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UNLAWFUL BIAS BY NON-DECISION MAKER CAN GIVE RISE TO EMPLOYER LIABILITY

by Eric A. Schneider

On March 1, 2011, the United States Supreme Court handed down its decision in *Staub v. Proctor Hospital*, (2011) 131 S.Ct. 1186. It held that an employer can be liable for wrongful termination where the individual making the termination decision was unaware that a factual report upon which he or she was relying had been tainted by unlawful bias.

Vincent Staub was an angiography technician employed at Proctor Hospital. He was also a member of the United States Army Reserve. Staub's supervisors were hostile to his military obligations, and Staub asserted that their bias induced them to issue an unjustified corrective action.

Thereafter, Staub's supervisor's boss, Buck, fired him in reliance on the corrective action notice. She had no knowledge that the supervisors falsely issued the corrective action notice due to their hostility toward Staub arising out of his Reserve obligations.

Staub sued under the Uniform Services Employment and Re-Employment Rights Act of 1994 (USERRA) which prohibits an employer from firing a worker based on the worker's membership in or obligation to perform service in a uniformed service.

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The case was tried, and the jury found for Staub, awarding him damages. The hospital appealed, and the Seventh Circuit reversed on the basis that Buck as the decision-maker had relied on more than just the plaintiff's supervisors' advice in making her decision.

In a 6-1 decision, with two justices not participating, the Supreme Court reversed and remanded. The Court held that where the employee's supervisor performs an act motivated by anti-military animus that is intended by the employee's supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment decision, then the employer is liable under USERRA.

WHAT CAN EMPLOYERS TAKE AWAY FROM THIS CASE?

Not infrequently, decision-makers rely upon information from lower level supervisors to make decisions without regard to the veracity of the facts leading to the supervisors' conclusions. If the supervisors had trumped up charges against the employee based upon unlawful discrimination (race, religion, whistle-blowing, etc.), the decision-maker's decision will not be shielded on the basis of that decision-maker's lack of knowledge that the recommendation was tainted. In more practical terms, before making an adverse employment decision based upon determinations made by others, the decision-maker should take it upon himself or herself to investigate the underlying facts to as great an extent as would be reasonably practical.

NO SINGLE TEST DETERMINES WHETHER A PERSON IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR

by Janet C. Song

Arzate v. Bridge Terminal Transport, Inc., (2011) 192 Cal.App.4th 419, involves a wage and hour class action on behalf of truck drivers against defendant Bridge Terminal Transport, Inc. The plaintiffs, who were members of a union, alleged violations of the Labor Code for failure to pay minimum wages, failure to pay all wages due upon discharge, and failure to provide itemized wage statements. The defendant won summary judgment on the ground that plaintiffs were independent contractors and not employees.

The Court of Appeal did not make a finding as to whether plaintiffs were independent contractors. However, the Court held that the trial court erred in granting summary judgment to the defendant because a trier of fact might reasonably conclude that the plaintiffs were employees.

The Court recognized that the right to control work details is the most important and significant consideration in determining whether a person is an employee or an independent contractor. However, other factors should be considered, including the following:

- The right to discharge at will, without cause, strongly supports an employment relationship;
- Whether the one performing services is engaged in a distinct occupation or business;
- The kind of occupation and whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- The skill required in the particular occupation;
- Whether the principal or the worker supplies the tools and place of work for the person doing the work;
- The length of time for which the services are to be performed;
- The method of payment (whether by the time or by the job);
- Whether the work is part of the principal's regular business;
- Whether the parties believe they are creating an employment relationship.

The Court found multiple factors which did not support an independent contractor status in this case: (1) there was a collective bargaining agreement signed by the defendant which stated that owner-operators of trucks (such as the plaintiffs) were employees of the company; (2) the defendant issued W-2 forms to the plaintiffs, withheld taxes, and offered health plan benefits that included paying 70% of the cost; (3) the defendant paid hourly rates for part of plaintiffs' work day, such as waiting time and drivers' meetings; (4) the defendant could terminate the truck lease agreements on 24 hour notice; and (5) the work the plaintiffs did was part of the defendant's regular business.

WHAT CAN EMPLOYERS TAKE AWAY FROM THIS CASE?

This area is a hotbed for litigation right now. The EDD is aggressively pursuing employers who it believes are misclassifying workers. Thus, employers should be aware of the various factors considered in determining whether a person is an employee or an independent contractor because depending on the person's status, different rules will apply with regard to the employer's duties and responsibilities. Whether the employer controls the manner and means of the work is not the only factor the Court will look at when making its determination.

GAY MALE WORKER'S HARASSMENT AND RETALIATION CLAIMS MAY PROCEED WHERE HE COMPLAINED TO CO-WORKER

by Michelle T. Harrington

Shane Dawson was hired by Entek International as a production line worker. He worked with 24 other employees, all of whom were male. He had two acquaintances who already worked at Entek, Josh Dobbs and Travis Etherington, who were aware that he was gay.

Dawson's direct trainer on the production line was Troy Guzon. Guzon worked side by side with him on the production line. Dawson considered Guzon his supervisor as well as trainer. According to Dawson, Guzon was the only "supervisor" he dealt with day to day.

