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Labor & Employment Briefing

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

FAILURE TO OBTAIN SECURITY CLEARANCE AT RAYTHEON INSUFFICIENT TO JUSTIFY TERMINATION

by Eric A. Schneider

Zeinali v. Raytheon Company involves an Iranian engineer who was terminated after he failed to obtain the security clearance that was a condition of his employment. Notwithstanding that a long line of case law prohibits employees of public and private employers from challenging federal government security clearance decisions even on the basis of otherwise unlawful discrimination (i.e., race, religion, national origin, etc.), Zeinali sued Raytheon for discrimination. He claimed that Raytheon violated California's Fair Employment and Housing Act by discriminating against him on the basis of his Iranian national origin.

Raytheon successfully moved for summary judgment arguing that the government's denial of Zeinali's request for security clearance immunized the employer. The Ninth Circuit Court of Appeals however reversed and allowed Zeinali to proceed with his case.

How could this seemingly anomalous decision have come down? Was it not a "slam dunk" that an employer could fire an employee who failed to meet a condition of employment that the employee himself acknowledged?

It would have been a "slam dunk" indeed had Zeinali not been able to produce admissible evidence that Raytheon had chosen not to discharge two other similarly situated non-Iranian employees who had also been unable to obtain their security clearance.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Even when an employer is on seemingly safe ground in effecting a termination when the employee did not meet the requisite conditions for a position or perhaps had violated company rules, it must make sure that it is treating all similarly situated employees in the same manner. (*Zeinali v. Raytheon Company*, 9th Cir., Cal. 2011) 2011 U.S. App. Lexis 6792.

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PORNOGRAPHIC AD ON CRAIGSLIST COSTS SCHOOL ADMINISTRATOR HIS JOB

by Michelle T. Harrington

Employers across the state rejoiced when a California Court of Appeal upheld a school district's dismissal of a tenured dean of students and teacher based on his posting of a sexually explicit ad containing pictures of his face and genitalia on Craigslist. (*San Diego Unified School District v. Commission on Professional Competence*) The ad was a solicitation for (free) sex with other adult males. An anonymous parent discovered the ad and complained to the school district. In response, the school district served the employee with a notice of intent to dismiss for "evident unfitness for service" and "immoral conduct," among other charges.

The employee appealed to the Commission on Professional Competence ("CPC") arguing that he did not intend for any students to see the listing and thought it would be adult and private. He testified that he never used school time, equipment or resources in connection with the listing. Although the CPC determined that the employee's conduct was vulgar, inappropriate and demonstrated a serious lapse in good judgment, it nevertheless found that the school district did not have sufficient grounds for dismissal because it did not establish a connection between the listing and the employee's performance as an educator.

Anything private you post on a public website today can be headline news tomorrow

The school district sought to obtain a reversal of the CPC's ruling in the Superior Court. The court found that the employee's conduct did not affect students or other teachers and that he appeared to be a competent teacher and dean of students. Consequently, the court adopted the CPC's findings and denied the relief sought by the school district. The District appealed the denial to the California Court of Appeal.

The Court of Appeal analyzed the teacher's conduct and concluded that there was no substantial evidence to support the CPC's decision that he was fit to serve as a teacher. The Court explained that the teacher's conduct affected his employment because a parent and the school principal viewed the ad and lost confidence in the teacher and questioned his ability to serve as a role model for students.

The Court also found significant that rather than taking complete responsibility for his conduct, the teacher shifted responsibility to parents and students to not access the website.

In sum, the Court determined that the teacher's conduct coupled with his failure to accept responsibility or recognize the seriousness of his misconduct given his position as teacher and role model, demonstrated evident unfitness to teach. The public posting on a website of pornographic photos and obscene, sexually explicit text constituted immoral conduct in that it evidenced indecency and moral indifference, which justified his termination.

