceable. The Supreme Court ultimately found that there was an element of procedural unconscionability notwithstanding the opt out provision, but remanded the matter to the lower court for the determination of whether provisions were substantially unconscionable as well.

Review Was Granted on Issue of Whether Increased Wages or Commission Can be Used To "Indemnify" Employee Expenses

In Gattuso v. Harte – Hanks Shoppers, Inc. (2005) 133 Cal.App.4th 985, the Supreme Court will be deciding the issue of whether an employer complies with its duty under California Labor Code §2802 to indemnify its employees for expenses they necessarily incur in the discharge of their duties, by paying the employees increased wages or commissions instead of reimbursement.

Federal Circuit Reaffirms That The Bar Is Set High For Plaintiffs in Federal "Constructive Termination" Cases

In prior case authority, the 9th Circuit set the bar high for a claim of constructive discharge. The thought was that federal antidiscrimination polices are better served when the employee and employer attack discrimination within their existing employment relationship, rather than when the employee walks away and then later litigates whether his employment situation was intolerable.

The doctrine requires an inquiry as to whether working conditions become so intolerable that a reasonable person in the employer's position would have felt compelled to resign. Constructive discharge occurs when the working conditions deteriorate, as a result of discrimination, to the point that they become sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn an livelihood and to serve his or her employer.

In Poland v. Chertoff (2007), _____ F.3d ____, the employer transferred plaintiff to a new job in a new location. This meant a transfer to a different state and from a managerial position into a "non-supervisory" position. While plaintiff accepted the transfer, he ultimately retired early and filed a discrimination claim. The court found that an employee may not be unreasonably sensitive to a change in job responsibilities. The court found that for a customs agent, it was not unreasonable to be transferred, and, plaintiff had been transferred several times already. Even the transfer to non-supervisory position alone does not amount to a constructive discharge.

Federally Chartered Credit Unions Can Be Subjected to Punitive Damages

While federally chartered credit union can be exempt from punitive damages based on sovereign immunity, the California Appellate Court has recently determined in McGee v. Tucoemas Federal Credit Union, which involved an employment discrimination claim, that the credit union was not so immune. The court discussed the idea that in the absence of certain narrow exceptions, federal "instrumentalities" that are subject to a "sue and be sued" clause are presumed to have fully waived immunity.

Bottom line, Credit Unions may not be able to enjoy the federal instrumentality immunity defense on punitive damage claims as it pertains to employment matters any longer.

Five Year Dismissal Statute Losing Its Teeth??

Code of Civil Procedure §§583, 310, 583.360 require a lawsuit to be brought to trial within five years. However, there are exceptions, and recently it seems courts have been asked more and more to apply the impracticability tolling exception to prevent dismissal of such actions. One such case is Tamburina v. Combined Ins., a discrimination case. The trial court dismissed the case for the plaintiffs failure to bring the matter to trial in five years, and Tamburina appealed.

The Court of Appeal in this decision outlined the three hurdles a party must clear in order to prevent a dismissal. They are as follows: (1) Circumstances of impracticability (like long term illness); (2) Causal connection to the failure to move the case to trial; and (3) as the party reasonably diligent in prosecuting the case at all stages of the proceedings.

In applying these hurdles, the Court of Appeal held that the plaintiff had met the first two requirements by establishing that there were stipulations to continue trial due to counsel's illness and by demonstrating a causal connection between those illnesses and the failure to satisfy the five year requirement. However, the court also determined that the last hurdle was an issue of fact for the fact finder and remanded it for such a determination. Stay tuned.

Plaintiff Filed Claim Early in Violation of Statute and Employer Still Lost *by Colleen A. Déziel*

In Forester v.Chertoff (2007) DJDAR 13308 the Plaintiffs, federal employees, filed claims for age discrimination and retaliation under ADEA and Title VII. The plaintiffs claimed that Border Patrol Agent Rowdy Adams intended to eliminate the older workers from the Douglas Border Patrol station.

The plaintiffs participated in counseling with the EEOC and received letters regarding their right to pursue as EEOC complaints. One of the sentences in the letters stated that the plaintiffs could bypass the administrative procedure and file a civil action, after first filing a written notice of intent to file a civil action with the EEOC within 180 days. After filing a timely notice of intent, and as long as the plaintiffs wait an additional 30 days after the filing of such a notice, he/she can then file the civil action.

In the instant action, the plaintiffs did not wait 30 days. They only waited 9 days. Defendants moved for summary judgment, and the motion was granted based on the failure to wait 30 days. (We note that if plaintiffs were private employees, the notice and filing requirements would be different. In that situation, an employee must wait 60 days after filing a formal charge with the EEOC before his right to sue matures.)

Despite the fact that the Plaintiffs failed to wait the required time with which to file an action, the Supreme Court reversed the lower court's ruling on the defendant's motion for summary judgment finding that the defendant was not prejudiced by the early filing and relief was supported by the interests of justice. While one might reasonably think that this holding could be applied to matters involving private employees, think again. The Supreme Court was careful to distinguish matters involving private versus public employees. The notice requirements for private employees have been strictly construed and the Court noted the purpose behind the notice requirements for each are different.

Bottom line: Sometimes it really pays to be a public employee.

Employment Practices Group at Anderson, McPharlin & Conners LLP

Our Employment Practices Group places a special emphasis on keeping pace with rapidly changing employment laws and providing employers with effective representation in this constantly evolving area. For twenty years, our clients have known that we understand the challenges they face and that we will work with them in assessing risks and developing cost-effective strategies to bring employment matters to prompt and satisfactory resolution.

Our Employment Practices Group has broad experience with labor and employment matters and is well versed on the intricacies of the subjects with which we deal. Our Employment Practices attorneys have published numerous articles on a wide range of labor and employment topics and are frequently featured as speakers at seminars and conferences around the country. Equally important, the Group's attorneys have considerable "hands on" experience in addressing the problems that businesses encounter in managing a workforce and are thus able to offer practical, real-world advice that makes good business sense.

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