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

Confidentiality Provision in Severance Agreement Found to be Enforceable

by Eric A. Schneider

Sanchez v. County of San Bernardino (2009) 176 Cal.App.4th 516. The published aspect of the case considers the enforceability of a confidentiality provision in a severance agreement.

Plaintiff Sanchez had been a high ranking employee of the County of San Bernardino when her boss asked her to resign as a consequence of a physical romantic relationship with the president of a union after Sanchez had negotiated a labor contract with that union. Sanchez had stated that she had done nothing wrong because she had never been involved in any negotiations with the union after the commencement of her relationship. As part of a written severance agreement, it was agreed that neither side would disclose "the facts, events and issues which gave rise to this agreement." Nevertheless, word quickly came out that she had resigned due to a conflict of interest arising out of an improper relationship.

Sanchez sued the County on a number of theories including breach of contract. The trial court granted summary judgment, and she appealed.

The Court of Appeal held that the confidentiality provision was enforceable. While the County may have had a duty to disclose the existence of the severance agreement, it had no duty to disclose the circumstances that gave rise to the severance agreement. The court further found that while the County has a first amendment right to freedom of speech, it waived that right by agreeing to confidentiality.

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Private Contractor on Federal Enclave Immune from FEHA

by Eric A. Schneider

Leslie Lockhart worked for a brief period of time as a custodial officer trainee for a private contractor which provided staffing for the United States Immigration and Naturalization service at the San Pedro Immigration Customs Enforcement facility located at Terminal Island.

She claimed that her employer, MVM, failed to accommodate her disabilities and filed a complaint with the Department of Fair Employment & Housing and ultimately in state court under FEHA.

MVM brought a motion for summary judgment asserting that Lockhart's claims were barred by the federal enclave doctrine because she was employed by a federal contractor in a federal enclave. The trial court granted the motion, and she appealed.

IT PAYS TO WORK IN A FEDERAL ENCLAVE

The Second District Court of Appeal affirmed. Citing Taylor v. Lockheed Martin Corp. (2000) 78 Cal.App.4th 472, 478, the court noted:

> A federal enclave is land over which the federal government exercises legislative jurisdiction. . . . The federal power over such enclaves emanates from Article I Section 8, Clause 17 of the United States Constitution, which gives Congress the power 'to exercise its exclusive legislation in all cases whatsoever' over the District of Columbia and 'to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings.'

The court again cited Taylor v. Lockheed Martin Corp., *supra*:

> An enclave is created when the federal government purchases land within a state with the state's consent, which may be conditioned on the retention of state jurisdiction consistent with the federal use. . . . Unless those situations where the United States has a mere proprietary interest in a piece of land, the voluntary accession of land by a state to the federal government is an actual transfer of sovereignty….
> (78 Cal.App.4th at 478)

The evidence was undisputed that the Los Angeles Harbor authorities deeded the subject property to the United States of America in 1927. Since FEHA was enacted in 1980, and the predecessor statutes of FEHA were contained in the Fair Employment Practices Act which was not enacted until 1959, the Federal Enclave Doctrine bars the state law claims.

What Can Employers Take Away From This Case?

Nothing unless the employer is either the federal government or a contractor of the federal government performing work on a federal enclave. In that case, employees cannot pursue claims under FEHA, but they can of course raise the same sorts of claims under Title VII.

Lockhart v. MVM, Inc., (2009) 175 Cal.App.4th 1452, as modified (July 24, 2008).

Ninth Circuit Court of Appeals Gives Employers Needed Relief in the Wage and Hour Class Action Arena

by Hernaldo J. Baltodano

It is no secret that the number of certified wage and hour class actions exponentially increased after the California Supreme Court's Sav-On v. Superior Court (2004) 34 Cal.4th 319 decision came down in 2004. It was arguably most obvious in cases where employees alleged that they were improperly "misclassified" as exempt and unlawfully denied overtime pay. Employees argued that certification was warranted if employers categorically classified them as exempt without examining how they actually spent their time at work. The existence of standard operating procedures, moreover, often proved to be the "death knell" for employers because employees could argue that the mere existence of such policies gave rise to common questions that predominated over individual ones, justifying class certification. Last year, the class certification landscape changed somewhat when the Ninth Circuit Court issued a pair of key wage and hour decisions.

In In re Wells Fargo Home Mortgage, the Ninth Circuit reversed the certification of overtime claims brought by a group of home mortgage consultants ("HMC's") employed by Wells Fargo Home Mortgage. With their ranks at about 5,000, none of these HMC's received overtime pay because Wells Fargo categorically treated them all as exempt from state and federal overtime laws. Wells Fargo defended its classification on the grounds that the HMC's were exempt from overtime as outside sales employees and argued that these exemptions spawned numerous and individualized questions rendering class certification inappropriate.

Although it acknowledged that applicable state and federal exemptions gave rise to individualized inquiries concerning, among other issues, the types of tasks performed and time spent on such tasks by individual HMC's, the district court certified the claims stating, "it is manifestly disingenuous for a company to treat a class of employees as a homogeneous group for the purposes of internal policies and compensation, and then assert that the same group is too diverse for class treatment in overtime litigation."