Soon after Dawson began working at Entek, he claimed his co-workers began making derogatory comments about his sexual orientation, calling him "a homo, a fag and a queer". According to Dawson, he complained to Guzon about the behavior. Although Guzon reportedly agreed to speak with the workers, Dawson alleged Guzon himself began using the word "homo" when referring to Dawson.

Dawson took a day off from work allegedly due to the stress caused by his work environment. He called Entek's general number and informed the person who answered the phone that he would be absent. Entek recorded Dawson's absence as a "no-show/no-call day". Under the company's policy, employees are required to call one hour before their shift to report an absence to a supervisor.

The next day, Dawson notified Susan Morch, the company's human resources employee, that he had a problem and needed to file a complaint. He told Morch that Dobbs, Guzon and other employees used the words "homo, fag, and queer" when referring to him.

Two days later, Entek terminated Dawson's employment citing his failure to call in properly before missing work. Dawson sued Entek alleging retaliation and hostile work environment.

The trial court granted summary judgment in favor of Entek, in part, on the grounds that Dawson had not offered any evidence of pretext to rebut Entek's proffered legitimate reason for terminating his employment. Dawson maintained that the timing of his discharge in relation to his report to Morch in human resources, and his complaint to Guzon was sufficient indirect evidence that undermined the credibility of Entek's articulated reasons.

The lower court based its dismissal of Dawson's harassment claim (based on gender) on the grounds that he could not establish that the comments made by his co-workers were due to his gender. The court based its dismissal of Dawson's sexual orientation harassment claim on the basis that Entek did not know of the harassment because the person to whom Dawson complained about harassment, Guzon, was not Dawson's supervisor.

Dawson appealed.

The Ninth Circuit Court of Appeal first addressed Dawson's retaliation claim. The Court agreed with Dawson's argument that the timing of his discharge in relation to his report to Morch and his complaint to Guzon was sufficient to raise "indirect evidence that undermines the credibility of [Entek's] articulated reasons." The Court also found that the temporal proximity between Dawson's complaints to Guzon and Morch about the claimed harassment and his termination less than two days later raised a triable issue of fact necessitating a trial.

The Court then turned to the hostile work environment claim. The Court held that Entek could not assert that it lacked notice of the alleged harassment. The Court determined that Entek officially was put on notice of the hostile work environment when Dawson went to Morch and asked about filing a complaint. Likewise, the Court found that the company was put on notice when Dawson talked to Guzon about the treatment and Guzon not only ignored the complaint but joined in the derogatory name calling.

The Court also found that a jury should decide whether Guzon was a supervisor for whom Entek may be held vicariously liable and whether Entek can prove the *Ellerth/Faragher* defense to liability for harassment by a supervisor. The Court concluded: "[t]he district court should reconsider whether Entek has made out the affirmative defense after resolving the disputed facts in this case. If, for example, Entek fired Dawson in retaliation for his protected complaint, it would be difficult to say that Entek had adequately addressed the problem of harassment of homosexual employees."

WHAT CAN EMPLOYERS TAKE AWAY FROM THIS CASE?

The case of *Dawson v. Entek Int'l.*, (2011) 630 F.3d 928 reinforces several key principles of employment law. The first is that temporal proximity between an employee's protected conduct (harassment complaint) and an adverse employment action (termination) alone may be enough to show pretext and defeat an employer's motion for summary judgment. Second, a co-worker may be considered a "supervisor" for purposes of imposing vicarious liability on an employer based on the co-worker's ability to "demand obedience" from the employee. These holdings reiterate the importance of consistent documentation and treatment of employee problems, as well as the need to ensure that certain hourly employees are not expected to, and do not in fact, supervise other hourly employees through discipline or direction. Education of all employees who could be considered "supervisors" about complaints of discrimination and harassment, and what to do in the face of such a complaint, is important as well.

IF AN EMPLOYEE DOES NOT FILE AN ADMINISTRATIVE COMPLAINT WITHIN ONE YEAR OF THE DATE OF THE EMPLOYER'S UNLAWFUL CONDUCT, THE CLAIMS ARE TIME BARRED

by Janet C. Song

In *Trovato v. Beckman Coulter, Inc.*, (2011) 192 Cal.App.4th 319, the plaintiff filed an administrative complaint with the California Department of Fair Employment and Housing (DFEH) against her supervisor, Allyn and employer, Beckman Coulter, for sexual harassment and retaliation. The Court of Appeal held that the plaintiff's claims were barred by the one year statute of limitations.

Before filing a lawsuit for harassment or retaliation, a party must file an administrative complaint with the DFEH within one year of the date on which the unlawful practice occurred. (*Gov. Code* § 12960(d)). The limitations period starts to run from the time of the conduct constituting the unlawful practice.

At her deposition, the plaintiff testified that there was no incident of sexual harassment after her 2006 performance review on January 31, 2007. She also did not recall any incidents of retaliation after November 2006. The plaintiff filed her complaint with the DFEH in May 2008.