The Court made it a point to note that certain professions, such as public school teachers, police officers and judges, may be subject to limitations on their freedom of action that do not exist in other professions.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

This case is a victory not only for schools but also for employers. It allows employers of certain professions (teachers, police officers, judges and perhaps others where appearances are particularly important) some latitude in disciplining their employees' off-work conduct to the extent such conduct affects the employees' performance of their jobs. Of interest is the Court's determination that the teacher's termination did not infringe on his constitutional right of privacy (presumably in his private sexual activity). Because the Court seemed to gloss over this thorny subject without any analysis, employers should remain wary in taking disciplinary actions against employees for off-work conduct that implicate their constitutional rights.

EXEMPTIONS TO OVERTIME WAGE REQUIREMENTS FOR ENUMERATED AND LEARNED PROFESSIONS

by Vanessa S. Davila

In *Zelasko-Barrett v. Brayton-Purcell, LLP 2011DJDAR 12500*, plaintiff Matthew Zelasko-Barrett ("Barrett") appealed from an adverse summary judgment at the trial court level in favor of his former employer Brayton-Purcell, LLP ("Brayton" or "the law firm") on his claim for failure to pay him overtime wages and provide other benefits allegedly required by California law. Barrett alleged that the law firm misclassified him as employed in a professional capacity thereby exempting the firm from the obligation to pay him overtime wages and provide other benefits. The Court of Appeal affirmed the trial court's ruling agreeing with its holding that although the plaintiff had not yet been licensed to practice law in California, he was nonetheless a law school graduate and performed duties that brought him within an exception for those engaged in a learned profession. The appellate court concluded that the plaintiff's claim for additional wages and benefits was, therefore, properly rejected.

Brayton employed Barrett after he graduated law school and before passing the bar examination. From August 2007 to June 2009, Brayton classified him as a Law Clerk II. Law students who had not yet graduated law school were classified as Law Clerk I. Upon his admittance to the bar, Barrett became an associate attorney with the firm. Following Barrett's voluntary departure from the law firm, he filed this action asserting various claims based on the premise that as a Law Clerk II he had been misclassified as an employee to whom the provisions of California Industrial Welfare Commission wage order No. 4-2001 were inapplicable. Barrett claimed, among other things, that he was denied overtime wages, waiting time penalties, and meal and rest breaks. Brayton moved for summary judgment on the ground that in the Law Clerk II position Barrett had been an exempt professional employee.

The Labor Code authorizes the California Industrial Wage Commission to establish exemptions from the overtime requirements for executive, administrative and professional employees provided that (1) the employee is primarily engaged in the duties that meet the test of the exemption, (2) customarily and regularly exercises discretion and independent judgment in performing those duties, and, (3) earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. To come within either the enumerated professions or learned professions exemption, an employee must also meet the three requirements set forth above as found in the Labor Code.

Barrett's principal argument on appeal was that since law is one of the enumerated professions for which licensure is required, he cannot be deemed to have been employed in a law-related professional capacity unless he was licensed to practice law. In other words, Barrett interpreted the Labor Board to have intended that if you have a license, you are exempt, but if you don't have a license, you are not exempt. As the applicable statute specifically mentions the law as a recognized profession which requires a license, Barrett argued that statute could not be understood to exempt law-related employment without a license to practice law.

The appellate court disagreed. It found that Barrett's responsibilities as a Law Clerk II required the exercise of discretion and judgment. Citing to the federal regulations, the appellate court found that the term "discretion and independent judgment" . . . does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review.

In contrast, the appellate court noted that paralegals and legal assistants generally do not qualify as exempt learned professionals because an advance specialized academic degree is not a standard prerequisite for entry into the field. As Barrett is a law school graduate, the court found he satisfied the conditions and that the evidence before it showed Barrett to be an exempt employee. The appellate court therefore concluded that the professional exemption applies to a law school graduate performing legal services but not yet licensed to practice law if all of the statute's conditions are satisfied. All of those conditions were met in Barrett's instance.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Employers need to continue to be vigilant when determining whether one of its employees is exempt. Since this topic continues to be a hotbed for litigation, employers should periodically re-evaluate the determination of exempt versus non-exempt on those employees whose tasks make the decision a close call.