On appeal, Wells Fargo essentially argued that the district court's reliance on its blanket exempt policy was "tantamount to estoppel." The Ninth Circuit agreed and found that the district court put too much emphasis on Wells Fargo's exemption policy. Noting that one of the primary purposes of class certification is to "achieve judicial economy," the Court determined that Wells Fargo's exemption policy did not implicate the kind of "comprehensive uniform policies detailing the job duties and responsibilities of employees" that could legitimately earn the kind of deference erroneously given by the district court. "In contrast to centralized work policies, the blanket exemption policy does nothing to facilitate common proof on the otherwise individualized issues." The Court continued, "[t]he fact that an employer classifies all or most of a particular class of employees as exempt does not eliminate the need to make a factual determination as to whether class members are actually performing similar duties."

The Ninth Circuit applied a similar analysis to overtime claims brought by more than a thousand home loan consultants ("HLC's") employed by Countrywide. In Vinole v. Countrywide Home 571 F.3d 935 (9th Cir. 2009) the Ninth Circuit again examined an across-the-board exemption policy that excluded HLC's from overtime pay. But unlike In re Wells Fargo Home Mortgage, the Court did so while examining the propriety of a defendant employer's preemptive attack to class certification. Concluding that the Federal Rules of Civil Procedure "do not preclude a defendant from bringing a preemptive motion to deny certification," the Ninth Circuit in Vinole upheld the district court's granting of the employer's motion to deny certification. It also reiterated the importance of whether "adjudication of common issues will help achieve judicial economy" when weighing the appropriateness of class certification. The Court held that a district court should not rely on an internal uniform exemption policy to the near exclusion of other factors. At the end of the day, the Court stated, "The overarching focus remains whether trial by class representation would further the goals of efficiency and judicial economy." As in In re Wells Fargo Home Mortgage, the exemption policy at issue here did not implicate an employer's "centralized control in the form of standardized hierarchy, standardized corporate policies and procedures governing employees, uniform training programs, and other factors susceptible to common proof."

What Can Employers Take Away From This Case?

The In re Wells Fargo Home Mortgage and Vinole decisions provide much needed relief to employers, particularly those who have categorically classified certain employees as "exempt" from overtime and are defending those decisions in federal court. Nonetheless, employers are well-advised to examine what it is that their employees are actually doing before applying an across-the-board exemption. This is even more critical for those large, national employers who use standard operating procedures to routinize job duties. And after conducting this initial analysis, employers should periodically audit their wage and hour practices by assessing how exempt employees are actually spending their time at work and evaluating their exempt employees on job performance criteria that differentiate them from "rank and file" – be it managing other employees or performing work related to the company's management policies. In the end, the work actually performed by an exempt employee must fit his or her job description and any deviations should be thoroughly documented.

Employees Must Be Able to Identify a Reasonable Accommodation

by Eric A. Schneider

In Scotch v. The Art Institute of California – Orange County Inc. (2009) 173 Cal.App.4th 986, Carmine Scotch was a professor at Art Institute of California-Orange County, Inc. (AIC) who was terminated after AIC first reduced his class load. He claimed that he was reduced to part-time status and eventually quit his job because he was discriminated against on the basis of his HIV positive condition. He also claimed that AIC failed to engage in the interactive process with him and failed to provide him with reasonable accommodations to allow him to continue to work.

AIC asserted that its treatment of him stemmed from the economic reality of reduced classes because of declining enrollment; his performance scores were weak, and he not only did not have a master's degree, but he had not enrolled in a master's program; and that it had engaged in the interactive process, but the plaintiff's demand for accommodation was not reasonable.

The trial court granted AIC's motion for summary judgment, and the Court of Appeal affirmed.

The appellate decision goes into considerable detail as to the underlying facts which can be summarized as follows:

1. Scotch did not hold a master's degree, and he had not followed up on promises to enroll in a master's program;
2. As a member of the Accrediting Counsel for Independent Colleges and Schools (ACICS), AIC was obliged to limit upper division course faculty assignments to those who either hold graduate degrees or had certain other qualifications (which Scotch did not have);
3. AIC was faced with declining enrollment and had laid off or reduced to part-time a number of other instructors due to their failure to enroll in master's degree programs;
4. Scotch scored a 2.25 on a 5 point scale;
5. The only AIC person involved in the decisions concerning Scotch was the director of human resources who argued on his behalf; and
6. Scotch demanded as an accommodation that he should have been given priority in the assignment of course sections to enable him to maintain his fulltime employment status and keep his medical benefits.

In reviewing the summary judgment granted in favor of the plaintiff, the Court of Appeal employed the familiar *McDonnell Douglas* formulation (See, McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792) which has been adopted in California (See, Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 354.) Under the McDonnell Douglas test, the plaintiff has the initial burden of establishing a *prima facie* case of discrimination by showing that the employer took actions from which, if unexplained, can be inferred that it is more likely than not that such actions were based on a prohibited discriminatory criteria. The *prima facie* case generally means that the plaintiff must provide evidence that he or she was a member of the protected class; that he or she was qualified for the

position he or she sought or was performing competently in the position held; that he or she suffered an adverse employment action; and that some other circumstance suggests a discriminatory motive.

