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

Court Increases Employers' Liability for Vacation Pay

By Kathryn T. McGuigan

In a recent and surprising decision, a California court of appeal increased employers' potential liability for unpaid vacation claims.

John Church sued his former employer for breach of contract, misrepresentation, and various Labor Code violations. In particular, Church claimed that, when he terminated his employment in May 2001, he had not been paid his unused vacation. He had accrued ten days of vacation and had not taken any of it when he left his job.

Church did not allege a vacation claim until April 2002 which was dismissed by the trial court as time-barred under case law and the Division of Labor Standards Enforcement (DLSE) opinion which limited claims for vacation accruing during employment earlier than two years or four years, depending on whether the accrual is based on a written or oral contract. However, the Court of Appeal found that Church's claim was timely because he had filed his lawsuit within one year of his termination.

The next issue the court addressed was when vested vacation time accrues. Contrary to what the DLSE has published (the DLSE exceeds its expertise when it interprets the California Code of Civil Procedure), a cause of action accrues for non-payment of vested vacation time when it is not paid upon termination of employment. This means if an employee works for 12 years, has not used any vested vacation time and is terminated without being paid out for the entire 12 years, the cause of action for the entire 12 years accrues at that time. The statute of limitations begins to run at termination.

While employers have no obligation to provide vacation or paid time off in California, most do provide a vacation benefit to their employees. Those employers are subject to Labor Code §227.3 which provides that all vested vacation time must be paid to an employee when he or she terminates from employment. A vacation policy cannot provide for forfeiture of vested vacation upon termination under the Labor Code. An employer can limit vacation accruals by ensuring employees are scheduled for the time off they have accrued. Alternatively, employers may want to use an accrual cap. This is a predesignated ceiling after which point no vacation accrues until the employee uses sufficient vacation. However, the DLSE has taken the position that employees must be given up to nine months to take accrued vacation. Thus, an accrual cap should permit accrual of at least one year and nine months of vacation.

Church v. Jamison (2006)143 Cal.App.4th 1568

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Noble Goal Not Enough

In a recent decision, the Ninth Circuit Court of Appeals established a much lighter burden of proof for plaintiffs challenging a facially discriminatory qualification standard than that which is normally required. The Court also agreed that an ADA action challenging the application of a uniform qualifications standard may properly be brought as a class action.

In this case, a group of UPS employees and applicants claimed UPS violated the ADA when it excluded them from jobs as package car drivers because of their inability to pass the Department of Transportation's (DOT) hearing test. The package car positions are awarded only to UPS employees who meet certain criteria, including seniority, having a clean driving record, passing a road test, and passing a DOT physical, which includes the DOT hearing test. Although the DOT only requires drivers of vehicles with a gross vehicle weight rating (GVWR) of 10,001 pounds or more to pass the hearing test, UPS required drivers of all package cars, regardless of GVWR, to pass the test. The policy had the effect of automatically excluding all deaf and hearing impaired employees from driving the trucks.

Safety Issue or Discriminatory Policy?

The ADA prohibits a covered entity from discriminating against a qualified individual with a disability because of that person's disability. Under the ADA, the term "discriminate" includes the use of qualification standards or other selection criteria that screen out disabled individuals, unless the criteria is job related for the position in question and consistent with business necessity.

UPS argued that the policy was a safety issue rather than a discriminatory policy. The company presented testimony about drivers avoiding accidents because the driver heard a sound. The court found that UPS failed to show that those accidents would not also have been avoided by a deaf driver who has compensated for his or her loss of hearing by, for example, adapting modified driving techniques or using compensatory devices such as backing cameras or additional mirrors.

The court held that the hearing test UPS used is a qualification standard that screens out individuals with disabilities. The court found that the prohibition on the use of screening criteria applies to all disabled individuals, not just qualified individuals with a disability. The court held that UPS had the burden of proving that the use of the hearing test is job related and consistent with business necessity and found that the hearing impaired should be afforded the same opportunities that a hearing applicant would be given to show that they can perform the job safely and effectively.

The court's ruling places a lesser burden on plaintiffs challenging a discriminatory policy and higher burden on employers that maintain such a policy. The decision indicates that lawsuits brought under the ADA challenging the application of a uniform qualifications standard may properly be brought as a class action.

Even though the company's goal was aimed at improving employee and public safety, the court emphasized that more than a noble goal is in order. An employer must establish and be able to put on more than anecdotal proof that particular job qualifications are job related and consistent with business necessity.

