

Labor & Employment

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

Resident Employees Entitled To Wages For Work Actually Performed

by Colleen A. Déziel

In Isner v. Falkenberg/Gilliam & Associates, plaintiffs were resident employees at an apartment complex. In addition to performing their regular eight hour shifts, there were times when they were required to be on-call. Being on-call meant that they had to remain within hearing distance of their residence telephone for emergency calls. When on-call, the plaintiffs watched television, read magazines, played computer games and used the internet in their apartment. They could not go to the pool or walk around the complex, as to do so would prevent them from hearing the telephone.

The plaintiffs claim they were entitled to receive wages for this "on-call" time. The Court disagreed. Wage Hour 5 provides, in part, that an employee who is required to

reside on employment premises, shall be compensated for the time spent "carrying out assigned duties." The Court held that this language meant the time the employee was actually engaged in responding to calls, and not the time they spent attending to personal matters while they waited for an emergency call.

Bottom line, employers who employ resident employees, should make sure these employees properly document the actual time they spend performing their assigned duties.

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Disparate Work Assignments Coupled With Employee Ostracism Not Recommended

by *Brandon N. McMurtray*

In a recent case, *Davis v. Team Electric Co.*, the Ninth Circuit Court of Appeals discussed under what conditions disparate work assignments and employee ostracism could subject an employer to liability for discrimination.

Therein, plaintiff Christie Davis, a journeyman electrician, brought a sexual discrimination claim against her former employer alleging she was assigned more strenuous overhead work than her male counterparts, was forced to work more with Monokote (a hazardous construction material), and was given less varied work resulting in physical pain and injury. She further alleged she was excluded from the jobsite meetings, was prohibited from entering the jobsite trailer to take breaks or talk with the project superintendent about work matters, and that, at times, her radio communications to supervisors were ignored.

Analyzing plaintiff's claim of disparate work assignments, the Ninth Circuit held that a *disproportionate assignment of hazardous and strenuous work* could amount to an adverse employment action for purposes of an employment discrimination claim. While the Court has previously held that "assigning more, or more burdensome, work responsibilities" constitutes an adverse employment action, the issue here was whether plaintiff's uncontroverted allegation that "in the aggregate she was given a disproportionate amount of dangerous and strenuous work" was sufficient to establish a prima facie case of disparate treatment. The Court held that it was.

As to Ms. Davis' claims she was excluded from certain areas of the jobsite and that her radio communications were ignored (which the trial court disregarded as "mere ostracism"), the Court found it unnecessary to decide whether employee ostracism hampering one's ability to work was, by itself, sufficient to establish an adverse employment action (the Court has previously held ostracism alone is not). Rather, the Court stated "[w]e need not decide whether either of these actions alone would be sufficient to establish an adverse employment action because, together with the discriminatory work assignments, they materially affected the terms and conditions of [her] employment."

The Court's ruling makes it clear that employers need to be aware of, and avoid, situations where certain employees in protected classes, or who engage in protected activities, are given disparate work assignments subjecting them to a disproportionate share of undesirable or taxing work, as it may constitute an adverse employment action for purposes of an employment discrimination claim. Similarly, complaints of employee ostracism should be taken seriously and investigated, as such conduct may be actionable where it is coupled with disparate work assignments. It remains to be determined whether such ostracism alone is sufficient to state a claim for discrimination.

In a final point, the Court noted an unresolved issue as to the relative weight accorded circumstantial versus direct evidence "in the context of summary judgment" (i.e. whether they are treated equal or if circumstantial evidence of pretext must be both specific and substantial). However, the Court found it unnecessary to decide this issue as Ms. Davis' allegations of discriminatory comments, the absence of female supervisors, and alleged unfavorable treatment "when considered as a whole, constitutes specific and substantial circumstantial evidence that the reasons proffered for [her] allegedly disproportionate hazardous work assignments were pretextual."

*Whether
employee
ostracism is
sufficient to
qualify as an
adverse
employment
action still up in
the air*

Limitation In Same Actor Defense

by *Eric A. Schneider*

Employers regularly employ the “same actor” rule in the defense of discrimination cases, but the fact that the same individual hired the plaintiff knowing of her race and gender does not create a **presumption** that the termination was not discriminatory, but instead merely gives rise to an **inference** to that effect.

In Harvey v. Sybase, Inc. (April 18, 2008, A109300), Nita White-Ivy hired Marietta Harvey as an HR representative. Both women are of Philippine decent. White-Ivy terminated Harvey in 2003. Then, in 2003, Harvey sought reemployment, but was denied. The two positions then open were filled by Caucasian males. Harvey then brought a complaint with the Fair Employment & Housing Administration and filed a civil action claiming that the employer had both terminated and not rehired her due to her race, gender or national origin and claimed wrongful termination in violation of public policy.

The case was tried and the jury determined that race or gender was a motivating reason for the termination, and further that White-Ivy would not have terminated Harvey without regard to her race and gender.¹ Harvey was awarded \$1,342,943 in compensatory damages plus \$500,000 in punitive damages.