The plaintiff later submitted a declaration dated July 30, 2009 which stated that from January 2007 through May 2007, Allyn was no longer her manager but was still harassing her, that she had contact with Allyn after January 2007, and that she thought the harassment would persist for the rest of her career at Beckman Coulter.

The Court found the conclusory statements in her declaration insufficient to raise a triable issue of material fact regarding the statute of limitations issue, and she could not defeat the summary judgment granted in favor of defendants by contradicting her sworn deposition testimony with a later-filed declaration.

Next, the Court considered the plaintiff's argument that her claims were not time barred because of the continuing violation doctrine. This doctrine "allows liability for unlawful employer conduct occurring outside the statute of limitations if it is sufficiently connected to unlawful conduct within the limitations period." *Richards v. CH2M Hill, Inc.*, (2001) 26 Cal.4th 798, 802.

In *Richards*, the California Supreme Court adopted a three-prong test to determine whether this doctrine applies to harassment claims: (1) if the employer's unlawful actions are sufficiently similar in kind; (2) have occurred with

reasonable frequency; and (3) have not acquired a degree of permanence. The California Supreme Court also held that the doctrine may apply to a retaliation claim. (*Yanowitz v. L'Oreal USA, Inc.*, (2005) 36 Cal.4th 1028, 1059-1060.)

Here, the Court of Appeal clarified the first prong. The continuing violation doctrine applies if the employer's conduct occurring within the limitations period is similar in kind to the conduct occurring outside of the limitations period. In other words, at least one act of harassment or retaliation must occur during the limitations period to make the continuing violation doctrine applicable.

WHAT CAN EMPLOYERS TAKE AWAY FROM THIS CASE?

Employers should be aware of the statute of limitations, and this issue should be considered early on by employers and their counsel as the employees' claims may be barred. Employers should also be aware of the consequences of the application of the continuing violations doctrine. A claim seemingly barred by the statute of limitations may survive if there has been sufficient ongoing conduct. Claims of discrimination and harassment should be investigated and handled as quickly as possible, and every effort made to cut off any conduct deemed to be inappropriate and in violation of company or public policy.

TWO HOURS OF PREMIUM PAY PER WORK DAY ARE OWED ON DAYS IN WHICH BREAKS ARE NOT PROVIDED

by Kimberly M. Foster

In February, 2011, the California Court of Appeals upheld a lower court's interpretation of Labor Code § 226.7 to provide for up to two hours of premium pay per work day in the event that an employee is not provided with a meal and rest break. *United Parcel Service, Inc. v. Superior Court*, (2011) 192 Cal. App. 4th 1043.

In *United Parcel Service Wage & Hour Cases*, (2010) 190 Cal. App. 4th 1001, employees of UPS filed 32 coordinated actions against the company seeking compensation for unpaid wages, including premium pay for alleged violations of California Labor Code § 226.7, which sets forth an employer's obligation to provide meal and rest periods to employees. Under § 226.7 (b), "if an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." Cal. Labor Code § 226.7(b). Upon UPS filing a motion for pre-trial determination, the court considered whether one hour of premium pay was owed per work day (no matter how many break violations) or two hours of premium pay, in the event that the employee was not provided with a meal and rest break in the same work day. *Id*. at 1046. UPS argued to the court that § 226.7 should be interpreted as providing for only one premium payment per work day, regardless of the number of violations. The plaintiffs disagreed and asserted that two hours of premium pay were available to employees. The court held for the plaintiffs. UPS appealed.

On appeal from the lower court's holding, the Court of Appeals began its analysis of the premium pay issue by considering the language set forth in the Industrial Welfare Commissions' Wage Orders and in particular, Wage Order 9-2001 (which applied to UPS, a member of the transportation industry). Wage Order 9-2001 set forth the requirements of meal and rest periods separately, and provided an hour of premium pay per meal or rest period violation per work day. Thus, the Wage Order supported the lower court's holding and the plaintiff's interpretation of the Labor Code as providing for a maximum of two hours of premium pay per work day. Then, the Court considered a recent federal opinion (*Marlo v. United Parcel Service, Inc.*, (2009) U.S. Dist. LEXIS 41948 (C.D. Cal. 2009)) on the same exact issue, against the same exact employer. In *Marlo*, the federal court ultimately relied on the Wage Order to conclude that two hours of premium pay were available to employees per work day. The Court of Appeals, however, ultimately relied on legislative history and evidence that the legislature had consciously re-written § 226.7 to conform with the Wage Oder and as a result, upheld the lower court's reliance on such for the determination that two hours of premium pay was available per work day.

WHAT CAN EMPLOYERS TAKE AWAY FROM THIS CASE?

Employers who have been waiting patiently for the California Supreme Court to interpret an employer's duty to "provide" breaks under § 226.7 in *Brinker v. Superior Court* (i.e., making breaks available as opposed to "ensuring" that

they are being taken), are encouraged to investigate proactively how employees are provided with breaks in accordance with California law because the price of willful ignorance just became twice as expensive.