THE DOCTRINE OF AFTER-ACQUIRED-EVIDENCE BARS AN EMPLOYEE'S CLAIMS WHERE THE EMPLOYER WOULD HAVE REFUSED TO HIRE THE EMPLOYEE BASED ON THE USE OF A COUNTERFEIT SOCIAL SECURITY CARD

by Colleen A. Déziel

In the matter of *Salas v. Sierra Chemical Co. 2011 DJDAR 11941*, the appellate court held that where an employee has submitted a counterfeit Social Security card to gain employment with the company, said employee loses his right to sue the company under discrimination and retaliation laws.

More specifically, when Salas first applied for employment with Sierra, he provided a resident alien card along with a Social Security card and signed an Employment Eligibility Verification Form (I-9). Since Salas was a seasonal employee for Sierra, when Salas was rehired in subsequent seasons, he re-submitted these same documents. After a few years, Salas gained enough seniority to avoid being laid off after the season ended.

Shortly thereafter, between March 2006 and August of 2006 Salas injured his back on several occasions while at work. He filed a workers' compensation claim in August of 2006. Then, in December of 2006 he was laid off as part of the company's annual reduction in production line staff.

In May of 2007, Salas received a letter from Sierra informing him that laid off workers were being recalled. The letter also directed Salas to bring a doctor's note indicating that he had been released to return to work. There is a dispute between Salas and Sierra as to whether Sierra informed Salas that he must be "100% well with his back" if he wanted to return to work. Sierra denied ever making such a statement. Regardless, Salas never returned to work, but instead, sued Sierra for disability discrimination and failure to accommodate.

During litigation Salas refused to answer questions regarding his immigration status asserting his Fifth Amendment right against self incrimination, and it was at this time that Sierra discovered that the Social Security number used by Salas to secure employment with the company belonged to another man in North Carolina.

One of Sierra's arguments in its motion for summary judgment was that the doctrine of "after-acquired evidence" barred Salas's claims in the matter. This doctrine operates as a complete or partial defense where, after an allegedly discriminatory termination or refusal to hire, the employer discovers the employees or applicants' wrongdoings that would have resulted in the challenged termination or refusal to hire. Ultimately, the appellate court agreed with Sierra.

The appellate court found it significant that Salas's conduct constituted a violation of Federal law and placed Sierra in a position of submitting perjurious documents to the IRS and the Social Security Administration (i.e., had Salas's conduct merely violated an employer's "self-imposed" policies, the court's decision would likely have been different.) The appellate court stated that Salas's conduct violated the Immigration Reform and Control Act of 1986 which prohibits aliens from submitting forged, counterfeit, altered or falsely made documents to obtain employment, as well as the Federal law that requires employers to gather and report the Social Security numbers of employees to aid enforcement of the immigration laws, and to withhold certain income and Social Security taxes. The court reasoned that Salas had misrepresented a job qualification imposed by the Federal Government.

Further, the court also found that Salas's claims were barred by the doctrine of unclean hands for the same reasons.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Employers should take reasonable steps at the hiring stage to ensure that they are hiring only those workers who can legally be employed in the United States. As this case points out, an employer can be found to have violated Federal law by hiring someone who is not entitled to work in the United States. However, if someone falls through the cracks, and if it is later determined that such a person submitted false documentation to obtain employment, the employer should immediately take reasonable steps to investigate the situation (i.e., verify the validity of Social Security numbers, driver licenses, work permits or other documents provided by the employee, and then speak with the employee about the situation), and thereafter take appropriate action.

MINIMUM REQUIREMENTS FOR CERTIFICATION FOR FMLA LEAVE

by Eric A. Schneider

In *Lewis v. USA*, 641 F.3d 1174 (9th Cir. 2011), Janet Lewis was a federal employee working at Elmendorf Air Force Base in Alaska and was eligible for FMLA leave. In 2006, she requested 120 days of leave without pay pursuant to the Family Medical Leave Act (FMLA). The United States Air Force requested medical certification to support the request for leave and gave her a form created by the Department of Labor.