Bates v. United Parcel Service, Inc. (9th Cir. 2006) 444 F.3d 1104

Employee Fails to Prove Violation of CFRA

Barbara Neisendorf worked as the Vice President, Worldwide Training and Development, for Levi Strauss at an annual salary of $250,000 plus a signing bonus of $250,000, participation in two incentive bonus plans and additional benefits. During the two years of her employment with the company, Neisendorf's supervisor and subordinates voiced concerns about her performance, which ultimately resulted in her offering to resign in exchange for a separation package worth approximately $1.7 million. After learning that she was not going to receive the separation package, Neisendorf commenced a 14-week leave of absence based upon her physician's note, which stated "Medically, Ms. Neisendorf is unable to work;" her psychiatrist later diagnosed her with a "panic disorder." Although Levi Strauss had interacted with Neisendorf and her lawyer in an effort to find an appropriate accommodation, she was repeatedly informed that her successful return to her former position was conditioned upon her willingness to accept and address the performance deficiencies that had been previously identified. Neisendorf's refusal to acknowledge the deficiencies resulted in the termination of her employment. The Court of Appeal affirmed the trial court's dismissal of Neisendorf's claim for violation of the California Family Rights Act (CFRA) because Levi Strauss had legitimate nondiscriminatory (performance-related) reasons for terminating her employment that were unrelated to her leave of absence. The Court also affirmed dismissal of her claim for unpaid performance bonuses because her termination for cause rendered her ineligible for payment.

Neisendorf v. Levi Strauss & Co. (2006) 143 Cal.App.4th 509

Is Severe Obesity a Protected Disability?

In a recent ruling, the Sixth Circuit Court of Appeals found that morbid obesity is not in and of itself a disability protected by the Americans with Disabilities Act ("ADA"). In *EEOC v. Watkins Motor Lines, Inc.*, the EEOC brought suit on behalf of an employee who claimed he had been fired because of his morbid obesity (he weighed over 450 pounds).

The employee, who had been injured on the job, took leave to recover from his injuries. When he returned to work, he was examined by a company doctor, who determined the employee could not safely perform the requirements of the job. The employee was terminated as a result of the examination.

The EEOC filed a lawsuit on the employee's behalf, alleging the employer violated the ADA by discharging the employee. The Sixth Circuit held that the employee did not have a disability for purposes of the ADA, because he did not show that his obesity had a physiological cause. The EEOC argued that it did not have to present evidence that the employee's obesity was a result of a physiological disorder, because morbid obesity is a condition that qualifies as a disabling impairment under the ADA regardless of the cause.

The Court found that a physical characteristic must relate to a psychological disorder in order to qualify as an ADA impairment. The Court further reasoned that an abnormality not caused by a physiological problem was simply an unusual physical trait. Congress intended the ADA, however, to protect the truly disabled, not to create a "catch-all cause of action for discrimination based on appearance." Therefore, the Court "decline[d] to extend ADA protections to all 'abnormal' . . . physical characteristics," and the Court refused to find that the employee qualified as "impaired."

This ruling underscores the confusion over whether discrimination based on weight can lead to ADA liability for an employer. Employers should take care with extremely overweight employees, and consider:

- Obese employees can maintain ADA claims by showing that they were perceived as disabled;
- Morbid obesity – if physiologically caused – may constitute an ADA-covered disability;
- Obesity can be a symptom or cause of underlying health conditions which could bring an employee within the protections of the ADA

EEOC v. Watkins Motor Lines (6th Cir. 2006) 463 F.3d 436

Invasion of Privacy Claim Can Proceed

The California Court of Appeal recently considered the issue of whether two employees could proceed with a lawsuit against their employer for invading their privacy by placing a video surveillance system in their office without their knowledge. The Court held the lawsuit could go forward, because the surveillance equipment was capable of being activated while the employees were present; the employees had a reasonable expectation of privacy; and there were questions of fact as to whether the employer's actions were highly offensive or justified. The employees shared an office at Hillsides Children's Center, a residential facility for abused children. In response to information that someone was accessing illicit pornographic websites in the early hours of the morning, Hillsides decided to conduct surveillance in areas where the access had occurred. Although Hillsides did not suspect the plaintiffs, Hillsides installed a motion-activated video surveillance system in their shared office without telling them. The system was set up to broadcast images to a television monitor and video recorder in a storage room across the hall. Hillsides' director admitted to activating the system on three occasions, but claimed it was only activated when the plaintiffs were not present. Nevertheless, the plaintiffs discovered the system when they noticed a blinking red light on a shelf in their office.

The plaintiffs sued, basing their claim of invasion of privacy on the concept of "intrusion upon seclusion or solitude or private affairs." This type of invasion of privacy has two main elements: (1) intrusion into a private place, conversation, or matter, and (2) in a manner highly offensive to a reasonable person.