The employer then moved both for a new trial and JNOV. (Judgment [in favor of the defendant] notwithstanding the verdict.) The Court granted the JNOV as to the punitive damages, but otherwise denied the motion. The employer appealed that part of the ruling denying the motion for JNOV or in the alternative for a new trial. The plaintiff cross-appealed with regard to the punitive damages.

In affirming the trial court ruling with regard to the defendant’s JNOV motion, the Court noted that judicial analysis of the effect of same actor evidence has been clouded by imprecise language. California cases have stated that same actor evidence creates both an inference and a presumption, sometimes within the same sentence. (See Horn v. Cushman & Wakefield Western, Inc. (1999) 72 Cal.App.4th 798, 809, footnote 7; West v. Bechtel Corp. (2002) 96 Cal.App.4th 966, 981.) The Ninth Circuit opined that “the same actor inference is neither a mandatory presumption (on the one hand) nor a mere possible conclusion for the jury to draw (on the other). Whether it is a ‘strong inference’ is what a court must take into account on a summary judgment. [Cite omitted],” Coghlan v. American Sea Foods Co., LLC, (9th Circuit 2005) 413 F.3d 1090, 1096, footnote 10.

The Court in the Harvey case rejected the defendant’s argument that “introduction of same actor evidence places a higher burden on a plaintiff in an employment discrimination case” stating that it would be usurping the jury’s function if it were to adopt that approach. The Court also found that there was adequate evidence for a jury reasonably to reach the conclusion it did because White-Ivy had stated in connection with the potential hire of another woman in a position in the department that her boss “wanted her to hire two white males because he felt that the HR department was like an airport,” and that the individual being considered for the position “was helped by the fact that she . . . was white, but was disadvantaged by the fact that she was not male.”

What can we learn from this case? While the same actor evidence can be beneficial, it does not give rise to a “presumption.”² In other words, same actor evidence helps the defendant prove its defense, but it does not shift the burden of proof to the plaintiff. As a practical matter the shorter the period between the hire and the adverse employment action, the stronger the same actor evidence will be in the case. Logically, one would not expect that a Caucasian male who had interviewed an African-American female on Tuesday would terminate her on Thursday on the basis of her race and gender. Such evidence however would be nowhere near as compelling if the hire and adverse employment action occurred eight years apart, and the hirer had made racist and sexist comments in the interim.

¹ The jury also found that Harvey’s race or gender was a motivating factor in the decision not to rehire her, but found that White-Ivy would not have rehired her in any event.

² A presumption is defined in the Evidence Code as “an assumption of fact that the law requires to be made from another fact or group of facts . . . established in the action.” (Evidence Code Section 600.)

*Same
actor
defense--
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inference*

Application Of The Continuing Violation Doctrine

by Colleen A. Déziel

In the recent opinion of Hammond v. County of Los Angeles, the Court relied on and cited the recent opinion in Jones v. The Lodge At Torrey Pines when it held that non-employer individuals cannot be held liable for retaliation under the Fair Employment & Housing Act.

Another issue in this matter concerned the statute of limitations. The plaintiff claimed harassment, discrimination, and retaliation, which occurred more than one year prior to her filing an administrative complaint with the Department of Fair Employment & Housing. The plaintiff argued that the Continuing Violation Doctrine applied to allow her to rely upon conduct that occurred more than one year prior to filing of the charge. The Court decided not to rule on the issue of whether the Continuing Violation Doctrine applied to this matter, but instead held that there was sufficient evidence that actionable conduct occurred within the limitations period such that it did not need to make such a finding. Despite this ultimate finding, the Court did outline and analyze two cases decided by the U.S. Supreme Court on this very issue. The Court analyzed National Railroad Passenger Corp. v. Morgan (2002) 536 U.S. ____ and Ledbetter v. Goodyear Tire & Rubber Co. (2007) 55 U.S. ____.

In these cases, the Supreme Court discussed the difference between "discrete discriminatory acts" which must be committed within the statutory period, and a series of acts, each of which is intentionally discriminatory, and which would result in a fresh violation, and thus a fresh limitations period.

After pointing out this distinction, the Court of Appeal indicated that in the subject case, it believed each of the decisions made by the defendants against the plaintiff constituted discrete acts which "arguably" constituted fresh violations. Thus, the Court has provided insight into how it would evaluate the applicability of this doctrine.

LaRue v. DeWolff, Boberg & Assoc. (U.S. 2008) 128 S.Ct. 1020

by Kristin M. Kubec

The Supreme Court's ruling in this case has allowed an individual to sue for a fiduciary breach pursuant to the Employee Retirement Income Security Act of 1974 (ERISA). Prior to this ruling, a claim for a fiduciary breach under ERISA was required to benefit the entire plan, rather than an individual participant in the plan. This, in effect, limited the claims to those involving defined benefit and similar plans, under which all benefits are funded from a common asset pool. This ruling expands the scope of potential claims to include plans that involve a participant directed arrangement (i.e. investment instructions from the employee).