IS A CLAIM ADJUSTER EMPLOYED BY THIRD PARTY ADMINISTRATOR EXEMPT OR NON-EXEMPT FOR OVERTIME PAY

by Janet C. Song

Hodge v. Aon Insurance Services, (2011) 192 Cal.App.4th 1361 involves a class action brought by claims adjusters employed by a third party administrator. The adjusters alleged that their employer unlawfully designated them as exempt administrative employees. The class representative, Hodge, routinely worked more than eight hours per day and/or more than 40 hours per week, but did not receive overtime pay because he was classified as an exempt administrative employee.

The Court ruled that the adjusters were in fact exempt administrative employees, and thus the employer did not violate the overtime regulations.

In reaching this conclusion, the Court applied the standards set forth in the language of Wage Order No. 4, which was adopted by the Industrial Welfare Commission. Wage Order No. 4 regulates the wages, hours, and working conditions for professional, technical, clerical, mechanical, and similar occupations. It requires an employer to pay overtime when an employee works more than 8 hours in a workday or 40 hours in a work week.

However, it also states that the overtime rules "shall not apply to persons employed in administrative, executive, or professional capacities." Persons employed in such capacities are exempt from overtime pay.

Wage Order No. 4 defines a person employed in an administrative capacity as (1) any employee whose duties and responsibilities involve the performance of office or non-manual work directly related to management policies or (2) when the duties or non-manual work directly relate to general business operations of the employer or the employer's customers. In other words, the test is whether a person is performing work related to managerial policies or the general business operations of his/her employer or customers.

Here, the Court applied the first part of the analysis and held that all adjusters who were not involved in the adjusting of claims for an insurance-related entity were exempt employees, and not entitled to overtime pay. Next, the Court applied the second part of the analysis and held that the adjusters' duties were of substantial importance to the general business operations of the insurance-related entities.

WHAT CAN EMPLOYERS TAKE AWAY FROM THIS CASE?

Employers should be aware of the criteria for classifying an employee as an exempt administrative employee versus a nonexempt employee, as this will determine the employers' duties and obligations with regard to overtime pay, as well as other regulations. Classifying an employee as exempt or nonexempt is not black and white, and employers should consider the factors on a case by case basis. A wrong decision can result in significant sums being incurred due to penalties, back pay and litigation.

NINTH CIRCUIT RULES THAT CHRISTIAN CHARITY IS IMMUNE FROM RELIGIOUS DISCRIMINATION CLAIM

by Michelle T. Harrington

World Vision, Inc. describes itself as a "Christian humanitarian organization dedicated to working with children, families and their communities worldwide … by tackling the causes of poverty and injustice." World Vision terminated three employees after it discovered that they disavowed a central doctrine of World Vision's statement of faith. When the employees were hired, each had submitted a required statement about his or her "relationship with Jesus Christ" and had acknowledged "agreement and compliance" with World Vision's faith, core values, and mission statement. However, the three employees later denied the deity of Jesus Christ and renounced the doctrine of the Trinity (i.e., that God is one being, existing in the Father, the Son, and the Holy Spirit).

The employees filed suit (*Spencer v. World Vision Inc*., (2011) US. App. Lexis 1675) alleging religious discrimination in violation of Title VII of the Civil Rights Act.

The trial court held that World Vision was exempt under Title VII and granted summary judgment in its favor, dismissing the employees' case. The court relied on a nine-factor test in making its ruling: (1) whether the entity operates for profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation state a religious purpose, (4) whether it is owned, affiliated, or financially supported by a church or synagogue, (5) whether a formally religious entity participates in management, (6) whether the entity holds itself out to the public as secular or religious, (7) whether the entity includes prayer or worship in its activities, (8) whether it includes religious instruction, if an educational institution, and (9) whether its membership is made up of co-religionists. The plaintiffs appealed.

The Ninth Circuit Court of Appeal upheld the trial court's decision, but on different grounds. While the majority of the Court agreed upon certain factors to determine whether a religious organization falls under the exemption, they disagreed on the ultimate test. The Court agreed on the following factors: (1) the entity need not be a church or house of worship and (2) the entity need not always follow a strict policy of religious discrimination to be entitled to the exemption.

In addition, the Court refused to place weight on certain historically applied factors, such as where an entity receives its funding, and whether an entity's activity, product or service is primarily religious or secular.

Justices O'Scannlain and Kleinfeld disagreed on the ultimate test to determine whether a religious organization qualifies for the exemption. Judge O'Scannlain held that a nonprofit entity qualifies for Title VII exemption when it establishes that it: (1) is organized for a self-identified religious purpose (as evidenced in its articles of incorporation or similar foundational records), (2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and (3) holds itself out to the public as religious.

Justice Kleinfeld reformulated the test as follows: (1) whether the entity is organized for a religious purpose, (2) is primarily engaged in carrying out that religious purpose, (3) holds itself out as an entity for carrying out that religious purpose, and (4) does not engage primarily or substantially in the exchange of goods or services for money.

Both Justices O'Scannlain and Kleinfeld agreed that World Vision, under either test, qualified for the Title VII religious exemption. The Court found that World Vision was a nonprofit organization despite the fact that its operations were global in scope and its executives received hefty paychecks. Its articles of incorporation identified its primary purpose as "Christian missionary services," enabling "God's people … to accomplish more quickly and efficiently the Great Commission of advancing the Kingdom of God on earth."