Hillsides argued there was no evidence the plaintiffs were recorded or viewed by the surveillance equipment. The Court said the employees did not have to show that private information was disclosed to a third party – harm occurs when privacy is invaded in an offensive manner without consent. "[T]he mere placement of the surveillance equipment on the shelf in the office itself invaded their privacy because it allowed [Hillsides], or anyone with access to the storage room, to 'activate' the surveillance system at any time during the day without [their] knowledge, thus at least presenting the possibility of unwanted access to private data about [them]."

Although the plaintiff's' privacy was not absolute because their office could be viewed through a "doggie door" and at least 11 people had keys, they had a reasonable expectation that images of them in their closed office would not be transmitted to another part of the building. The Court also determined that the plaintiffs had raised an issue of fact about whether Hillsides' intrusion was "highly offensive," considering Hillsides had placed a motion-activated camera in their private office, left it functioning while they were present, and did not tell them about it so that they could modify their behavior. Because the offensive websites were only being accessed at night and the camera did not need to be in the office during the plaintiffs' working hours, the Court rejected Hillsides' argument that its actions were justified.

As for the plaintiffs' claim of intentional infliction of emotional distress, the court determined Hillsides' conduct was not "extreme and outrageous," because it did not intend to spy on Hernandez and Lopez and intended the camera to activate only when they were not present.

The Court sent the case back for further proceedings only on the invasion of privacy claim.

Hernandez v. Hillsides, Inc. (2006) 48 Cal.Rptr.3d 780

New EEO-1 Reporting Rules

The Equal Employment Opportunity Commission (EEOC) has significantly revised its EEO-1 Reports for 2007. The revisions represent the first major change to the EEO-1 Report in 40 years. The EEO-1 Report is a form that many employers are required to complete and file with the government each year. A completed EEO-1 Report reflects the submitting organization's workplace demographics — specifically including job categories divided by ethnicity, race, and gender. The EEOC uses EEO-1 Reports to support civil rights enforcement and to analyze employment patterns, such as the representation of female and minority workers within companies, industries, and regions. EEO-1 reporting requirements apply to private sector employers with 100 or more employees and private sector employers with federal government contracts of $50,000 or more and with 50 or more employees.

In 2007, the race and ethnic categories will be expanded to seven. More specifically, the "Asian and Pacific Islander" category will be divided into two new categories: "Asian, not Hispanic or Latino" and "Native Hawaiian or other Pacific Islander, not Hispanic or Latino." The revisions also add a "Two or More Races, not Hispanic or Latino" race category and rename two existing categories: "Black" as "Black or African American" and "Hispanic" as "Hispanic or Latino." The revisions also modify some job categories. The category of "Officials and Managers" will be divided into two levels based on responsibility and influence within the organization. Individuals who plan, direct and formulate company policy, set strategy, and provide overall direction will be classified as "Executive/Senior Level Officials and Managers." Individuals who oversee day-to-day operations or direct implementation or operations within specific parameters set by Executive/Senior Level Officials and Managers will be classified as "First/Mid-Level Officials and Managers." Nonmanagerial business and financial occupations are also moved from the "Officials and Managers" category to the "Professionals" category. According to the EEOC, these changes were made to improve data for analyzing mobility trends of women and minorities within the two new "Officials and Managers" categories. Employers should also be aware that the revisions change the process by which employers may obtain ethnic and racial employee information for EEO-1 reporting purposes. In the past, the EEOC permitted employers to determine an employee's race or ethnicity by visual observation. The revisions strongly encourage employers to ask their employees to self-identify their race or ethnicity and to rely on visual identification of an employee's race or ethnicity only when an employee refuses to self-identify. In gathering this information, employees must be notified that the self-identification is voluntary; employers may not force employees to declare their ethnic and racial classification.

Employers should solicit self-identification of race and ethnic information from each current employee, ensure that the information is correctly categorized, as well as update their applicant tracking systems and employee recordkeeping methods to include the new and revised EEO-1 categories. When requesting worker self-identification, employers should include a compliant statement explaining the voluntary nature of the inquiry. Employers can use the EEOC's recommended language on its self identification forms, stating: "The employer is subject to certain governmental recordkeeping and reporting requirements for the administration of civil rights laws and regulations. In order to comply with these laws, the employer invites employees to voluntarily self-identify their race and ethnicity. Submission of this information is voluntary and refusal to provide it will not subject you to any adverse treatment. The information will be kept confidential and will only be used in accordance with the provisions of applicable law, executive orders and regulations, including those that require the information to be summarized and reported to the federal government for civil rights enforcement. When reported, data will not identify a specific individual." Employers should ensure that they maintain the confidentiality of this information and that its access is limited.