Prevailing Employee On \$44.63 Overtime Claim Slapped By The Court On Attorney Fee Motion

by Colleen A. Déziel

In Harrington v. Payroll Entertainment Services, Inc., a failed class action, the plaintiff filed a claim for \$44.63 in unpaid overtime. The matter was ultimately settled for \$10,500 and the plaintiff's attorney filed a motion for approximately \$46,000 in attorney's fees. The trial court denied the motion outright, and while the Appellate Court reversed the trial court's denial of the motion, it only awarded \$500.00 of the requested fees. The Appellate Court emphasized the fact that the plaintiff indeed was entitled to "reasonable" attorney's fees, but found that there [was] no way on earth this case justified the hours purportedly billed by [the plaintiff's] lawyers.

In a final dig, the Appellate Court noted that it awarded the amount of fees itself, because it did not want to waste further judicial resources in remanding the issue of "reasonable" fees to the trial court. This case provides a lesson on how expensive even the smallest of overtime claims can get when one considers attorney's fees. It, thus, behooves an employer to make sure that all employees are appropriately compensated.

Lonicki v. Sutter Health Central

by Colleen A. Déziel

In Lonicki v. Sutter health Central, the Supreme Court of California handed a small victory to both employers and employees when it decided the issues of:

- (1) Whether evidence that a full time employee was able to perform a similar job for another employer on a part time basis conclusively established an ability to do the job for the original employer when determining that employee's qualification for leave under California Family Rights Act ("CFRA"); and
- (2) Whether an employer's failure to invoke the CFRA dispute resolution mechanism of having a health care provider jointly chosen by the parties to determine the employee's entitlement to medical leave, bars the employer from later

claiming the employee did not suffer from a serious health condition and was capable of performing her job.

The answer to both is no.

The plaintiff in this matter was a nurse who claimed to be suffering from depression and stress. Plaintiff's employer challenged the plaintiff's claim that she was entitled to leave under CFRA, and it made the decision to deny plaintiff leave under CFRA and, ultimately, terminated her for failing to come to work. In challenging plaintiff's claim that she was entitled to leave under CFRA, and in the face of two conflicting medical opinions, the employer did not obtain a third opinion from a health care provider who was jointly approved by the employer and employee, as is allowed under Government Code § 12945.2.

While the plaintiff argued that this failure estopped or precluded the employer from challenging the right to CFRA leave, the Supreme Court held that the provision was not mandatory, and there was no language in the Statute which reflected otherwise. Instead, the language reflected that the third opinion was a mere option or choice available to the employer. As such, there is no such bar to an employer making such an argument.

In regard to the evidentiary issue concerning the plaintiff's ability to perform a similar job for another employer on a part time basis, the Supreme Court held that such evidence was not conclusive evidence establishing that plaintiff's ability to perform her job. Comparing the language and intent behind CFRA to the Family Medical Leave Act, the Supreme Court noted that the Federal Courts have long held that the inquiry into whether an employee is able to perform the essential functions of her job should focus on her ability to perform those functions in her "current environment." However, the Supreme Court also noted that such evidence was certainly strong evidence that she was capable of performing her full time job at defendant's hospital.

California Supreme Court Accepts Review Of UC Regents Whistleblower Case/One Issue Includes The Determination Of Whether An Employee Is Required To Challenge An Employer's Decision As To An Internal Grievance Through A Writ of Mandate, As Opposed To Simply Filing A Civil Action
by Michael J. Kowalski

In the matter of Brand v. Regents of the University of California, the Appellate Court held, among other things, that a UC employee does not have to formally challenge the Regents decision as to a grievance based on the fact that the investigative procedure employed by the UC lacked a quasi-judicial quality (i.e., no hearing, no witnesses subpoenaed, no testimony under oath and no record of any proceedings to name a few.) The matter was appealed by the UC to the Supreme Court who granted review, but thereafter, stayed further action until a related matter involving the same issue could be determined.

More specifically, Brand alleged that he was a senior licensing officer for the Regents' campus at UC San Diego. He discovered what he believed to be fraud, misappropriation of funds, self-dealing and conflicts of interest involving his supervisor, Alan Paau, who is one of the named defendants.

Brand notified the UC management through "a number of internal reports." Paau and four other men (all named as defendants) found out about Brand's disclosures and, according to Brand, the five men started to retaliate against him. Specifically, Brand alleged he was denied salary increases, given negative performance reviews, subjected to a hostile work environment, threatened with termination and then ultimately terminated.

Brand filed a series of written complaints under the UC Whistleblower Protection Policy, alleging he had been retaliated against, in violation of the California Whistleblower Protection Act (Government Code §8547 et seq.). In all, Brand filed five grievances: September 18 and 22, 2002 (the September '02 complaints); October 11, 2002 (the October '02 complaint) and June 19 and 30, 2003 (the June '03 complaints). The Regents denied all the grievances after they had gone through the various steps contained in the administrative process. The September '02 complaints were denied in April 2003; and the October '02 and June '03 complaints were denied in July 2004.

Brand filed suit in June 2005, alleging three causes of action. As against all defendants, he alleged retaliation in violation of Govt. Code §8547.10, which prohibits retaliation against a UC employee who makes protected disclosures. His second cause of action was against the Regents only and alleged violation of Labor Code §1102.5, which similarly protects an employee's right to engage in whistleblower activity. The third cause of action was against the five individual defendants only and alleged violation of Govt. Code §8547.11, which prohibits interference with an employee's attempt to make a protected disclosure.