Then, if the plaintiff establishes his *prima facie* case, a presumption of discrimination arises, and the burden shifts to the employer to rebut the presumption by producing admissible evidence sufficient to raise a genuine issue of material fact that the employer took its actions for a legitimate, non-discriminatory reason.

Then, if the employer meets that burden, the presumption of discrimination disappears, and the plaintiff must challenge the proffered reasons for the adverse employment action as pretext for discrimination or offer other evidence of a discriminatory motive.

In the context of a summary judgment, if, as in the present case, the summary judgment motion relies in whole or in part upon showing of non-discriminatory reasons for the discharge, the employer satisfies its burden as the moving party if it presents evidence of such non-discriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the termination. Then, to defeat the motion, the plaintiff employee must introduce evidence raising a triable issue that would permit a trier of fact to find by a preponderance that intentional discrimination occurred.

The court first addressed the discrimination claim. The court was satisfied that AIC's evidence of the necessity to provide further course sections resulted in faculty being reduced from full-time to part-time or asked to leave. As a consequence, there were not enough lower division courses to assign Scotch (who was not eligible to teach upper division courses) five course sections. The burden shifted to Scotch. In that regard, he argued that the method of scheduling courses and implementing the ACICS accreditation standards were a pretext for discriminating against him. He asserted that the master's degree requirement was new and that he was not informed of it until after he had revealed to the director of human resources that he was HIV positive.

The court found that the timing of the master's degree requirement and the lack of notice to Scotch were not material because he had not shown a causal link between his revelation that he was HIV positive and the decision to implement the master's degree requirement. In particular, he had presented no evidence that any of the decision makers who decided to implement the requirement knew that he was HIV positive. As noted above, the only person who did know that had stood up for him.

Furthermore, AIC had encouraged Scotch to pursue a master's degree or at least start the process. He, however, did not do so.

Next, the court tackled the failure to make a reasonable accommodation claim. It found that Scotch's proposed accommodation was not reasonable because it was not a modification or adjustment to the workplace necessary to enable him to perform the essential functions of his position. Scotch had claimed that the limitations from his disability were that he needed to avoid stress, and that he could not pursue a master's degree while teaching fulltime and fulfilling other professional development requirements. His request for assignment of lower division courses, however, did not accommodate those limitations and were unnecessary to enable him to perform the essential functions of his position.

With respect to his claim for failure to engage in the interactive process, AIC argued that it had engaged in the interactive process by listening and responding to the plaintiff's request for clarification and by not scheduling him to teach morning sessions. It was undisputed that AIC had agreed to the request that he not teach morning classes, and it offered to allow Scotch to enroll in a three-year master's degree program rather than a two-year program, and that the time he spent working toward a master's degree would take the place of other professional development requirements. Scotch had expressed satisfaction with that response and did not request any further accommodation. Nevertheless, the court found that AIC should have initiated a second meeting with him before deciding to reduce the number of course sections assigned to him which effectively changed his employment status to part-time. Nevertheless, that failure was ultimately deemed immaterial because Scotch had still not identified a reasonable accommodation that was objectively available during the interactive process.

Next, the Court of Appeal addressed the claim for retaliation. In that regard, AIC's successful showing of a legitimate, non-retaliatory reason for its adverse employment action served to defeat this claim as well.

The Court quickly dispatched the claim for termination of employment in violation of public policy which was based on constructive termination by citing Turner v. Anheuser-Busch, Inc. (1994) 7 Cal.4th 1238, 1247 on the basis that "a poor performance rating, accompanied by a demotion or reduction in pay, does not constitute a constructive discharge." Further citing Turner, the Court stated "the conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (Turner, *supra*, 7 Cal.4th 1246, 1247.)

What Can Employers Take Away From This Case?

Firstly, this is an exceptionally well written opinion that addresses various causes of action that can be associated with a disability case. The Court of Appeal thoroughly outlines the elements of these causes of action in a summary judgment context. Secondly, the Court of Appeal points out that in a claim for failure to engage in the interactive process in order to prevail, the employee must identify a reasonable accommodation that would have been available at the time that the interactive process should have occurred. While employees do not have at their disposal the extensive information concerning possible alternative positions and possible accommodations, they should nevertheless be able to identify such an accommodation through discovery.

Just Say "No" to Unlicensed Sub-Contractors

by Colleen A. Déziel

UNLICENSED SUB-CONTRACTORS CAN LEAD TO THE GENERAL CONTRACTOR HAVING UNEXPECTED EMPLOYEES

General contractors have yet another reason to worry about the retention of unlicensed sub-contractors. While typically an employee of an independent contractor would not be considered an "employee" of the general contractor, a California appellate court has recently relied on Labor Code section 2750.5 when it ruled in Martin Cerda v. Sanders Construction Company, Inc. (2009) 175 Cal.App.4th 430, that where the sub-contractor is unlicensed, its employees become the employees of the general. This is significant for many reasons, one of which concerns wage and hour law.

In Sanders Construction Co., Inc., Sanders, a general contractor, was hired for a hotel construction project. Sanders retained Humberto Figueroa Drywall Company to install drywall. The contract price for the drywall work included both labor and materials. After Humberto was paid by Sanders for the job, Cerda made a complaint for unpaid wages due to him and others against the general, Sanders.