For more information, see the EEOC's web site at www.eeoc.gov.

Family Responsibilities Discrimination – New Trend on the Horizon?

By Eric Schnieder

In a recent paper, Mary C. Still, a faculty fellow at the University of California Hastings College of Law, empirically analyzed some 613 cases of "Caregiver Discrimination" indicating that such cases are on the rise. Caregiver discrimination or family responsibilities discrimination (FRD) is, as it sounds, discrimination against employees on the basis of their family caregiving responsibilities.

Interestingly, while caregiving may lie at the heart of the claim, the actual legal theories grounding these cases chiefly consist of sex discrimination and, to a lesser extent, pregnancy discrimination, and the cases frequently derive from employers alleged to have relied upon gender stereotyping. The United States Supreme Court has recognized that basing such workplace decisions on gender stereotypes constitutes sex discrimination. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228.

Typically a female employee will claim that she was denied work opportunities on the basis of her having small children at home where the employer assumes, without asking the employee, that she would not want to be involved in projects that would take her out of town or work long hours. Were this hypothetical employee able to prove that her employer in fact did engage in such conduct, she would have a good case for discrimination on the basis of her sex. Recently making the news in that regard was a lawsuit, for sex discrimination, filed on behalf of attorney Alyson Kirleis against the law firm where she is a partner, claiming that management had told her that her priorities were out of order because she spent too much time working and not enough time with her family. While that allegation in isolation is gender neutral, other allegations in the case (that she was told that one of the firm's clients wanted only "gray haired guys" trying its cases, and that the firm's chairman told her that the "gals" in the firm would prepare the cases, and that the male lawyers would try them; and that women are "constructively excluded" from various firm functions "because of the sexually explicit nature of the entertainment including skits, songs, pornographic materials and props") would indicate that the real thrust of the case is sex discrimination.

California's Fair Employment and Housing Act does not proscribe discrimination on the basis of family responsibility nor does federal law. Nevertheless, employers would be well served not to make assumptions and then act upon what they perceive to be in the best interest of their employees' relationships with their families in deploying personnel. That, however, does not preclude employers from providing their employees with opportunities not to participate in particularly labor intensive activities or to work on part time schedules. Then, if the employee should choose such options, whether for family responsibility reasons or for altogether different reasons, the choice was theirs.

San Francisco's New Paid Sick Leave Law

Employers will be required to provide paid sick leave for all employees within San Francisco city and county under a new law approved by San Francisco voters as Proposition F on November 7, 2006. Under the law, employees hired after February 5, 2007, will begin to accrue paid sick leave 90 days after their employment begins. Employees hired on or before that date will begin to accrue one hour of paid sick leave for every 30 hours they work starting February 5, 2007.

Under the law, employer includes "any person…including corporate officers or executives, who directly, or indirectly or through the services of a temporary service or staffing agency, employs or exercises control over the wages, hours or working conditions of an employee." A covered employee is any person who performs work, including part-time and temporary, within San Francisco for an employer. The mandated requirements also apply to workers assigned to work in the city, even if their home base is elsewhere.

For employees working for an employer on or before February 5, 2007, paid sick leave begins to accrue on that date. For employees hired by an employer after February 5, 2007, paid sick leave begins to accrue 90 calendar days after the employee's first day of work. For every 30 hours worked, an employee accrues one hour of paid sick leave. Paid sick leave accrues only in hour-unit increments, not in fractions of an hour. For employees of employers for which fewer than 10 persons (including full-time, part-time, and temporary employees) work for compensation during a given week, there is a cap of 40 hours of accrued paid sick leave. For employees of other employers, there is a cap of 72 hours of accrued paid sick leave. An employee's accrued paid sick leave does not expire; it carries over from year to year. If an employer has a paid leave policy, such as a paid time off policy, that makes available to employees an amount of paid leave that may be used for the same purposes as paid sick leave under the law and that is sufficient to meet the accrual requirements under the law, the employer is not required to provide additional paid sick leave. All or any portion of the applicable requirements do not apply to employees covered by a bona fide collective bargaining agreement to the extent that the law's requirements are expressly waived in the collective bargaining agreement in clear and unambiguous terms.

An employee may use paid sick leave not only when he or she is ill, injured, or for the purpose of receiving medical care, treatment, or diagnosis, but also to aid or care for a family member or designated person when they are ill, injured, or receiving medical care, treatment, or diagnosis. If an employee has no spouse or registered domestic partner, the employee may designate one person for whom the employee may use paid sick leave to provide aid or care. Employers must offer the opportunity to make a designation no later than 30 work hours after the date paid sick leave begins to accrue. The employee has 10 work days to make this designation. Thereafter, employers must offer the opportunity to make or change the designation on an annual basis, again with a window of 10 work days for the employee to make the designation.