Lewis submitted the form apparently completed by her psychiatrist stating that she had been diagnosed with post traumatic stress disorder and needed therapy, medical treatment, bed rest, prescription medication, and 120 days off work.

The Air Force, however, regarded the certification as inadequate because it failed to state "the appropriate medical facts," more specifically, that it contained no explanation as to why she was unable to perform her work duties and no discussion about whether additional treatments would be required for her condition.

Lewis refused to provide further documentation, and ultimately the Air Force terminated her. She filed suit.

Because Lewis was a federal employee, her FMLA leave was governed by a particular federal statute which provides in pertinent part as follows:

A certification shall be sufficient if it states -

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition.

Be sure you have ALL the facts before granting or denying an employee FMLA leave

Lewis's supervisor told her that the documents that she had submitted were insufficient to support her request for FMLA leave. When Lewis refused to submit additional information, the supervisor regarded her as AWOL, and she was eventually terminated.

Lewis first sought relief from the Merit Systems Protection Board, but that entity found against her. She then filed an action in the United States District Court for the District of Alaska presenting claims of discrimination and retaliation under Title VII and a statutory claim of unlawful removal from employment pursuant to a federal statute.

Ultimately, the matter reached the 9th Circuit Court of Appeals. The appellate court held in favor of the government with respect to the termination because the documentation in support of her FMLA request for leave did not meet the minimum statutory requirements.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Why is this important for private employers which are not governed by the controlling statute in this case?

Although the court interpreted family and medical leave as it relates to federal employees, the aforementioned portion of the statute applying to federal workers is identical to the language contained in the general FMLA statute which sets forth the requirements for certification to be regarded as sufficient. Private employers as well can insist upon adequate explanations as to why the employee would not be able to perform his or her work duties and the need for additional treatment.

EMPLOYERS MUST PROVIDE MEAL AND REST BREAKS, BUT ARE NOT REQUIRED TO ENSURE THAT EMPLOYEES TAKE BREAKS

Yet another case comes down on the issue of whether an employer must "ensure" that rest and meal breaks are taken. As we previously reported, we continue to await the Supreme Court's decision in *Brinker Restaurant Corp. v Superior Court* and *Brinkley v. Public Storage Inc.* wherein the main issue to be addressed is whether making rest and meal breaks available to employees is sufficient to constitute compliance with the Labor Code. In *Flores, et al. v. Lamps Plus, Inc., et al.*, 2011 DJDAR 6615, the three named plaintiffs filed this lawsuit on their own behalf and on behalf of a putative class of approximately 2,608 current and former non-exempt employees, alleging various Labor Code violations. The plaintiffs' theory was that employers must ensure employees take meal and rest breaks, and that Lamps Plus failed to do so.

A party seeking class certification must prove: (1) a sufficiently numerous, ascertainable class; (2) a well-defined community of interest; and, (3) that certification will provide substantial benefits to litigants and the courts. The named plaintiffs must also adequately represent the class and their claims must be typical of the class.

The Court of Appeal affirmed the trial court's denial of the plaintiffs' motion for class certification. The Court found that employers are required to provide employees with breaks, which means "make them available," but need not ensure employees take breaks. Lamps Plus had an employee handbook that included a policy requiring meal and rest breaks which complied with labor laws. There was no evidence of any illegal companywide policy. The Court found that individual issues predominated over common issues as to the meal and rest period claims, and that class treatment was not superior to individual actions.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

This is another case from an appellate court that holds employers only need to make sure meal and rest breaks are made available to employees in order to comply with the labor laws. Until the Supreme Court issues its ruling on *Brinker* and *Brinkley*, employers should endeavor to keep accurate records of meal breaks and rest breaks. Also, avoid pressuring employees to skip breaks, decline to schedule breaks, or establish a work environment discouraging or preventing employees from taking breaks as you may face potential liability.