The defendants demurred, asserting several arguments, including that the plaintiff failed to timely file his action, pursuant to the limitations set forth in Govt. Code §8547.10(c) (which states that "any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the [designated university officer] and the university has failed to reach a decision regarding that complaint within the time limits established for that purpose by the regents").

The defendants second argument was that the plaintiff had failed to exhaust his judicial remedies, because Brand filed his action for damages without first challenging the Regents' decisions through a writ of mandate, thus creating collateral estoppel as to the Regents' findings. The defendant made several other arguments concerning failure to include certain specific complaints in his grievances and arguments related to absolute privilege and immunity under the Government Code which will not be addressed herein.

On the issue of timeliness, the Appellate Court disagreed with the trial court, and instead, found that with regard to Brand's internal complaints, the UC had 120 days to present its findings of fact to the Chancellor (this time limit was contained in the UC's own policies). The UC failed to do so with regard to the October '02 and June '03 complaints (Brand did not dispute that the UC timely responded to the September '02 grievances). Thus, under Govt. Code §8547.10(c), Brand was able to file his state court action because he had (a) filed his internal complaint with the UC, and (b) the UC failed to reach a decision within the time limits established.

As for filing a writ of mandate, the Court of Appeal held that Brand did not need to challenge the UC's decision through that process before bringing his state court action. The Court found the grievance investigative procedure employed by the Regents lacked a quasi-judicial quality in that, among other things, a hearing was not held, testimony was not given under oath, the parties were not able to subpoena, call, examine or cross-examine witnesses and there was no indication that a record of the proceedings was created. Thus, Brand was not required to challenge, through writ of mandate, the Regent's decision to deny Brand's complaint. Therefore, there was no collateral estoppel of the issues. Pacific Lumber Co. v. State Water Resource Control Board (2006) 37 Cal.4th 921, 944.

Following the Court of Appeal's ruling, the defendants petitioned for review to the California Supreme Court, which was granted on May 14, 2008. As noted above, in its order, the Supreme Court deferred further action on the case, pending its consideration and disposition of a related issue in State Board of Chiropractic Examiners v. Superior Court (Arbuckle).

In that case, Carol Arbuckle, a chiropractor, filed an unsuccessful complaint with State Personnel Board. She then sued her employer (the Board), alleging that adverse employment actions were taken against her in retaliation for her whistleblower reports. The Board moved for summary judgment based on Arbuckle's failure to exhaust her administrative and judicial remedies. The trial court denied the motion. The Board petitioned for a writ of mandate, which was granted with the Court of Appeal reversing the trial court's decision and ordering it to enter summary judgment. Arbuckle petitioned for a rehearing, arguing that the Board did not timely issue its ruling on her complaints, so she was free to file the lawsuit. The Court of Appeal denied the rehearing.

The Supreme Court granted Arbuckle's petition for review on June 27, 2007. It will decide the issues concerning whether, under the Whistleblower Protection Act (Govt. Code §8547 et seq.), a state employee may bring a civil action after suffering an adverse decision by the State Personnel Board without successfully seeking a writ of administrative mandate to set aside that decision. At present, the matter has been fully briefed, but there is no date set for oral argument. Stay tuned.

Bikini Contest Participant's Claim for Retaliation Following Disclosure Of A Kiss From the Board's Chairman Upheld Even Though She Was Not The One Who Complained About The Offending Conduct!!

by Vanessa Davila

In the recent case of Steele v. Youthful Offender Parole Board (YOPB), an employee who entered a bikini contest was harassed by the Chairman of the YOPB, and was subsequently retaliated against after the offending conduct and subsequent retaliation was reported by another employee. California's Third District Court of Appeal upheld the judgment in favor of the contestant. The Appellate Court essentially held that there was sufficient evidence to support the jury's finding that Steele engaged in a protected activity, even though Steele was not the individual who actually filed a charge with the Department of Fair Employment and Housing ("DFEH"), about the offending conduct and the subsequent retaliatory conduct.

More specifically, plaintiff Steele was employed with YOPB as an office assistant/receptionist. While employed with YOPB, Steele participated in three bikini contests held by a local radio station. On the day of the last contest, Steele was approached by YOPB's Chairman, Raul Galindo, and asked for directions to the contest. Galindo showed up at the contest before it began and, after the contest, Galindo leaned in to kiss Steele on her mouth as she was thanking him for coming. Steele turned her head so that she received the kiss on her cheek. She was taken aback, but not offended.

The following day, Steele mentioned the kiss to a coworker who, in turn, told another coworker, Kym Kaslar, about the bikini contest and Galindo's kiss. The story about the kissing incident eventually reached the ears of Steele's supervisors and other YOPB management. Kaslar was told by management to keep her mouth shut, that the information she knew could get her and Galindo fired, and threatened her with adverse action if she said anything.