Based on Labor Code section 2750.5, which reflects that "an unlicensed sub-contractor is a statutory employee of the general contractor," the appellate court explained that ultimate responsibility for wage compensation rests with the general contractor, here Sanders.

What Can Employers Take Away From This Case?

It behooves an employer to ensure than any sub-contractor it retains to help perform services has a license in good standing. The consequence of not doing so can be quite costly. Wage and hour litigation is expensive, especially when one considers the penalties and attorney's fees that can be awarded in such claims.

Mind Your Company Documents

by Kimberly M. Foster

In LVRC Holdings LLC v. Brekka, 581 F.3d 1127 (9th Cir. 2009), LVRC, an owner and operator of a residential treatment center for addicted persons in the State of Nevada, filed a lawsuit against a former employee, Christopher Brekka, and his wife, for violations of the Computer Fraud and Abuse Act (CFAA).

FAILING TO IMMEDIATELY DEACTIVATE FORMER EMPLOYEE PASSWORDS AND USER NAMES CAN LEAD TO UNAUTHORIZED ACCESS WITH NO REDRESS FOR THE EMPLOYER

The CFAA provides a private right of action for persons who are injured by someone who "knowingly, with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct further the intended fraud and obtains anything of value." 18 U.S.C. § 1030. LVRC alleged that Brekka violated CFAA by emailing company documents to his personal computer during the course of his employment and by continuing to access LVRC's online statistical systems after his employment ended. Both before and after his employment with LVRC, Brekka and his wife owned and operated two consulting businesses that provided referrals to addiction centers through the use of internet sites and advertisements. LVRC knew about Brekka's ownership of the consulting businesses upon his hire. However, with evidence that his user name and password had been used to access company documents after his termination, LVRC sought to show that he obtained the documents "without authorization," as set forth under the Code, and to further his personal interests to LVRC's detriment.

The district court granted summary judgment in Brekka's favor, finding that LVRC had authorized him to access company records during the course of his employment and had not established the existence of a material issue as to whether Brekka had failed to access the LVRC website without authorization after he left the company. *Id*. at 1129.

On appeal, the Ninth Circuit agreed with the district court's interpretation of "without authorization" to find that "when an employer authorizes an employee to use a company computer subject to certain limitations, the employee remains authorized to use the computer even if the employee violates those limitations." *Id*. at 1137. The matter of disciplining an employee who violates those limitations is one thing, but there was no CFAA claim against an employee who had been given authorization during his employment. The more difficult question was how to treat evidence that someone with Brekka's user name and password had accessed company documents after his termination. The court affirmed the district court's judgment that LVRC had not created a genuine issue of material fact to withstand a motion for summary judgment given that it could not prove that the person who accessed the company website was Brekka and there was evidence that the website had been accessed even after LVRC had dismantled Brekka's user name and password.

What Can Employers Take Away From This Case?

The lesson to be learned is that it will be very difficult to sustain a CFAA cause of action against an employee who has been granted access to company computers. Employers are encouraged to guard their confidential and proprietary information by immediately deactivating user names and passwords upon an employee's termination.

Employer Liable After Terminating Employee for Breastfeeding in Company Parking Lot Following Her Return from Pregnancy Leave

by Kimberly M. Foster

In Dept. of Fair Employment & Housing v. Acosta Tacos, Case No. E200708 T-0097-00se (6/16/09), Marina Chavez, a former cashier of Acosta Tacos in Los Angeles, California, brought this case against the taqueria alleging that her termination constituted unlawful sex discrimination and retaliation.

Chavez had been employed by Acosta Tacos for a little over two years when she became pregnant. In November or December 2006, Chavez informed her manager, Jamie Acosta, of her pregnancy and expected due date. Acosta permitted her to take a medical leave when the baby arrived a month early and permitted her to return to work after she expressed her readiness to resume her cashier duties. During her first shift back at work, Chavez used her break to feed her baby in the parking lot. Chavez's partner had brought the baby to work to be fed. Another employee observed the breastfeeding and reported it to Acosta who later told Chavez that she would have to wait until she had finished lactating before returning to work. When she protested this, he summarily terminated her for her "disrespectful attitude." Chavez then filed a claim for employment discrimination with the Department of Fair Employment and Housing. The agency filed suit on her behalf.

MAKE SURE YOUR EMPLOYEES KNOW AND UNDERSTAND THEIR RIGHTS RE DISCRIMINATION

Acosta Tacos sought to defend itself from liability by presenting evidence of Chavez's undocumented work performance issues that occurred a year prior her pregnancy leave. In particular, the company alleged that Chavez had brought her children to work when she had no childcare and had left them in the car in the parking lot several times. It further alleged that she was seen talking to her romantic partner towards the end of her shift when she should have been working instead.

Crediting Chavez's testimony as truthful and not crediting Acosta's testimony with respect to undocumented work performance issues, the Commission found for Chavez on all claims she alleged and awarded her over $40,000 in lost wages and emotional distress damages. The DFEH had established both direct and circumstantial evidence that Chavez's termination was because of her sex. In particular, that she had been terminated for insisting on her return to work following her leave and her right to breast feed her baby. With respect to Chavez's retaliation claim, the proximity between Chavez's insistence that she be allowed to return to work and her termination was sufficient to establish that she had been terminated for engaging in the protected activity of opposing any restriction on her FEHA right to take pregnancy leave and return to the same position once no longer disabled. Lastly, Acosta Tacos was found liable for failing to take all reasonable steps to prevent discrimination from occurring because the record showed that its pregnancy discrimination policy was written in English only, was not distributed to employees and Acosta failed to display posters that informed the employees of their rights under the law.