NATIONAL BANKS ARE NOT EXEMPT BY SECTION 24 OF THE NATIONAL BANK ACT FROM THE PROHIBITION AGAINST DISABILITY DISCRIMINATION

In *Quinn v. U.S. Bank, N.A., et al.*, 2011 DJDAR 8227, the plaintiff, a former senior vice president of U.S. Bank, filed a lawsuit for disability discrimination in violation of the Fair Employment and Housing Act (FEHA) against the bank and his former supervisor. He alleged that the defendants terminated him because he suffered from Type 2 diabetes, refused to accommodate his diabetes, and harassed him for seeking accommodations necessary to treat his diabetes.

The bank moved for summary judgment on the grounds that: (1) the plaintiff's FEHA claims were preempted by section 24 of the National Bank Act, which grants national banks the power to dismiss officers *at pleasure*, and alternatively; (2) section 24, as implicitly amended by the ADA, preempts the provisions of FEHA that provide plaintiffs a longer time to file suit than is permitted under the ADA.

The Court concluded that the "dismiss-at-pleasure" provision of section 24 is repealed by implication to the extent necessary to give effect to the ADA. The Court found that the authority granted to national banks under section 24 does not encompass the right to terminate officers in a manner that violates the prohibitions against disability discrimination enumerated in the ADA. The Court also noted that the ADA does not exempt national banks from its provisions. The Court also rejected the bank's alternative argument, and concluded that FEHA's statute of limitations, which is longer than the time to file suit under the ADA, is not preempted by section 24 as amended by the ADA.

The Court reversed summary judgment for the bank, but affirmed summary judgment for the former supervisor as the ADA does not allow individual claims against supervisors.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

If you are a national bank employer, you must comply with the ADA requirements and the FEHA requirements in California, both of which prohibit disability discrimination against your employees, including officers of the bank.

FLSA'S ANTI-RETALIATION PROVISION INTERPRETED TO PROTECT ORAL COMPLAINTS

by Vanessa S. Davila

In a recent 6-2 decision, the U.S. Supreme Court ruled that the anti-retaliation provision of the Fair Labor Standards Act ("FLSA" or the "Act"), protects employees who file oral, as well as written, complaints with their employers. *Kasten v. Saint-Gobain Performance Plastics Corp.* (2011) 131 S.Ct. 1325, 179 L.Ed. 279.

The FLSA contains an anti-retaliation provision that forbids employers to discharge or in any other manner discriminate against any employee because such an employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to the Act, or has testified or is about to testify in such proceedings, or has served or is about to serve on an industry committee. 29 U.S.C.S. § 215(a)(3).

Just hearing a complaint requires action, don't wait for it to be put in writing

Kasten brought an anti-retaliation suit against his former employer Saint-Gobain Performance Plastics Corp. (Saint-Gobain), under the FLSA, which provides for minimum wage, maximum hour, and overtime pay rules among other things. Kasten complained to Saint-Gobain that the location of the timeclocks prevened workers from receiving credit for the time they spent putting on and taking off their work-related protective gear. In his suit, Kasten claimed that Saint-Gobain discharged him because he orally complained to company officials about the placement of the timeclocks. In granting Saint-Gobain's motion for summary judgment against Kasten, the District Court concluded that the Act's anti-retaliation provision did not cover "oral" complaints. Kasten appealed and the U.S. Court of Appeals for the Seventh Circuit affirmed summary judgment in favor of the employer, finding that Section 215(a)(3) of the Act did not protect oral complaint. The U.S. Supreme Court granted Kasten's petition for certiorari, reversed the Circuit Court's judgment in favor of the employer, and remanded the case for further proceedings.

The FLSA protects employees who have "filed any complaint . . ." In its extensive analysis of the statute's language, the Supreme Court interpreted this phrase to include oral complaints. Interpretation of this phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that might shed light into what was intended by the legislature when enacting the statute. *Dolan v. Postal Service*, 546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed. 29 1079.

The Court considered whether Congress would want to limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly the illiterate, less educated, or overworked workers who were most in need of the Act's help at the time of passage. It reasoned that limiting the scope of the provision to written complaints would prevent Government agencies from using hotlines, interviews and other oral methods to receive complaints. Accordingly, the court concluded that Congress did not intend to limit the scope of the Act's anti-retaliation provision to written complaints.