Shortly thereafter, Kaslar, not Steele, filed a complaint with the State Personnel Board in which she claimed, in part, unlawful retaliation by YOPB based on her disclosure of the kissing incident between Galindo and Steele. Despite the filing of Kaslar's complaint, YOPB told Steele and Kaslar that there might be budget cuts in the future and that it might be in their best interests to look for another job. No other YOPB employees received similar warnings. Kaslar was again told by management that she "wouldn't be in this situation if you just kept your mouth shut and stayed out of office politics and left the clerical people alone." At that time, Steele was the only clerical person at the office. Kaslar was subsequently transferred to a different department.

Meanwhile, Steele received ongoing pressure from YOPB management as a result of the kissing incident with Galindo. Steele received criticism from her supervisor regarding work performance issues of dubious merit which were left uninvestigated and unresolved. She was reminded of the budgetary crisis and told to start looking for other work. She was told that Kaslar had been transferred because of her sexual harassment complaint, and it was inferred that she would be subject to a similar fate if she became involved as a witness for Kaslar. Steele was then threatened with an unjustified, inappropriate and accelerated level of discipline, a suspension, and repeatedly told the way to avoid a "huge black mark" on her service record would be to transfer before the suspension could be effective. Her work schedule was also manipulated in that her hours were changed in an intentional effort to make her job less desirable. Steele eventually tendered her written resignation from her employment with YOPB.

The Appellate Court found that all of the foregoing was sufficient evidence to establish that Steele had been constructively discharged from her employment with YOPB, and thus, that she had suffered an "adverse employment action."

The Appellate Court also found there was substantial evidence to support the jury's finding that Steele had engaged in a protected activity under the Fair Employment and Housing Act ("FEHA"). The Court relied upon Government Code section 12940(h), which contains language including protection for an individual whose involvement is as a "potential witness" if the employer perceives the individual as someone who participated in activity protected under FEHA.

Applied to this case, the Court found that while the plaintiff was not the individual who filed the charge with the DFEH, it was sufficient that Kaslar had filed such a complaint about this conduct with the DFEH (i.e., Kaslar complained, in part, of the retaliatory conduct she was being subjected to due to her report of the initial kissing incident involving Galindo and Steele.) The Court reasoned that Steele was a "potential witness" in such proceeding, and as such, Steele was engaged in a protected activity so as to meet the first requirement for a claim of retaliation.

The lesson from this case is that employer's need to be aware that even if someone appears to be a mere witness to complained of conduct/activity, such employee, apparently, still can bring a claim under the FEHA statutes, as long as someone else filed a charge concerning the same conduct.

Steele v. Youthful Offender Patrol Board – Cal.Rptr.3d -- 2008 WL 2043197 (Cal.App. 3 Dist.)

California Legislature Considering Changes To Meal-Break Requirements

by *Glen H. Mertens*

As all California employers should now know, the California Supreme Court made it clear last year in Murphy v. Kenneth Cole Productions, Inc. that the statute of limitations to recover the extra pay that must be paid to a non-exempt employee who is denied a meal break is three years rather than one year. The extra pay amounts to one hour's wages for every work day in which the affected employee misses his or her meal break. The potential for recovering three years' worth of such penalty-wages has resulted in a steady stream of claims, both in Court and to the California Division of Labor Standards Enforcement, in which non-exempt employees have alleged that their employers have not provided them with the 30-minute meal breaks required under California Labor Code § 512. In many instances, the Court claims are styled as "class actions" in which one disgruntled worker purports to make a claim for three years' worth of penalty-wages on behalf of "similarly situated" co-workers, all of whom allegedly were "denied" the meal breaks to which they were entitled under Section 512.

In the wake of the Murphy decision, a number of legislative proposals have been introduced in Sacramento to clarify the obligation of California employers to provide 30-minute meal breaks to non-exempt employees who work more than five hours in a work day. Unfortunately, given the way the legislative process works, none of these proposals is likely to become "law" in the near future.

On April 15, 2008, the California Senate Labor and Industrial Relations Committee unanimously approved an *amended* version of Senate Bill 1539. SB 1539, as originally drafted, would have, among other things, expanded the conditions in which employees could take "on-duty" meal periods, allowed collective bargaining agreements to override certain of the meal-period rules, and defined an employer's obligation to provide an employee with a meal period to mean only that the employee be given

“an opportunity to take” a meal period. Unfortunately, SB 1539 was amended to delete these substantive changes to the current meal-break regulations, such that the amended version of the bill that was approved by the Senate Committee simply declares that it is the Legislature’s intent to enact legislation to address issues and concerns related to the meal-break requirement.

Perhaps because the amended version of SB 1539 proposes no meaningful changes to the existing meal-period laws, the bill is now languishing in Sacramento. The proposed legislation was withdrawn from hearing before the Senate Appropriations Committee and referred to the Rules Committee, which most likely will refer the bill back out to a policy committee. The bill is not yet sitting before a particular policy committee for substantive action.