The Ninth Circuit disagreed with the employees' challenge that World Vision's activities were inconsistent with its religious purposes because it provided services to non-Christians. Instead, the Court found that the organization's activities were in harmony with its Christian mission of outreach to all in need, regardless of religion.

Although the Court failed to articulate a clear test in its initial opinion issued in August 2010, recently on January 25, 2011, the Court issued an amended opinion. The amended opinion clarifies the test for determining exemption from Title VII for certain religious organizations as follows: (1) the entity is organized for a religious purpose, (2) the entity is engaged primarily in carrying out that religious purpose, (3) the entity holds itself out to the public as an organization carrying out that religious purpose, and (4) the entity does not engage primarily or substantially in the exchange of goods or services for monetary gain, beyond nominal amounts.

WHAT CAN AN EMPLOYER TAKE AWAY FROM THIS CASE?

To be on the safe side, an organization that wishes to be exempt from Title VII's prohibition against religious discrimination should strive to meet all of the factors outlined by the Ninth Circuit as well as by the trial court. That way, if the tide changes, the organization will be on more secure footing.

While religious organizations are exempt from laws prohibiting religious discrimination, secular organizations face different challenges. Non-religious organizations have a duty to reasonably accommodate their employees' religious beliefs so long as they are able to do so without an undue burden on their business. By the same token, such organizations may have to reign in overzealous employees who want to convert unwilling coworkers.

RECOVERY OF ATTORNEY'S FEES FOR PREVAILING EMPLOYER IN A WAGE AND HOUR CASE

by Janet C. Song

In *Kirby v. Immoos Fire Protection, Inc.*, (2010) 186 Cal.App.4th 1361 the court discussed the interplay between Labor Code section 1194 and Labor Code section 218.5, with regard to fee shifting in a wage and hour action.

Section 1194 states: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

Section 218.5 states: "In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action . . . **This section does not apply to any action for which attorney's fees are recoverable under Section 1194.**"

In other words, in cases where an employee seeks to recover unpaid overtime wages, section 1194 shifts fees in favor of a prevailing employee, but not a prevailing employer. Section 218.5 provides for attorney's fees to a prevailing party, either an employee or employer, on a claim for unpaid wages and specified benefits. However, pursuant to the second sentence of section 218.5, if an action for which attorney's fees are recoverable falls under section 1194, then a prevailing employer cannot recover its attorney's fees.

Kirby argued that since the entire case included causes of action that were subject to section 1194, the employer could not recover any attorney's fees even for defending against those causes of action that were not subject to section 1194. The Court disagreed.

The Court interpreted the two sections as barring employers from relying on section 218.5 to recover fees in any action for *minimum* wages or *overtime* compensation. Thus, the Court held that section 218.5 applies to causes of action for nonpayment of wages, fringe benefits, or contributions to health, welfare and pension funds. For such causes of action, a prevailing employer can recover attorney's fees.

If, in the same case, an employee adds a cause of action for nonpayment of *minimum* wages or *overtime*, an employer cannot recover attorney's fees for work in defending against the minimum wage or overtime claims. However, an employee's addition of a claim for unpaid minimum wages or overtime does not bar recovery by a prevailing employer for a cause of action unrelated to the minimum wage or overtime claim. Please note that the Supreme Court accepted review of this matter. We will keep you updated.

WHAT CAN EMPLOYERS TAKE AWAY FROM THIS CASE?

If this case is upheld on Appeal, and the employer prevails in defending a cause of action for nonpayment of wages, fringe benefits, or contributions to health, welfare and pension funds, it may be able to recover attorney's fees. However, if an employer prevails in defending a cause of action alleging unpaid minimum wages or overtime, it cannot recover attorney's fees. If a case includes causes of action for both nonpayment of wages and benefits, as well as for unpaid minimum wages or overtime, the same rules apply. However, employers are not barred from recovering any attorney's fees just because an employee includes both types of causes of action in a single lawsuit. Under these circumstances keeping track of time spent defending the non minimum wage and overtime claims may help lead the employer to recover a larger award in fees upon a successful defense of such claims.

EMPLOYER REQUIRED TO TAKE AFFIRMATIVE STEPS TO PREVENT MALE PRISONERS FROM HARASSING FEMALE EMPLOYEES OF TRANSITIONAL HOUSE

by Eric A. Schneider

Turning Point of Central California, Inc. operates halfway houses where prisoners are housed while they transition into the workforce and society prior to their full release on parole. Joyce Turman worked as a resident monitor at a Turning Point facility for five years until she was fired.

Budgetary issues had made it necessary to trim staff, and the employer chose Turman for layoff because of its rule that nightshift monitors could only gather urine samples from prisoners of the same gender, and Turman worked in an all male facility.

At trial, the plaintiff presented claims for gender discrimination and hostile work environment. The jury found for the defendant employer as to both claims.

On the gender discrimination cause of action, the trial court had issued a jury instruction on disparate impact, finding that the evidence produced did not support disparate treatment. The jury found in the employer's favor. The Court of Appeals affirmed that aspect of the verdict because disparate treatment required a showing of intentional discrimination, and the trial court had properly found that the policy was neutral.