Employers must post a notice informing employees of their rights in a location where employees can read it easily. The San Francisco Office of Labor Standards Enforcement provides this notice through the city's annual business registration mailing. A downloadable version of the notice is also available on OLSE's website. Employers must retain records documenting hours worked by employees and paid sick leave taken by employees, for a period of four years, and must allow OLSE access to such records. Employees who assert their rights to receive paid sick leave are protected from retaliation. Employees who are denied their rights under the law may file a complaint with OLSE.

Employers that do not follow the law can be subject to civil actions and fines equal to three times the amount of paid sick leave withheld from the employee or $250, whichever is greater. In addition, if a violation of the new law results in other harm to the employee or any other person, such as discharge from employment, an additional administrative penalty of $50 for each day or portion of a day may be required to be paid to each employee or person whose rights are found to have been violated.

Social Security No-Match Letters

Recently, the Department of Homeland Security published a notice of proposed rulemaking in which it proposed to make changes to its regulations regarding how employers are to respond to Social Security no-match letters. The proposed regulations provide "safe harbor" procedures for employers who receive such letters. By taking steps within the timeline set, an employer would avoid prosecution for knowingly hiring illegal workers.

Under the current immigration regulations, it is unlawful to knowingly hire or to continue to employ a person who is not authorized to work in the United States. Such knowledge can be actual or constructive. The proposed regulations would add two items to the list of examples that give rise to constructive knowledge: (1) receipt of a Social Security Administration no-match letter; or (2) written notice from Homeland Security that, in completing Form I-9, an employee presented documentation that, according to its records, was not assigned to the employee. Please note that employers are not required to submit Form I-9 to Homeland Security.

The new rules then provide a suggested procedure that employers should follow when they receive such notice in order not to be deemed to have constructive knowledge that an employee is an unauthorized alien. This "safe harbor" procedure includes attempting to resolve the mismatch and, if it cannot be resolved with a certain period of time, re-verifying the employee's identity and employment through a specific process.

The proposed rules include the following steps to take advantage of the proposed "safe harbor":

- Within 14 days of receiving the no-match letter, the employer must take reasonable steps to resolve the discrepancy, including checking the employee's records for any typographical errors, and verifying with the government that the corrected information matches the agency's records, and/or requiring the employee to resolve the discrepancy with the government; and
- Within 60 days of receiving the no-match letter, if the employer has not been able to verify with the government the employee's authorization to work in the United States, then the employer must within 3 additional days verify the employee's authorization to work and his or her identity by completing a new I-9. However, documents on which the no-match letter is based may not be used to satisfy the I-9 requirement. Documents lacking a photograph may not be used to establish identity under this safe harbor procedure.
- The proposed regulation cautions employers not to infer illegal status because of an employee's foreign appearance or accent.

Following the safe harbor procedure would protect employers from liability for "knowingly" employing unauthorized aliens. It should also provide an employer with a solid defense to a wrongful or discriminatory discharge claim by an employee who is terminated as a result of a no-match letter, as long as the employer applies the no-match safe harbor procedures consistently and uniformly.

While the regulations are only proposed, it is possible that final rules may be published soon. We will keep you informed.

$19 Million Verdict in Disability Case Cut to $3.4 Million

A jury award of more than $19 million to a Northern California woman for wrongful termination and harassment based on disability has been slashed to $3.405 million by the Third District Court of Appeal. The justices agreed that Charlene J. Roby, who was fired by McKesson Corp. after 25 years, had presented substantial evidence that the company fired her based on a psychiatric condition and failed to reasonably accommodate her disability. The court also held, however, that the plaintiff failed to prove that she was subjected to a hostile work environment based on disability and that a $15 million punitive damage award was excessive. "The [Fair Employment and Housing Act] is not intended to protect employees from rude, boorish, or obnoxious behavior by their supervisors," Justice Kathleen Butz wrote.

California, she noted, has adopted the federal standard, which requires a showing of "discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment." While Roby presented evidence that her supervisor mistreated her, Butz said, she failed to show a link between the mistreatment and the panic disorder that was the basis of her FEHA harassment claim.

Jurors found, and McKesson—a worldwide distributor of healthcare products—did not contest on appeal, that the company was liable under common law for wrongful termination, and that it was liable under the FEHA for lack of reasonable accommodation and disparate treatment. Roby, who was a customer service representative in West Sacramento when she was fired, said the company was so anxious to get rid of her, it refused to grant reasonable exceptions to its strict absence policy, even though she had proof that her absences were based on her condition. Other employees, she said, were accommodated when their absences were based on illness.