More promising is Assembly Bill 1711, which was scheduled for hearings before the Senate Committee on Labor and Industrial Relations on June 25, 2008. AB 1711 proposes a number of changes to the meal-break regulations that would result in more flexibility for employers to schedule meal breaks in a manner that is consistent with the needs of the business. Among other things, AB 1711 proposes that the 30-minute meal period may be completed before the end of the sixth hour of work. The current interpretation of the meal-period requirement set forth in Labor Code § 512 is to the effect that the meal break *must be commenced no later than the end of the fifth hour* of work, such that the half-hour break is to be completed no later than five and one-half hours into the work day. AB 1711’s proposal would provide employers with a bit more flexibility in scheduling the meal breaks. Equally important, expanding the amount of time in which the meal breaks may be taken would eliminate a good number of legal claims in which disgruntled employees claim that they are entitled to one hour’s additional pay under Section 512 simply because their meal breaks allegedly did not begin precisely at the conclusion of the fifth hour of work.

AB 1711 also contains significant modifications to Section 512(b) to clarify when an “on duty” meal period is permitted. Current regulations are vague in this regard. AB 1711 proposes that on-duty meal periods would be permissible when the “nature of the work” prevents an employee from being relieved of all duties, as when the employee works alone or “is the only person in his or her job classification who is on duty and there are no other employees who can reasonably relieve him or her of all duties.” AB 1711 also proposes that the meal-period requirements of Section 512 would not apply to employees covered by a collective bargaining agreement where such agreement expressly provides for meal periods and for binding arbitration of disputes concerning such meal-period provisions. As such a change would permit unionized employers to negotiate their own meal period schedule through the collective bargaining process, the proposed amendment could well result in much greater scheduling flexibility for those employers.

At some point after the June 25, 2008 scheduled hearing, the Senate Committee will vote on whether or not AB 1711 should be sent to the Senate floor for a vote. If the bill is passed by the Senate without amendment, the bill would be sent to the Governor for his signature in order to become law. If the bill is amended by the Senate, it will be sent back to the Assembly. If the Assembly concurs with the Senate’s amendments, the bill will then be sent to the Governor. If the Senate Committee makes substantial edits to AB 1711, however, in the same manner as was done with SB 1539, the proposed legislation may be tied up in committees for an undetermined amount of time.

As it is not clear that the California Legislature will take meaningful action to address the employment community’s concerns about the meal-break regulations relating to Labor Code § 512 in the near future, employers are cautioned to review their meal-break scheduling policies and practices carefully, recognizing that failure to provide a duty-free, half-hour meal break to non-exempt employees who work more than five hours in a work day could result in substantial liabilities extending back at least three years. As noted above, an employee who is not “provided” with an appropriate duty-free meal break immediately following the fifth hour of work may claim one additional hour’s pay for every work day on which the meal break was not properly scheduled. In addition, given that the additional one hour’s pay for a missed meal break is considered a “wage,” an employee who separates from a company and whose final paycheck does not include that additional pay for missed meal breaks may make a claim for “waiting-time penalties” under Labor Code § 203. Where such waiting-time penalties are sought, they almost always amount to an additional 30 days’ pay. Employers are advised to keep accurate, daily records that reflect when each eligible employee takes his or her meal breaks, so as to be able to defend themselves against claims for the additional “wages” and penalties that arise from missed meal breaks.

Bill Protects Potheads From Discrimination

by Michelle T. Harrington

You may recall in our last newsletter we reported that on January 24, 2008, the California Supreme Court issued its decision in Ross v. Ragingwire Telecommunications, Inc., which addressed the question of whether a person who is authorized to use marijuana for medical purposes under the California Compassionate Use Act (Cal. Health & Safety Code § 11362.5) and discharged from employment on the basis of his or her off-duty use of marijuana, has a claim under the California Fair Employment and Housing Act (“FEHA”) (Cal. Gov’t Code § 12900 et seq.) for discrimination based upon a disability or wrongful termination in violation of public policy.

In the Ross case, the plaintiff, a disabled veteran, was discharged for failing an employer mandated drug test even though he had informed his employer that he was using medical marijuana outside the work place under his physician's recommendation pursuant to the Compassionate Use Act.

The plaintiff filed suit alleging the defendant violated the FEHA by denying him employment and failing to make reasonable accommodation for his physical disability, for which he sought relief from the use of marijuana. The accommodation the plaintiff sought was for the defendant to allow him to use marijuana at home by waiving the defendant's policy of requiring a negative drug test of new employees.

The California Supreme Court issued a 5-2 decision holding that the Compassionate Use Act, which gives authorized medical marijuana users defenses to certain state criminal charges related to marijuana, does not protect employees who test positive for marijuana use. The Court observed, "Nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and obligations of employers and employees."

Then, citing to its decision in Loder v. City of Glendale (1997) 14 Cal.4th 846, 882-883, wherein the court held that an employer may require pre-employment drug tests and take illegal drug use into consideration in making employment decisions, the Supreme Court held that the FEHA does not require employers to accommodate the use of illegal drugs. Accordingly, the Court concluded that the plaintiff in the Ross case could not state a cause of action under the FEHA or one for wrongful termination in violation of public policy based upon the defendant's refusal to accommodate his use of marijuana.

In April 2008, the California Assembly Judiciary Committee approved Assembly Bill (AB) 2279 protecting medical marijuana patients from employment discrimination. If passed, this bill will effectively overturn the California Supreme Court's decision in Ross.