To fall within the scope of the anti-retaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection. The standard can be met, however, by oral complaints, as well as by written ones.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Employers can no longer afford to discount or dismiss an employee's complaint simply because it was communicated orally only. Employee complaints concerning matters falling within the purview of the FLSA (i.e. wages, work hours, overtime, etc.), should be seriously investigated regardless of how received. Employers should also document any complaint received from the employee – along with the employer's treatment of the complaint – in the employee's personnel file. Failing to take any complaint into account may find you the subject of a retaliation claim should you later take adverse employment actions (i.e. demotion, termination, etc.) against that employee.

ANOTHER EMPLOYMENT CLAIM BEATEN BY STATUTE OF LIMITATIONS

by Eric A. Schneider

Hall v. Goodwill Industries of Southern California (2011 Cal.App. Lexis 304) clarifies application of the statute of limitations for bringing suit under the Fair Employment and Housing Act. The statute begins to run on the date that the right to sue letter is issued rather than on the date of the employee's receipt of the notice.

The Second Appellate District affirmed the trial court's summary judgment in favor of the defendant employer where the following events had occurred:

December 24, 2004: The Department of Fair Employment and Housing issued the right to sue notice;
December 31, 2004: The employee received the notice;
December 30, 2005: The employee filed suit.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Always, always examine the timeliness of the filing of suit.

"REASONABLE ACCOMMODATION" INCLUDES MAKING AFFIRMATIVE EFFORTS TO REASSIGN A DISABLED EMPLOYEE UPON REQUEST

In *Cuiellette v. City of Los Angeles*, 2011 DJDAR 5687, the plaintiff, a LAPD officer, sued for disability discrimination and failure to accommodate a disability under FEHA, and was awarded a judgment of $1,571,500. The city appealed.

The plaintiff was injured after several years on the job and was placed on disability leave. After his worker's compensation claim resolved with a finding of 100% total permanent disability, the city accepted his request to return to work in a different light duty position. The plaintiff worked less than five days in the light duty position before the city realized that he was 100% disabled. On that basis, the city sent him home and terminated him.

FEHA prohibits an employer from discriminating against an employee because of physical disability only if the adverse employment action occurs because of a disability and the disability would not prevent the employee from performing the essential duties of the job, at least not with reasonable accommodation. An employee has the burden of proving that he or she was able to do the job, with or without reasonable accommodations.

The Court said that the question was whether the plaintiff's medical restrictions prevented him from performing the essential functions of the light duty position into which he had been placed upon request, not whether he could perform all of the essential functions of a police officer in general. The Court found that the plaintiff proved that the city placed him into one of several vacant, light duty positions, and that he could perform all of the essential functions of the light duty position. The Court found that the city, having already placed him in a light duty position, had an independent duty to comply with FEHA, and that if the city had concerns about his medical restrictions, it had an affirmative duty to engage in an interactive process and to make an effort to accommodate the plaintiff, rather than simply terminate him.

The Court affirmed the judgment in favor of the plaintiff, and concluded that even if the plaintiff could not perform all of the essential functions of a police officer, he could perform the essential functions of a position into which he had been placed by the LAPD as a reasonable accommodation in accordance with its then existing practice.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

If an employee cannot be accommodated in his or her existing position and the requested accommodation is reassignment, you must make affirmative efforts to determine whether a position is available. This does not require creating a new job, moving another employee, promoting the disabled employee, or violating another employee's rights. But employers have a duty to reassign a disabled employee if an already funded, vacant position at the same level exists.

WHEN CALCULATING THE NUMBER OF EMPLOYEES FOR PURPOSES OF APPLYING EMPLOYMENT LAWS, EMPLOYERS MUST NOT FORGET TO INCLUDE RELATED BUSINESSES

by Brian L. Bradford

Typically, a business is not subject to federal employment discrimination laws if it does not have the required number of employees. However, small business owners may feel a false sense of security regarding their exposure to lawsuits under such statutes, particularly if the owner operates any other related businesses.