Under McKesson's "90-day rolling" attendance policy, an employee could be terminated for having an excessive number of absences within any 90-day period. Absences that were approved 24 hours in advance were excused, but all other absences were supposed to be counted, even if the employee was entitled to use vacation time or sick leave. Roby presented evidence that employees entitled to unpaid leave under the Family and Medical Leave Act had those absences counted as well, unless they invoked the statute in writing. There was no mention of FMLA leave in the company handbook. Roby did, in fact, obtain five days of FMLA leave which was not counted against her. But several absences that she documented to be for doctor's appointments or therapy were.

The plaintiff presented evidence that an employee with asthma was not terminated under the policy, even though she missed 15 to 20 days of work—more than Roby—and was rarely able to give 24 hours notice that she would be out. Another worker took several weeks off after a hand injury, but those days were not charged. Jurors returned a verdict for compensatory damages totaling $3.5 million against McKesson and $500,000 against Roby's supervisor, Karen Schoener, plus punitive damages of $15 million against the company and $3,000 against Schoener. The trial judge denied motions for new trial and JNOV, except that the compensatory damage award against McKesson was cut by $706,000 after the plaintiff's attorney conceded an error in the jury's calculations.

On appeal, however, the court concluded that another $600,000 of the compensatory damages awarded against McKesson, and the entire award against Schoener, had to be thrown out because they were based on the unproven harassment claim. In an unpublished portion of the opinion, the court held that the punitive damage award was constitutionally excessive, and that a $2 million award, less than 1.5 times the remainder of the compensatory damages, was sufficient. The justice noted that the defendant caused no physical harm to the plaintiff; that more than half the compensatory damages award was for non-economic, psychological harm; and that the reduced award far exceeded the penalties that could have been awarded in a FEHA administrative action. The court also rejected the plaintiff's argument that she should be given the option of a new trial in lieu of a reduced award.

Roby v. McKesson HBOC (2006) 2006 WL 3775897

U.S. Supreme Court Hears Pay-Bias Lawsuit

In *Ledbetter v. Goodyear Tire & Rubber* (2006) 127 S.Ct. 617 , a case recently argued before the United States Supreme Court, the issue is "whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period."

Ledbetter claims she was repeatedly passed over for promotions and received a smaller salary than her male co-workers because she rejected a supervisor's sexual advances and due to her sex. At trial, a jury awarded Ledbetter damages of $3.5 million based on a series of salary decisions going back 19 years. The Eleventh Circuit Court of Appeals reversed the verdict and ordered that Ledbetter's complaint be dismissed. The Eleventh Circuit held that Ledbetter's claim was time barred because she could not prove intentional discrimination in either the one decision during the limitations period or the last decision preceding the limitations period. The court stated "We have concluded that in the search for an improperly motivated, affirmative decision directly affecting an employee's pay, the employee may reach outside the limitations period created by her EEOC no further than the last such decision immediately preceding the start of the limitations period. We do not hold that an employee may reach back even that far; what we hold is that she may reach no further."

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, religion, gender, and national origin, and requires victims of discrimination to file a claim within either 180 days or 300 days of the discriminatory act, depending on the state. The justices will have to decide if the statute of limitations eliminates most of Ledbetter's claims.

Ledbetter could have a significant impact on how Title VII cases are litigated and how damages are calculated. Defendants in discrimination cases prefer an interpretation of the timely filing requirement that bars not only challenging any act that occurred outside the 180-day period, but also that excludes any evidence of past behavior or motives that might be used to infer discriminatory motives behind conduct within the 180-day period. In addition, a narrow reading of the timely filing requirement would affect the amount of damages plaintiffs can recover. If the Court accepts the employee's argument that today's paycheck is understood to be part of a continuing system of pay discrimination, it will be possible for plaintiffs to recover the pay differential attributable to discrimination going back in time. If the Court accepts the employer's argument that the only thing that is actionable is the decision to set pay, then the plaintiffs could be limited to recovering only the discrepancy in pay that flowed forward from the illegal decision 180 or 300 days before. Particularly in cases involving low-wage work, several months of backpay when the difference is only a dollar an hour may not result in a damage award large enough to provide a victim of discrimination with a reason to overcome the considerable obstacles to suing. A decision is expected by July 2007.

Legislative Update

Sexual Orientation: New Law Expands Protections

Governor Schwarzenegger recently signed S.B. 1441, which expands discrimination protections for individuals in programs or activities conducted, operated, or administered by the state or state agency, or that's funded directly by the state, or receives any financial assistance from the state. This includes programs such as workers' compensation and unemployment and disability insurance.