What Can Employers Take Away From This Case?

Employers are encouraged to make sure that managers understand the law as it applies to returning a disabled employee to work and specifically that employees cannot be terminated for using their breaks to breast feed their babies, or for requesting a similar accommodation. Further, employers should ensure that their employees understand their rights, which could mean distributing policies and handbooks in Spanish or other applicable languages. It would be smart to obtain a verification in writing from employees which reflects that they either have read and understood the policies, or have had them read or explained to them.

Be Careful What You Ask For

by Kimberly M. Foster

COMPLAINTS BY EMPLOYEES OF UNLAWFUL CONDUCT MUST BE FULLY INVESTIGATED

In Crawford v. Metropolitan Government of Nashville et al., 129 S. Ct. 846 (2009), the United States Supreme Court considered whether an employee's inactive participation in a workplace investigation of sexual harassment is sufficient to trigger the opposition clause of Title VII, which makes it unlawful for an employer "to discriminate against any … employe[e] who (1) "has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a).

Vicky Crawford had been employed by Metropolitan Government and Davidson County, Tennessee (Metro) for thirty years when she was asked to participate in a sexual harassment investigation. A human resources officer asked Crawford whether she had ever witnessed "inappropriate" behavior by the employee relations director, Gene Hughes. When Crawford confirmed that Hughes had grabbed his crotch in front of her on several occasions, and her story was subsequently corroborated by two other women with similar experiences, Metro concluded its investigation, but took no action against Hughes. Crawford and the two other accusers were fired soon after the investigation was completed. Metro alleged that Crawford had embezzled from the County.

The district court granted summary judgment in favor of Metro finding that Crawford could not satisfy the opposition clause of Title VII given that she had not "instigated or initiated any complaint," but had "merely answered questions by the investigators in an already-pending internal investigation initiated by someone else." *Id*. at 850.

In an opinion written by Justice Souter, the Supreme Court reversed the grant of summary judgment in Metro's favor. Relying on the conclusions it reached in Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1988) and Faragher v. Boca Raton, 524 U.S. 775 (1988), the Court recognized the impossible Catch-22 scenario an employee would face "[i]f the employee reported discrimination in response to the inquiries, the employer might well be free to penalize her for speaking up. But if she kept quiet about the discrimination and later filed a Title VII claim, the employer might well escape liability, arguing that it had exercised 'reasonable care to prevent and correct [any discrimination] promptly.' " *Id.* at 852. Rather than placing this impossible burden on the employee, the Court held that an employee who reports acts of harassment or discrimination in response to an investigation launched by an employer has engaged in conduct covered by the opposition clause of Title VII.

What Can Employers Take Away From This Case?

The practical impact of this holding is that when an employee is interviewed as a part of a workforce investigation and this interview reveals unlawful conduct for the first time, or otherwise, such statements by that employee should be treated as complaints of unlawful conduct and should be investigated fully. Moreover, subsequent adverse employment actions (demotion, termination etc.) taken against the "complaining" employee must be evaluated in light of a possible claim for retaliation.

Mixed Motive Jury Instruction Should Have Been Given in Pregnancy Discrimination Case

by Colleen A. Déziel

A DEFENSE IN MIXED MOTIVE CASES LIVES ON

In Harris v. City of Santa Monica (2010) 181 Cal.App.4th 1094, the appellate court has clarified that in a mixed motive case, other than those for age discrimination, employers continue to be able to assert that it would have made the same employment decision even if it had not taken an illegitimate factor into account. The appellate court also held that this defense is not one that can be waived by not alleging it in an answer.

In a mixed motive case, both legitimate and illegitimate factors contribute to the employment decision. Once the employee establishes that an illegitimate factor played a motivating or substantial role in an employment decision, the burden falls to the employer to prove by a preponderance of the evidence that it would have made the same decision even if it had not taken the illegitimate factor into account.

The plaintiff in Harris alleged that she was terminated at least in part because she was pregnant. She claimed that the current state of the law was that if the City of Santa Monica's motive to terminate her was based at all on an illegal purpose (here her pregnancy), then she should prevail.

Thus, when the City of Santa Monica requested a jury instruction reflecting the mixed motive defense she objected to the court giving such an instruction. The court agreed with the plaintiff and refused the city's instruction.

Instead, the trial court gave the instruction offered by the plaintiff which reflected that the city would be liable if the plaintiff's pregnancy was a motivating reason/factor for the discharge, and that a motivating factor is one that moves the will and induces action even though other matters may have contributed to the taking of the action.

One of the plaintiff's arguments in support of her claim as to the status of the law on this particular defense was that the new jury instructions (i.e., CACI) did not include an instruction for the mixed motive defense. Essentially, the plaintiff argued that the fact that the old jury instructions (i.e., BAJI) had included such an instruction, and the new instructions (i.e., CACI) did not include such an instruction, necessarily meant that the drafters specifically intended to exclude it (i.e., a recognition by the drafters that it is no longer good law.)