Under limited circumstances, employees may assert that employers are subject to federal employment discrimination statutes by aggregating the number of employees with respect to multiple businesses. The U.S. Court of Appeals for the Ninth Circuit has long held that, under an "integrated enterprise" test, multiple businesses could be treated as a single employer for Title VII purposes if they had "(1) interrelated operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control."

The Ninth Circuit has clarified that this test applies when an allegedly discriminatory employer, not covered by a federal statute because it has fewer than the statutory threshold for the number of employees, needs to be integrated with another employer to fulfill the statutory requirement:

> A plaintiff with an otherwise cognizable Title VII claim against an employer with less than 15 employees may assert that the employer is so interconnected with another employer that the two form an integrated enterprise, and that collectively this enterprise meets the 15-employee minimum standard. We use the integrated enterprise test to judge the magnitude of interconnectivity for determining statutory coverage.

Owning many small businesses that are related could count as one big business when it comes to employment laws

1. Interrelated Operations: Evidence of interrelated operations can include common offices, long-distance shipping, bank accounts, payroll, shared facilities, common marketing and customer rewards plans, and common human resources plans (including employee evaluations, employee benefits and personnel files).

2. Common Management: Under the "common management" prong, courts look to see if the two companies share officers. The fact that the directors of the subsidiary are all employees of the parent does not establish that the parent controls the subsidiary.

3. Centralized Control of Labor Relations: It is well settled that the control required to meet the test of centralized control of labor relations is not potential control, but rather actual and active control of day-to-day labor practices. Employers may avoid centralized control of labor relations by maintaining separate human resources personnel for each separate business.

4. Common Ownership: Ownership alone is not enough to aggregate the number of persons employed by a common employer, but it is nevertheless relevant. It is well established that directors and officers holding positions with a parent and its subsidiary, for example, can and do "change hats" to represent two corporations separately, despite their common ownership.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Small business owners should be especially cognizant of any other business operations that they own that may have any relation or overlap with any of their other businesses. While it may be efficient at times to allow personnel for one business to provide services for another business, the combination of job duties may impact a business owner's ability to establish that it employs less than the required number employees to subject the business to the provisions of the federal antidiscrimination statutes.

POSTINGS ON SOCIAL MEDIA MAY BE PROTECTED BY NLRA

by Brian L. Bradford

On August 18, 2011, the National Labor Relations Board's (NLRB) General Counsel published a comprehensive summary of the Board's resolution of more than one dozen "social media cases" within the past year. The NLRB noted that novel issues have arisen in the past year due to the proliferation of the use of several forms of social media, including Facebook, Twitter, Youtube, and other audio or video media. The memorandum summarized several cases in which it determined whether each employer's discipline for activity via social media violated the National Labor Relations Act (NLRA). In doing so, the memorandum provides useful guidance to employers regarding employers' proffered reactions to social media activity.

The Memorandum cited several examples of cases in which the NLRB found each employer's discipline violated the National Labor Relations Act, including:

- Posting of comments on Facebook related to allegations of poor job performance of a coworker in response to a request for information from a coworker preparing to meet with management about the complaints; and,
- An employee's complaint on her Facebook page about her supervisor's refusal to permit a union representative to assist her in responding to a customer complaint about the employee.

Of course, the NLRB provided some limit to what employees may permissibly post via social media sites under the protection of the NLRA. In contrast to the above examples, the NLRB found that that an employer's discipline did not violate the NLRA in other cases. For example, the NLRB approved the employer's discipline when:

- An employee posted a message to a relative on Facebook complaining about the employer's tip policies and disparaged the customers of his employer;
- An employee posted on a U.S. Senator's Facebook "wall" complaining about his employer's wages and equipment, and suggested that the employer was not sufficiently equipped to provide emergency and non-emergency medical transportation and fire protection services to several municipalities.

In all of the summarized cases, employees posted on their own Facebook page, on their own time, and using their own equipment. A synthesized reading of these case summaries reveal two major points of emphasis for employers to determine whether actions concerning social media are compliant with the NLRA.