Under the proposed bill, an employer may not discriminate against an applicant or employee based upon his or her status as a qualified medical marijuana patient or primary caregiver and the medical use of marijuana does not occur on the employer's property or premises or during work hours. The bill provides that an employer is not prohibited from terminating or taking other corrective action against an employee who is impaired on the premises of the place of employment or during the hours of employment because of the medical use of marijuana.

The bill's protection for positive drug tests for marijuana excludes employees in "safety sensitive positions." According to AB 2279, these include law enforcement positions or "a position in which medical cannabis affected performance could clearly endanger the health and safety of others." To meet the standard for a safety sensitive position, the position must have the following characteristics:

- (A) Its duties involve a greater than normal level of trust, responsibility for, or impact on the health and safety of others.
- (B) Errors in judgment, inattentiveness, or diminished coordination, dexterity, or composure while performing its duties could clearly result in mistakes that would endanger the health and safety of others.
- (C) An employee in a position of this nature works independently, or performs tasks of a nature that it cannot safely be assumed that mistakes like those described in subparagraph (B) could be prevented by a supervisor or another employee.

Because the bill does not identify specific industries or categories of positions that may qualify as "safety sensitive," aside from law enforcement, the question of which positions may be exempted from this protection will no doubt be the subject of much litigation.

In sum, under current law (Ross), an employer may fire an employee who tests positive for marijuana (assuming the test complies with California law) even if he or she has a note from a doctor recommending its medical use. However, if AB 2279 passes, an employer will need to review its drug testing policy to ensure that, among other things, it excludes positive tests for cannabis use as a ground for termination or other disciplinary action. Because the law in this area is unsettled (and unsettling), you should consult with legal counsel before implementing any drug testing policy or taking corrective action against an applicant or employee in connection with medical marijuana use.

In A Victory For Employers, The Appellate Court Has Held That The Timing Of Termination, Relative To The Date An Employee Files A Workers' Compensation Claim Alone Is Not Sufficient To Withstand Motion For Summary Judgment

by Colleen A. Déziel

In many retaliation based claims, plaintiffs have argued that proximity or time alone in regard to the filing of a Workers' Compensation Claim versus the date of termination is sufficient to create an issue of fact to overcome a motion for summary judgment. In the recent case of *Arteaga v. Brinks*, the Appellate Court held that such is not the case when an employer presents evidence of a non-discriminatory and non-retaliatory reason for the adverse employment action.

In *Arteaga v. Brinks*, the plaintiff, an armed car messenger, was notified that he was going to be the subject of an internal investigation into cash shortages, and that depending on the outcome of the investigation, he could be terminated. There had been numerous shortages over a nine month period on runs which involved the plaintiff as either a guard or messenger.

The plaintiff was informed in March of 2004 that there would be an investigation which included him. Seventeen days later, the plaintiff claimed to suffer from pain and numbness in his arms, fingers, shoulders and feet. He also stated he was suffering from a lot of stress. The stress was alleged to have been the result of the accusations related to the cash shortages. He filed a Workers' Compensation Claim. After several doctor visits, the plaintiff was released to work with no restrictions. Plaintiff never displayed any difficulty in performing his duties.

Six days after the filing of the claim, the plaintiff was terminated based on the fact that Brinks had lost confidence in the plaintiff's abilities due to the numerous shortages found in his routes.

Evidence was presented that other Brinks employees who had filed Workers' Compensation Claims were not terminated.

Plaintiff filed a complaint alleging disability discrimination with failure to accommodate and failure to engage in the interactive process, and wrongful termination in violation of public policy based on the same disability discrimination theory, plus retaliation for filing the Workers' Compensation Claim.

Ultimately, Brinks filed a motion for summary judgment essentially based on the fact that plaintiff was not physically disabled, that Brinks had a legitimate non-discriminatory and non-retaliatory reason for discharging plaintiff and that individuals could not be held liable under either cause of action. The motion for summary judgment was granted.

The Court of Appeal affirmed the Trial Court's ruling and held that the plaintiff's symptoms did not constitute a "physical disability" under the FEHA and that Brinks had a legitimate non-discriminatory reason for the termination.

More specifically, the Court held that symptoms of pain and numbness did not make it difficult for the plaintiff to achieve the life activity of working and that loss of confidence in his abilities as confirmed by an investigation was a legal ground for the termination.

The Court further held that while temporal proximity of the termination and the filing of a Worker's Compensation Claim may be sufficient to establish a prima facie case of discrimination and retaliation, it does not create a triable issue of fact as to pretext once the employer has offered evidence of a legitimate, non-prohibited reason for its action. The Court found this to be especially so where the employer raised questions about the employee's performance before he engaged in protected activity, and the subsequent discharge was based on those performance issues.

So the practical lesson to learn from this is that when an employee has performance issues and files a Workers' Compensation Claim or engages in some other protected activity after learning of these performance issues, the temporal proximity of the protected activity and the termination alone will not be enough for the employee to withstand a motion for summary judgment on discrimination and retaliation claims.

It is also interesting to keep in mind that the Court in this matter held that even under California's lenient disability standard, the Court did not find "numbness and pain" to be sufficient to qualify as a "disability."