The Court also upheld the verdict regarding the termination on the basis that the plaintiff had not shown a disparate impact relative to her gender.

On the hostile work environment claim, Turman had introduced evidence that she was regularly subjected to coping with male prisoners propositioning her for sex, making sexual gestures in front of her, and referring to her by unacceptable epithets related to her gender. She testified that her direct supervisor would tell her, "they don't really mean it," and that she should "try and be nicer to 'em."

The Court of Appeals reversed the hostile environment claim on the basis that the employer had failed to demonstrate that there was not substantial evidence to support the jury's finding that the defendant did not fail to take immediate and corrective action to alleviate Turman's hostile work environment. More succinctly stated, the employer should have taken affirmative steps to stop the crude behavior of the inmates. This matter has been appealed to the Supreme Court. We will keep you updated.

WHAT CAN EMPLOYERS TAKE AWAY FROM THIS CASE?

1. An employer is permitted to maintain a gender specific policy so long as it is applied equally between the sexes; and,

2. The employer has an affirmative burden to take reasonable steps to alleviate a hostile work environment, even where the offenders are not its own employees. (*Turman v. Turning Point of Central California, Inc.*, (2010) 191 Cal.App.4th 53.

AN EMPLOYER THAT CAN SHOW BUSINESS NECESSITY IN REQUIRING A FITNESS FOR DUTY EXAM DOES NOT VIOLATE THE ADA

by Janet C. Song

In *Brownfield v. City of Yakima*, (2010) 612 F3d 1140 the Ninth Circuit discussed the circumstances that constitute "business necessity" which allow an employer to require a fitness for duty exam of an employee.

An employer may not require a medical examination to determine whether an employee is disabled "unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. 12112(d)(4)(A). "Business necessity" is a high standard and is not equivalent to mere expediency. The employer has the burden of showing business necessity. This statute also provides safeguards for employees by prohibiting employers from using medical exams as a pretext to harass employees or to fish for non-work-related medical issues.

The holding in *Brownfield* was heavily colored by the fact that the case involved a police officer. The Ninth Circuit noted prior decisions which recognized that "[p]olice departments place armed officers in positions where they can do tremendous harm if they act irrationally," and that the ADA does not "require a police department to forego a fitness for duty examination to wait until a perceived threat becomes real or questionable behavior results in injuries." (citing *Watson v. City of Miami Beach*, (11th Cir. 1999) 177 F.3d 932, 935). An employer could subject itself to liability for negligent hiring or retention by ignoring an employee's erratic behavior.

The Ninth Circuit concluded that prophylactic psychological examinations can sometimes satisfy the business necessity standard, especially when the employer is engaged in dangerous work, such as a police department. The Court held that the business necessity standard may be satisfied even before an employee's work performance declines if the employer is faced with significant evidence that could cause a reasonable person to ask whether an employee is still capable of performing his job. There must be genuine reason to doubt whether an employee can perform job-related functions.

Thus, the Ninth Circuit held that the City did not violate Brownfield's rights under the Americans with Disabilities Act (ADA) by requiring a fitness for duty exam after he repeatedly displayed emotionally volatile behavior while serving as a police officer. The Court found that the City had an objective, legitimate reason to doubt his ability to perform his duties as a police officer.

WHAT CAN EMPLOYERS TAKE AWAY FROM THIS CASE?

This case is very fact specific and involves an employer engaged in dangerous work. While most employers are not usually faced with this situation, it is good to keep in mind that if an employee is involved in dangerous work and if the employer can meet its burden of proving business necessity when requiring a medical examination, it may be allowed to require an employee to submit to a fitness for duty examination even before the employee has engaged in any wrongful conduct or caused harm.

FIRED EMPLOYEE HAS VIABLE RETALIATION CLAIM AGAINST EMPLOYER BASED ON HIS FIANCÉ'S COMPLAINT OF DISCRIMINATION

by Vanessa S. Davila

In Thompson v. North American Stainless, No. 09-291, 2011 BL 17217, (2011) 131 S.Ct. 863, Eric Thompson and his fiancé, Miriam Regalado, were employees of North American Stainless (NAS) until 2003. In February 2003, Regalado filed a charge against NAS with the Equal Employment Opportunity Commission (EEOC) alleging sex discrimination. Three weeks later, NAS fired Thompson. Thompson then filed a charge with the EEOC claiming that NAS had fired him to retaliate against his fiancé, Regalado, for her having filed a sex discrimination claim against it. Thompson also filed suit against NAS under Title VII of the Civil Rights Act.

The district court granted NAS summary judgment on the ground that third-party retaliation claims were not permitted by Title VII, which prohibits discrimination against an employee "because he made a [Title VII] charge," 42 U.S.C. § 2000e-3(a), and which permits a "person claiming to be aggrieved . . . by [an] employment practice" to file a civil action under § 2000e-5(f)(1). The Sixth Circuit affirmed the district court reasoning that Thompson was not entitled to sue NAS for retaliation because he had not engaged in any activity protected by the statute. The U.S. Supreme Court disagreed and reversed.