The most important inquiry regarding these cases involved whether the use of the social media addressed "protected activity" under the NLRA. So long as the cases addressed the terms and conditions of the employee's employment, the subject matter was deemed to be protected activity. Such communications are no less protected simply because they take the form of an arguably less formal format, such as social networking media.

The NLRB's memorandum appeared to place limitations on the use of social media to engage in protected activity. The NLRB also regularly evaluated whether the employees were engaged in concerted activity. In the terminations upheld by the NLRB, the employees were not discussing terms and conditions of employment with coworkers, or in preparation or continuation of any conversations with coworkers. Instead, the postings appeared to be individual gripes with management.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Employment actions stemming from social media is fertile ground for novel employment litigation. Employers must be cautious when deciding whether and how to react to an employee's posting of facially disparaging remarks on social media sites. Employers should consider developing, with the aid of counsel, policies addressing the use of social media by employees.

SABBATICAL VERSUS VACATION – MAKE SURE YOU UNDERSTAND THE DISTINCTION, AS A MISCLASSIFICATION OF VACATION AS A "SABBATICAL" CAN RESULT IN LIABILITY FOR UNPAID WAGES UPON TERMINATION

by Colleen A. Déziel

A California appellate court finally addressed the issue of whether certain time off is to be classified as extended vacation or whether it may properly be considered a sabbatical. The difference is significant in terms of wages owed upon termination, whether voluntary or involuntary. In *Paton v. Advanced Micro Devices, Inc.*, the sixth appellate court district noted that vacation was defined as paid time off that accrues in proportion to the length of the employee's service, was not conditioned upon the occurrence of any event or condition, and usually did not impose conditions upon the employee's use of the time away from work.

Since the purpose of a sabbatical is different from that of a vacation, namely sabbaticals are offered to provide incentive for experienced employees to continue with and improve their service to the employer, the appellate court for the first time outlined the four factors that a court will look at when making the determination of whether the "time off" will be properly classified as a sabbatical. The court held that the determination is to be made on a case by case basis, and the following four factors will be considered:

(1) the leave that is granted must be infrequent. Every seven years is the traditional frequency, as this would be long enough time for an employee to gain experience and demonstrate expertise that an employer might want to retain. However, greater or lesser frequency could be appropriate depending upon the industry or particular company involved;

(2) the length of the leave should be adequate to achieve the employer's purpose. It should be longer than that offered as vacation;

(3) a legitimate sabbatical will always be granted in addition to regular vacation; and

(4) since a sabbatical is designed to retain valued employees, then a legitimate sabbatical program should incorporate some feature that demonstrates that the employee taking the sabbatical is expected to return to work for the employer after the leave is over (i.e., the employee must agree to continue to work for employer for a specified period of time after the sabbatical. No particular amount of time was offered as a bright line rule, but the court did mention within the opinion a "judge" sabbatical program that required an additional three years of service after the sabbatical. This suggests that simply requiring a mere few months of service thereafter may not be sufficient and the impact of how this will affect at-will employment was not addressed.)

This case also makes it clear that another factor the courts will be concerned with, is whether there is also evidence of the context in which the employer decided to offer the sabbatical in the first place, or on what forces prompted a modification of the program over time as each may have some bearing upon the "crucial factual question of 'what was the true purpose of the program?'"

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

To the extent that an employer already has in place a sabbatical program, or the employer is considering implementing one, it should be mindful of the factors outlined above. These factors should be followed in establishing a new program or modifying an existing one. The employer should also endeavor to ensure that the purpose behind the sabbatical program and the reasons the employer considered when deciding to offer such a program are made very clear and put upfront within a written policy, as the court has determined that this is a "crucial" question to be answered when it decides whether a program is really a sabbatical as opposed to an extended vacation. The consequence of misclassifying these programs can lead to a substantial loss to the employer by way of wages due, waiting time penalties and attorney's fees to the complaining employee. This does not even take into considering the legal fees the employer itself will incur in its defense of such claims. *Paton v. Advanced Micro Devices, Inc.* (2011) 197 Cal.App.4th 1505.

HAVE A QUESTION?

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