Proposed Family Medical Leave Act Revisions

by Kristin M. Kubec

The Department of Labor ("DOL") has issued proposed revisions to the federal Family Medical Leave Act ("FMLA") regulations. The following is a summary of the highlights of these proposed revisions:

Employer Notice: Employers would have to post the FMLA posters in conspicuous places, where applicants and employees can see them. Electronic posting would still be permissible, but the proposed revision suggests that *intranet* posting accessible to employees alone would not be acceptable. *Internet* posting, where applicants applying for jobs as well as employees could view the policy, would appear to be acceptable under the proposed revisions. Employers who do not have handbooks (the DOL currently requires those with handbooks to include notice of FMLA provisions), would have to annually distribute notice of the FMLA's provisions and complaint procedures to employees. 73 Federal Register ("FR") at 7902, 7903-7904, 7978

Employee Notice – Unplanned Absences: This new revision addresses whether an employee is entitled to FMLA protection if they fail to call in an absence prior to the start of their shift. The DOL proposes that except under extraordinary circumstances, an employee should be able to call in an absence prior to the start of their working day. 73 FR at 7910. Absent extraordinary circumstance, an employee who fails to call in the absence would be unprotected under the FMLA, even if the absence itself qualified for FMLA protection. 73 FR at 7909. For employers with call in procedures, this revision requires an employee to comply with the call in procedure or lose their FMLA protection. Under the current FMLA, an employer cannot deny FMLA leave for failure to follow a call in procedure. 73 FR at 7909

Employee Notice – Planned Absences: The proposed FMLA retains the requirement that an employee provide 30 days' notice for a planned absence. However, the proposed revision would require an employee who provides less than 30 days notice to respond to a request from the employer as to why they could not provide the requisite notice. 73 FR at 7908

Information Employee Required to Provide Concerning Leave: The proposed revisions seek to clarify what must be included in the employee's notice. It provides that sufficient information "must indicate that the employee is unable to perform the functions of the job (or that a covered family member is unable to participate in daily regular activities), the anticipated duration of the absence, and whether the employee (or family member) intends to visit a health care provider or is receiving continuing treatment." 73 FR at 7908 The inclusion of this language implies that if an employee does not provide it, the employee would not trigger FMLA.

Eligibility Notice: The proposed revisions would require an employer to provide an employee seeking FMLA leave with an "eligibility notice" that tells the employee whether they are eligible for the leave, how much leave is available, and that they have certain rights and responsibilities concerning the leave. The employer would also have to provide information concerning the additional requirements for use of paid leave (if available from the employer), and that the employee can take unpaid leave if they chose not to meet the employer's requirements for taking paid leave. If a fitness for duty form is required by the employer, the employer must also include with this notice a statement of the employee's essential job functions.

This notice would be due within five business days of the employee's request for leave or from when the employer learns the employee's leave may qualify for FMLA.

Designation Notice: Once the employer obtains the information necessary to determine whether the absence is protected FMLA leave, the employer has five business days to provide the employee with a notice informing the employee whether the leave will be counted as FMLA leave. The proposed revisions also include a provision that the employer will have to provide in the designation notice the number of hours, days or weeks that will be designated as FMLA leave. Employers must also inform employees if leave is not designated as such because of insufficient information or because of a non-qualifying reason.

Medical Certifications: The Department of Labor ("DOL") is considering whether to include language obligating an employer to remind an employee of a need for medical certification if it is not returned within the now-required 15 days. Under this proposal, an employer would have to remind the employee and provide another seven days in which to provide the certification.

The DOL has also proposed the requirement that an employer be obligated to return an incomplete or inadequate

medical certification to the employee and *to specify in writing* what information is lacking. The employee would have seven calendar days to cure whatever defect existed in the original certification.

Finally, the DOL has proposed that an employer be able to have direct contact with the employee's healthcare provider (if the employee consents and if the employer has given the employee the opportunity to cure any deficiency with the certification) for purposes of clarifying the medical certification form. The employer would only be permitted to ask the health care provider for information required by the certification form. These proposals would not change the existing rule that employee consent is not necessary for an employer to contact a health care provider to authenticate a medical certification.

Definition of Serious Health Condition: The definition remains largely unchanged from that in the current version of the FMLA. However, the proposed regulations do offer some clarity as to one of the existing definitions concerning the phrase which states that a serious condition exists when there are three calendar days of incapacity plus "two visits to a healthcare provider." The proposed regulation would require the two visits to occur within 30 days of the period of incapacity. For a chronic condition, "periodic visits" is defined as at least two visits to a healthcare provider per year.

Fitness-for-Duty Certification: There are two proposed revisions to the current law. The first of these revisions would allow an employer to require that the certification address the employee's ability to perform the essential functions of the employee's job. The second addresses circumstances where reasonable job safety concerns exist. Under the second revision, an employer may require a fitness-for-duty certification before an employee may return to work from intermittent FMLA leave. The current regulations prohibit that requirement for intermittent leave.

Intermittent Leave: The DOL has proposed that for scheduled, intermittent leave (i.e. situations where someone might have to leave in the middle of a shift), the employee be required to make a "reasonable effort" (as opposed to the current language which requires them to "attempt") to schedule intermittent leave so as to not be disruptive to the employer's operations.

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