In particular, the new law adds sexual orientation to the list of protected categories. It also defines the terms "sex" and "sexual orientation" to specify that those terms have the same meaning as under the California Fair Employment and Housing Act.

Finally, the measure states that discrimination includes the perception that a person has any of the enumerated characteristics (that is, sex, sexual orientation, race, religion, age, disability, etc.) or that the person is associated with a person who has, or is perceived to have, any of these characteristics.

Changes to Required Sexual Harassment Training

AB 2095 amended California Government Code §12950.1 requiring only supervisors located in California to be trained on sexual harassment. Prior to this amendment, covered employers with supervisors located outside of California who supervised California employees were uncertain about whether those supervisors were required to be trained. However, if an employer has two employees in California, one is a supervisor and the employer has at least forty-eight employees outside of California, the California supervisor must be trained on sexual harassment prevention.

Accounting for Overtime on Paystubs

California Labor Code § 204, which specifies the periods required for payment of wages, has been amended. The existing statute provides that all wages earned by employees are due and payable twice each calendar month on days designated by the employer; however, "wages earned in excess of the normal work period" (*e.g.,* overtime wages) may be paid by no later than the next consecutive payday. This statute is inconsistent with Labor Code §226(a), which requires that employers provide each employee at the time of each payment of wages an itemized statement showing, among other things, the total hours worked by the employee during that pay period. AB2095 reconciles these two conflicting requirements. The amendment essentially provides that an employer is in compliance with the above-mentioned provision of Labor Code§ 226(a) if overtime hours worked in a current pay period, but paid in the next consecutive period, are "itemized as corrections on the paystub for the next regular pay period." The amendment further requires that such corrections state "the inclusive dates of the pay period for which the employer is correcting its initial report of hours worked."

State Discrimination and Harassment Materials Available Online

Assembly Bill 1806 amends Government Code section 12950 to require that the California Department of Fair Employment and Housing (DFEH) make available online its employment discrimination poster (Form 162) and sexual harassment information sheet (Form 185). Under existing law, employers must post the poster in a prominent and accessible location in their facilities, and distribute the harassment sheet to all employees. These materials may be downloaded from the DFEH Web site.

New IRS Tip Agreement Available January 1, 2007

Dealing with tipped employees can be confusing for employers, presenting many employment law and payroll challenges. The IRS has developed a new program to assist employers in properly reporting tip income and to help reduce compliance burdens and opportunities for error. While we cannot offer tax advice, the following provides you with a brief overview of the new ATIP program. For further information on IRS tax compliance, consult your tax professional.

ATIP provides benefits to employers and employees similar to those offered under previous tip reporting agreements. However, ATIP does not require employers to meet with the IRS to determine tip rates or eligibility. Employers are not required to sign an agreement with the IRS to participate. Like other tip reporting programs, participating by employers and their employees is voluntary.

Employers who participate in ATIP report the tip income of employees based on a formula that uses a percentage of gross receipts, which are generally distributed among employees based on the practices of the restaurant.

Employers receive significant benefits by participating in ATIP:

- The IRS will not initiate an "employer-only" 3121(q) examination during the period the employer participates in ATIP.
- Tip reporting is simplified and in many cases employers will not have to receive and process tip records from participating employees.
- Enrollment is simple. There are no one-on-one meetings with the IRS and no agreements to sign. Employers elect participation in ATIP by checking the designated box on Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips.

Employees also benefit from ATIP:

- The IRS will not initiate a tip examination during the period the employer and employee participate in ATIP.
- The improved income reporting procedures could help employees qualify for loans or other financing.
- Employees who work for a participating employer can easily elect to participate in ATIP by signing an agreement with their employer to have their tip income computed under the program and reported as wages.

Some general requirements for participating restaurants:

- The employer annually elects to participate in ATIP and uses the prescribed methodology for reporting tips by filing Form 8027 and checks the ATIP participation box. Simplified filing is provided for small establishments not required to file Form 8027.
- Employer's establishment must have at least 20% of gross receipts as charged receipts that reflect a charged tip.
- At least 75% of tipped employees must agree to participate in the program.
- Employer reports attributed tips on Employees' Forms W-2 and pays taxes using the formula tip rate.
- The formula tip rate is the charged tip rate minus 2% – the 2% takes into account a lower cash tip rate.
- The charged tip rate is based on information from the establishment's Form 8027.

ATIP is a three-year pilot program for food and beverage employers. Employers will participate on an annual basis. The first annual basis begins January 1, 2007.