The appellate court disagreed with the plaintiff's interpretation of this exclusion. Instead, the appellate court noted that the omission was more likely a recognition by the drafters of CACI that the law involving a mixed-motive case was not stable and clear, but instead arguably in flux.

The court found that there continued to be a viable defense in these cases and that it was reversible error for the trial court not to have provided it to the trier of fact.

What Can Employer Take Away From This Case?

The employer continues to be able to establish in mixed motive cases that even though there is evidence that an illegitimate factor contributed or played a motivating factor in an employment decision, that it would have made the same employment decision regardless of the illegitimate factor. As such, as long as an employer can establish by a preponderance of the evidence that it has a legitimate reason for the termination, and that it, standing alone, would have induced it to make the employment decision, then it can prevail on a claim for discrimination.

Employer May Not Contractually Shorten the Statute of Limitations on Time to Bring Wage and Hour Claim

by Colleen A. Déziel

In the matter of Pelligrino v. Robert Half International G039985, 2010 WL 664197 (Feb. 25, 2010), the appellate court has held that an employer may not attempt to shorten the time that an employee has to bring a wage and hour claim by including a provision to this affect in an employment agreement. The court relied on Gentry v. Superior Court (2007) 42 Cal.4th 443, when it reasoned that the wage and hour laws underlying plaintiffs' claims protect unwaivable and fundamental statutory rights that are supported by strong public policy. The provision shortening the limitation period violates the strong public policy and was thus, found to be unenforceable.

This court also analyzed the issue of whether an administrative, executive exemption applied to preclude the complaining employees from bringing an overtime claim. Robert Half International is a staffing company that places temporary employees or "candidates" with its clients. The employees in this case were account executives for various of Robert Half International's divisions. The account executive job responsibilities included recruiting, interviewing, and evaluating candidates to be placed as temporary employees, selecting and placing candidates on job orders and assisting clients with their call-in business needs and new business development. The account executives were expected to follow the "recipe" established by corporate headquarters.

In this regard, account executives are expected to perform the three major functions of their position on a three week rotating basis broken down into a "sales week," "desk week," and "recruiting week." There were a specific number of calls, client contacts, client visits and networking events that were required to be performed during sales week. During desk week each was required to handle incoming calls and, during recruiting week, each was required to interview a specified number of candidates.

Account executives did not have responsibility for hiring or firing, did not supervise any support staff and did not have any role in the supervision of placed candidates. They also did not make recommendations to a client regarding how to staff projects. Account executives were evaluated on their ability to meet the minimum required goals/numbers.

In order to qualify for the administrative exemption, Robert Half had to show that each plaintiff (1) performed services of office or non-manual work directly related to management policies or general business operations of the employer or its customers, (2) customarily and regularly exercised discretion and independent judgment, (3) performed under only general supervision work along specialized or technical lines requiring special training or executed under only general supervision special assignments and tasks, (4) to be engaged in the activities meeting the test for the exemption at least 50% of the time, and (5) earn twice the state's minimum wage.

In the instant matter, the court found that the "account executives" did not meet the first criteria. The court reasoned that the evidence reflected that the plaintiffs' duties were not directly related to management policies because they instead constituted sales work (i.e., a direct sale occurred when a candidate was placed with a client, the account executives were evaluated on meeting sales minimums, the account executives were primarily responsible for selling the services of Robert Half, each had no role in supervision of staff or candidates, and they did not create policy but rather followed an existing recipe.)

What Can Employers Take Away From This Case?

More than anything, an employer needs to be aware that it cannot shorten the time that an employee has with which to assert his/her rights against the employer as to issues of overtime compensation. We note that the court did make a distinction between rights being asserted for overtime and minimum wage versus straight time wages. The court noted that straight time wages are a matter of private contract between the employer and employee, while overtime and minimum wages were mandated by statute.

Also, in regard to the administrative exemption, employers need to continue to be vigilant on assessing and classifying exempt versus non-exempt employees. Specific job duties and the time spent performing each task remain crucial factors in this determination.

Series of Boorish Behavior Not Deemed Severe and Pervasive

by Eric A. Schneider

Alicia Haberman served as a sales representative for Cengage, a text book publishing company. In the course of her employment she experienced the following:

1. Her boss (Bredenberg) asked her how she looked so pretty so early in the morning;
2. Bredenberg told her of his wife's medical issues, and he said that he thought that the next time around he would go for "younger ones because women in their 40's get sick;"
3. Bredenberg stated that his high school administrator was "hot for being an older woman;"
4. Bredenberg told a customer that Haberman was amazing and had five children with no father in the picture;
5. Bredenberg joked that his father, Richard, is referred to as "Big Dick;"
6. A fellow employee asked her whether she was seeing Bredenberg because Bredenberg had said that she was "drop dead gorgeous;"
7. While she and Bredenberg were separately parking for a convention, Bredenberg called her on her cell phone and told her that he was "coming right up behind her and it felt pretty good;"
8. Bredenberg asked her if she were getting married;
9. Bredenberg told her during a conference that an author of one of the text books they were selling "had the 'hots' for her" and asked whether she or another employee would ever go out with this author;
10. Bredenberg told her that his grief counselor had told him that he was not ready for a relationship, and he told her that he just wanted to have sex and asked her what she thought and whether she had any friends that just wanted to have sex and whether she knew anyone who was good in bed;
11. Bredenberg and another employee conducted a role playing training session at Bredenberg's home;
12. Bredenberg asked her if she had any friends who just wanted to have sex; and
13. Bredenberg told her that a customer's contractor had the "hots" for her and wanted to date her.