Title VII of the Civil Rights Act of 1964 makes it illegal for an employer "to discriminate against any of his employees . . . because he has opposed any practice, made an unlawful employment practice by this subchapter, or because he has participated in any manner in an investigation, proceeding, or hearing under this title." 42 U.S.C. § 2000e-3(a).

The U.S. Supreme Court found that Title VII's anti-retaliation provision "must be construed to cover a broad range of employer conduct." Moreover, Title VII's anti-retaliation provision prohibits any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Applying this standard to Thompson, the court reasoned it "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." The Court also interpreted Title VII broadly to allow a suit to be brought not only by "the person claiming to be aggrieved," but by "any plaintiff with an interest arguably [sought] to be protected by the statutes" . . . .

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

As employers deal on a daily basis with numerous anti-retaliation provisions similar to the one in Title VII (e.g., Family and Medical Leave Act, Americans with Disabilities Act, and Fair Labor Standards Act), they must be properly trained in the art of prevention so as to minimize the risk for employee retaliation claims. The Supreme Court's broad interpretation of Title VII's anti-retaliation claim in *Thompson*, that an adverse action against a fiancé might dissuade a reasonable employee from engaging in a protected activity, may prove problematic to employers who, it would seem, must now consider how that adverse action against an employee's family member, lover, and close friend may have the same effect, depending on the specific circumstances. So what can an employer do to protect itself and avoid a potential influx of retaliation claims? Ensure all supervisors and human resources personnel are properly trained on how to recognize, investigate, document and evaluate all types of potential harassment, discrimination and retaliation which may occur in the workplace and ensure uniform employment practices are maintained so that such claims can be prevented, or at least kept to a minimum, whenever possible.

EMPLOYEE MAY BRING TAMENY CLAIM FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY IN CASE INVOLVING TERMINATION BASED ON NON-COMPETE CLAUSE

by Janet C. Song

In *Silguero v. Creteguard, Inc.*, (2010) Cal.App. Lexis 1439 the Court addressed the question of whether a terminated employee can bring a *Tameny* claim for wrongful termination in violation of public policy against her subsequent employer who terminated her based on a non-compete agreement she entered into with her former employer. The answer is yes. (Tameny established an exception to at will employment. The exception being that employees cannot be terminated for a reason that is contrary to public policy.)

The plaintiff's former employer forced her to sign a non-compete agreement which prohibited her from all sales activities for 18 months following departure or termination. The plaintiff was terminated by her former employer shortly after she signed this agreement. Then she got a new job with Creteguard. Her former employer notified Creteguard regarding the non-compete agreement, and Creteguard, while recognizing that non-compete clauses are unenforceable in California, terminated her out of respect for its colleague in the same industry.

The plaintiff sued for wrongful termination in violation of public policy and illegal trade restriction in violation of the Cartwright Act.

Generally, noncompetition agreements are void in California with some exceptions, none of which applied in this case.

The Court held that the plaintiff could assert a *Tameny* claim for wrongful termination in violation of the public policy prohibiting noncompetition agreements in favor of open competition and employee mobility, embodied in Business and Professions Code section 16600 ("every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.")

With regard to the cause of action based on the Cartwright Act, the Court held that the plaintiff did not have a viable claim because the loss of a job is not the type of injury that the Act was intended to redress. The plaintiff alleged wrongful conduct by Creteguard only in connection with her termination. There was no allegation of any underlying restraint of trade or commerce.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Employers need to be aware that non-compete clauses are generally unenforceable in California, and the courts will not allow employers to circumvent this rule against non-compete clauses indirectly by requesting that a subsequent employer who hires the employee ratify and enforce the non-compete clause. This will constitute a violation of public policy and will subject the employer to a *Tameny* claim for wrongful termination.

ENFORCEABILITY OF BINDING ARBITRATION AGREEMENT IN EMPLOYMENT CASES

by Janet C. Song

Many employers grapple with the issue of whether or not to have arbitration agreements with their employees. One issue that all employers must keep in mind when, and if they decide to have such an agreement, is that if the agreement is both procedurally and substantively unconscionable (i.e., so detrimental to the interests of the contracting party as to render the contract unenforceable), the courts will not enforce it.

Dotson v. Amgen, Inc., (2010) 181 Cal.App.4th 975 is a case involving the enforceability of a binding arbitration agreement for a wrongful termination claim.

Amgen, Inc. hired Dotson, an attorney, with his employment offer contingent upon him signing an arbitration agreement. The agreement contained the following provision:

"Each party shall have the right to take the deposition of one individual and any expert witness designated by another party. . . . Additional discovery may be had where the arbitrator selected pursuant to this agreement so orders, upon a showing of need." This differs from the California Discovery Act which allows for unlimited depositions, unless a court issues a protective order or in limited jurisdiction cases.

Dotson signed the agreement. After he was terminated, Dotson filed suit. Amgen moved to compel arbitration. Dotson objected and argued that the agreement, including the discovery provision, was unconscionable. The trial court agreed with Dotson, refused to sever the discovery provision, and found the agreement unenforceable. Amgen appealed.