Don't Mess With Your Ex - (At Least Not At Work)

By Michelle Harrington

Randall Oakstone and Ramona Philbrook were lovers. They were also employees of the United States Postal Service who worked in the same distribution center. For a period of about three years, they were inseparable and contemplated marriage. Then, for unknown reasons, Mr. Oakstone decided to break off the relationship. The break was messy. Ms. Philbrook initially refused to accept the fact their relationship had ended. She repeatedly attempted to convince him to reconsider. Mr. Oakstone refused, saying there was no more relationship to discuss. One day, she confronted him in the parking lot as he was walking to his truck and demanded that they discuss their personal issues. When he refused, she hung onto him and went "limp" in an effort to prevent him from entering his vehicle. He did not touch Ms. Philbrook, but yelled out loudly. Other postal workers heard the hubbub and asked them if they needed help. They both responded "No," and explained it was personal.

Thereafter, Mr. Brookstone began seeing other women and eventually married his current wife. When Ms. Philbrook found out, she cooled considerably. Then, a position at the Postal Service opened up which provided additional overtime opportunities and a higher pay rate than Mr. Oakstone's current position. Mr. Oakstone was temporarily assigned to this position, which required him to be in constant contact with Ms. Philbrook through a walkie-talkie. Ms. Philbrook protested his assignment and informed the supervisor who made such assignment of their past intimacy. She also claimed he had been physically abusive, specifically referring to the parking lot incident. She contended he had physically assaulted her, pushed her down, and dragged her across the lot. She said she was afraid of him. She demanded that Mr. Oakstone not be allowed to work in this position or with her.

Due to Ms. Philbrook's false allegations and Mr. Oakstone's complaints about Ms. Philbrook, management at the Postal Service adopted a negative attitude against him. They singled him out by imposing restrictions on his movement and changed his duties in unusual and negative ways. He was denied work and overtime opportunities, monitored and limited on his breaks, and given more work and less time to complete it than other employees. Finally, the Postal Service eliminated his position and reassigned him to another less desirable position with a lower rate of pay and a loss of overtime opportunities. Despite Mr. Oakstone's requests, the Postal Service never investigated his complaints nor took any corrective action to address them.

In Mr. Oakstone's subsequent lawsuit for sex discrimination and harassment under Title VII, *Oakstone v. Postmaster General* (D. Maine 2004) 332 F.Supp. 2d 261, the Postal Service contended that his complaint lacked merit because the gravamen of his complaint is not sex discrimination, but the spiteful retribution of a former lover. The Postal Service argued Ms. Philbrook's retaliation against Mr. Oakstone is not because he is male; it is because she feels jilted. The Postal service cited to a number of cases that have ruled against claims arising out of failed office romances. (*Taken v. Oklahoma Corp. Comm'n* (10th Cir. 1997) 125 F.3d 1366, 1368; *Huebschen v. Dep't of Health & Social Serv.* (7th Cir. 1983) 716 F.2d 1167, 1168; *Kahn v. Objective Solutions, Intl.,* (S.D.N.Y. 2000) 86 F.Supp.2d 377, 379; *Keppler v. Hinsdale Township High School* (N.D.Ill. 1989) 715 F.Supp. 862, 864; *Freeman v. Cont'l Technical Servs., Inc.* (N.D.Ga. 1988) 710 F.Supp. 328, 329; *See also, Succar v. Dade County Sch. Bd.* (11th Cir. 2000) F.3d 1343). The reasoning in this line of cases is that the harassment in these instances was motivated by the scorned lover's contempt for the plaintiff following a failed romantic relationship and not on the plaintiff's gender; the gender was merely coincidental.

In reviewing the cases dealing with failed romantic liaison, the Court in *Oakstone* noted a distinction: "In failed romance cases, where employment harassment follows, there is a difference for Title VII purposes between non-gender based and gender based harassment. If the means for revenge is non-gender based harassment, it does not trigger a Title VII response; if the means is gender-based, it does." (*Oakstone supra,* 332 F.Supp.2d at 271.) Ultimately, the Court concluded that there was sufficient evidence to generate a factual issue, requiring a jury to decide, as to whether Ms. Philbrook's retribution crossed the line into Title VII harassment.

The factual distinctions in failed romance cases can be subtle and, thus, dangerous to the unwary. Employers would be wise to warn their employees against retaliating or harassing an ex-paramour following a romantic liaison that has soured.

Anderson, McPharlin & Conners 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. The depth of experience within the Group enables us to provide a full range of services to our clients, from "preventative-maintenance" training and risk management to aggressive representation in all areas of labor and employment litigation.

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