Cengage moved for summary judgment on the basis that the conduct taken as a whole was neither severe nor pervasive and did not create a hostile work environment as a matter of law and on that basis affirmed the summary judgment relating to hostile environment. The court also affirmed the wrongful termination claim because there was no showing of any causal nexus between the conduct and any adverse employment action.

What Can Employers Take Away From This Case?

While indeed there was a great deal of inappropriate conduct on the part of the plaintiff's supervisor, taken as a whole it did not amount to the creation of a hostile work environment. It is important to note that the conduct did not include inappropriate touching or any demands for sexual favors that could constitute quid pro quo sexual harassment. Cases entailing boorish behavior may be more defensible than they would appear at first blush. Haberman v. Cengage Learning, Inc. (2009) 180 Cal.App.4th 365.

Employers Seeking to Enforce Wage and Hour Arbitration Agreements Continue to Face an Uphill Battle

by Hernaldo J. Baltodano

In Gentry v. Superior Court (2007) 42 Cal.4th 443, the California Supreme Court set forth various factors that trial courts must consider when examining the propriety of a class arbitration waiver to a claim for unpaid overtime. These factors include the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that other employees may be unaware or misinformed about their rights, and other obstacles to the vindication of employees' rights to overtime pay through individual arbitration. In Franco v. Athens Disposal (2009) 171 Cal.App.4th 1277, the Court applied the Gentry factors to a trash truck driver's claims for meal and rest period violations and request for civil penalties under the Private Attorney's General Act ("PAGA"). Applying the Gentry factors, the Court reversed the trial court's granting of a petition to compel arbitration of these claims because "the state has a significant interest in making sure that the drivers of commercial vehicles receive sufficient food and rest while on the job." According to the Franco Court, "Because the arbitration agreement contains a class arbitration waiver and also precludes Franco from seeking civil penalties on behalf of other employees, contrary to the PAGA, we conclude that the agreement as a whole is tainted with illegality and is unenforceable."

What Can Employers Take Away From This Case?

The Franco decision is no surprise given California's significant pro-employee bent. Employers will be hard-pressed to arbitrate alleged class-wide violations of the Labor Code and courts will continue to take a hard look at any attempt to circumvent employees' rights to overtime pay and other "unwaivable" rights, such as meal and rest periods. And because it lacks the necessary resources to enforce its wage and hour laws, the state has effectively deputized plaintiffs to act as "private attorneys general" to enforce these laws. Any attempt to curb an employee's ability to serve in this capacity will meet stiff opposition. For these reasons, employers will serve themselves well by implementing sound wage and hour policies and practices, and periodically auditing their practices to avoid the expense and disruption of wage and hour litigation.

Arbitration Agreements Must Be Clear, Concise and Understandable to All Employees

by Eric A. Schneider

In Olvera v. Pollo Loco, Inc. (2009) 173 Cal.App.4th 447, the employer's attempt to enforce arbitration was rebuffed because of two factors which the court determined represented procedural unconscionability.

Firstly, notwithstanding that there was nothing in the company handbook requiring an acknowledgment that the employee be bound by a "mid-year policy update" which included mandatory arbitration, "the inequality in bargaining power between the low-wage employees and the employer makes it likely that the employees felt at least some pressure to sign the acknowledgment and agree to the new dispute resolution policy, whatever they understood that policy to be."

Secondly, the court determined that the employees' agreement to be bound by the new dispute resolution policy (which required arbitration) was not an informed decision because while the portion of the policy providing that employees should first contact management to resolve any problem and then, if the problem is not resolved in that manner, mediation was required was in large type, (both English and Spanish), and in an inviting, "easy to read" format, on the other hand, the requirement of binding arbitration for all employment related disputes inaccurately stated that mediation was required (which it was not), and that the policy requiring arbitration was in much smaller type than the explanatory materials and in English only. "This exacerbated the effect of the misrepresentation and made it more likely that the employees would be misled."

What Can Employers Take Away From This Case?

The burden to enforce arbitration agreements rests with the employer. Any such provision should be in clear, easy to read language; be in both English and Spanish where applicable; and certainly not be in any smaller type than other materials.

Employers Must Ensure that Poor Performance is Well Documented

by Eric A. Schneider

WITHOUT ADEQUATE DOCUMENTATION, A PLAINTIFF'S DECLARATION ALONE CAN RESULT IN AN UNFAVORABLE RULING FOR THE EMPLOYER ON SUMMARY JUDGMENT

Van Asdale v. International Game Technology (2009) 577 F.3d 989 involves an examination of the whistle blower protection provisions of the Sarbanes-Oxley Act (18 U.S.C. §1514A.) The plaintiffs were husband and wife who were licensed in Illinois to practice law and who were working as in-house intellectual property lawyers in Nevada. Their employer is a Nevada company specializing in computerized gaming machines. They were terminated after discussing with management the possibility that the company with whom International Game Technology (IGT) had merged had violated a patent manufactured by a competitor. They sued for wrongful discharge and relief under the whistle blower protection provisions of Sarbanes-Oxley. The trial court granted summary judgment in favor of IGT.

The court first addressed the question of whether the plaintiffs could rely upon evidence that may be protected under the attorney-client privilege. Illinois law would have protected the employer in that regard, but the plaintiffs were not practicing in Illinois. The court analogized to federal age discrimination cases which held that in-house counsel may pursue retaliation claims under Title VII.

The court next identified the four elements of a *prima facie* case under Section 1514a: (1) The employee engaged in a protected activity or conduct; (2) the named person knew or suspected, actually or constructively, that the employee engaged in the protected activity; (3) the employee suffered an unfavorable personnel action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.

Throughout the opinion, the court pointed out that in reviewing a summary judgment case, the evidence had to be viewed in a light most favorable to the appealing party. Ultimately, for the reasons discussed, that rule resulted in the summary judgment being reversed.

The court first turned the question of whether the plaintiffs had engaged in some protected activity. The plaintiffs had not used the words "fraud," "fraud on shareholders," or "stock fraud" but they may have used the terms "Sarbanes-Oxley" or "SOX." The court pointed out, however, that the employee does not have to cite a specific code section that he believes was violated to trigger the protections of the statute.

Also in connection with the first element, the court analyzed the district court's determination that Mr. Van Asdale's declaration contradicted his deposition and brought into play the "Sham Affidavit Rule." The court found that there were only minor conflicts between his deposition and his declaration such that the Sham Affidavit Rule was inapt.

The court found that the Van Asdale's subjectively believed that the conduct that they were reporting violated a statute. Likewise, if their testimony were to be believed, management would have known of their subjective belief. There was no dispute that the plaintiffs suffered an unfavorable personnel action.

Finally, there were sufficient circumstances to raise the inference that the protected activity contributed to the unfavorable action in that there was little in the way of documentation supporting the employer's contention that the plaintiffs' job performances were inadequate.

What Can Employers Take Away From This Case?

A plaintiff can overcome summary judgment on the strength of his own testimony which will be interpreted most favorably to him.

An HR Perspective

Finding the Right Employee to Fill the Position

by Rick B. Friedman, Administrator

If you find the right person to fill the job, YOUR job will be easier. Think of the benefits of having trouble-free employees. No counseling sessions and no complaints about poor work, poor performance, poor attitude, or poor attendance. But how do you begin? Let's break the process into sections:

Evaluate and define your needs: To find the right employee for a job, it must start with "what IS the job?" Create a job description that itemizes – line-by-line – the tasks your new employee will be doing and the qualities you seek for the position. Be descriptive and concise. Separate the qualifications into two categories: "required" and "desired."

Review resumes: Note gaps of employment between jobs and ask for explanations during the interview. When only year ranges are provided (i.e., "2007-2009"). This could mean employment of three years (01/01/07 – 12/31/09), but it could also mean employment as short as one year (12/31/07 – 01/01/09). Ask for clarification. If a resume contains spelling errors, typographical errors or descriptions that end with "etc.," you will be hiring someone whose accuracy and attention to detail could be troublesome.

Interviewing techniques/skill testing: Administer tests specific to the type of performance you expect. If you require a typing speed of 70+ words per minute, give an applicant a typing test BEFORE you spend time interviewing him/her. If the applicant only types 50 words per minute (give at least one practice and three tries), end the interview process.

Before the applicant enters your office, review the resume. Make notes on a separate sheet with questions you want to ask about the resume. Hold your calls and instruct that you do not want to be disturbed. Interviews are a two-way street. An excellent candidate may think twice about accepting a position from a company where the bosses think so little of their employees that they take calls, read emails or do other work during the interview process.

Your interview questions should invoke *narrative-type* responses. If you ask "Do you work well under pressure?" You will always get a "yes" answer. "What are you looking for in your next job?" or "How would you handle the following problem _____?" requires some thinking and helps you know more about the person. Keep the conversation going on the applicant's side. If you spend your time doing most of the talking, all you will learn about the applicant is that he/she is a good listener.

Reference checking: Even if the candidate seems like the perfect employee during the interview process, ALWAYS check references, even if you can only get verifications of dates of employment and job title. Make sure you are receiving the information from someone qualified to provide you honest and accurate answers. If you receive references with phone numbers that are direct lines, consider calling the company's main line and verifying the title of the person.

Extending the offer of employment: Offering someone a job is not like trying to get the best price for a used car. If you find the perfect person who wants a particular salary – assuming that salary is within your budget – don't haggle. Your potential perfect employee is certainly interviewing elsewhere. Why chance losing him/her? If the applicant's salary requirements are less than you anticipated, offer a little bit more. You will still be within your budget and will be hiring someone who feels appreciated and who will likely work harder for your company.

Have a Question?

If you have H.R. problems or have questions regarding H.R. procedures, please call us or send them via email (to CAD@amclaw.com). We will be happy to provide comments or options on steps that can be taken in an effort to help you reach successful conclusions.

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

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