The Federal Arbitration Act (FAA) applied because Amgen is a multinational company. The FAA provides that a written arbitration agreement is valid, irrevocable, and enforceable unless there are grounds in law or in equity to revoke the agreement. Thus, the validity of an arbitration agreement is governed by state law applicable to contracts.

In California, courts look at whether the terms of an arbitration agreement are 1) procedurally unconscionable and 2) substantively unconscionable, in deciding whether to enforce the agreement.

Procedural unconscionability focuses on the making of the agreement and whether there is oppression or unfair surprise. Oppression results from unequal bargaining power, when a contracting party (here, the employee) has no real choice but to accept the terms. Unfair surprise results from misleading bargaining conduct suggesting that the party's consent was not an informed choice.

Substantive unconscionability focuses on overly harsh or one-sided terms.

Both procedural and substantive unconscionability must be considered and balanced. If there is little procedural unconscionability present, then there must be more substantive unconscionability if an employee wants to get around the agreement, and vice versa.

In *Dotson*, the Court found little procedural unconscionability – the only factor being that the arbitration agreement was presented to Dotson on a take it or leave it basis. In finding that the agreement was not procedurally unconscionable, however, the Court considered these factors:

- Agreement was not overly long;
- Agreement was written in clear, unambiguous language;
- The fact that arbitration was a condition of employment was stated numerous times and set forth in large, bold typeface;
- Dotson was an educated attorney who knowingly entered into the agreement in exchange for a generous compensation and benefits package.

Turning to the substance of the agreement, the Court found that the discovery provision was not unconscionable. The Court pointed out that arbitration is meant to be streamlined, as opposed to a jury trial, and that limiting discovery is one way of streamlining the procedure. The Court also discussed the fact that the agreement still gave the arbitrator broad discretion to allow additional discovery if needed so that the parties could sufficiently litigate their claims.

Even if the discovery provision was unconscionable, the Court found that the trial court abused its discretion in refusing to strike that provision and enforce the rest of the agreement. The Court stated that it is proper to sever a provision when there is only one provision that is found to be unconscionable and that provision can easily be severed. The Court disagreed with the trial court that the discovery provision permeated the entire agreement with an unlawful purpose, and could have easily been removed without requiring the trial court to rewrite the agreement.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Although courts favor enforcing arbitration agreements, they also recognize that in employment cases, the agreement is typically prepared by the employer and presented to the employee as a condition of employment without any negotiation regarding the terms. Courts also recognize that there is usually an economic disparity between the parties since the employee is an individual and the employer is oftentimes a corporation or large business. Therefore, employers should ensure that their arbitration agreements are not procedurally or substantively unconscionable by following the steps outlined above (i.e., using clear terms, not overly long etc.).

It may also be helpful to provide a summary of the terms of the agreement and answers to frequently asked questions about the agreement, and tell the employee to consult with an attorney before signing.

WHEN DECIDING WHETHER TO HAVE EMPLOYEES EXECUTE AN ARBITRATION AGREEMENT, CARE MUST BE MADE TO ENSURE THAT THE AGREEMENT IS BOTH PROCEDURALLY AND SUBSTANTIVELY CONSCIONABLE

by Colleen A. Déziel

In yet another case involving the validity of arbitration agreements, another California appellate court emphasized the requirement that agreements be procedurally and substantively conscionable. In *Wherry et al. v. Award, Inc. et al.*, (2011) 192 Cal.App.4th 1242 the Court came to a different conclusion than the *Dotson* court based on the fact that the substance of the two agreements was very different. In *Wherry*, the plaintiffs entered into independent contractor agreements with the defendant employers, each of which included an arbitration provision. The plaintiffs were given the agreement when they first contracted with the defendants, were required to sign it if they wanted to work for the defendants, were only given a few minutes to review it and sign it, were not given time to ask questions and were not provided with a description of the agreement. The plaintiffs also were not provided with a copy of the arbitration provision after executing the agreement.

In addition to the above, substantively, the arbitration agreement did not provide for discovery, and subjected the plaintiffs to fees and costs prohibited by the Fair Employment and Housing Act (i.e., it allowed the arbitrator to impose the cost of the arbitrator and the arbitration itself, along with attorney's fees against the employee if the employer prevailed. There was no limitation that the arbitrator must have found the claim to have been frivolous or filed in bad faith). It also had a limitations period that was less than that allowed by statute.

These facts led the appellate court to find the agreement was both procedurally and substantively unconscionable. In regard to the agreement being procedurally unconscionable, the court found it significant that the plaintiffs were not provided with sufficient opportunity to review and consider the agreement, which prevented them from being able to negotiate it. These facts are similar to *Dotson* above.

As for it being substantively unconscionable, the court found that where employment is conditioned on mandatory arbitration, the employer cannot impose on the employee costs he or she would not normally have to pay if the case were litigated in a court. This included the arbitrator's fee. As for the term that allowed the arbitrator to award the employer its attorney's fees, the court found that this term was inconsistent with existing law which requires a showing that the plaintiff's claims were frivolous or filed in bad faith.

Further, the court reiterated that an agreement cannot provide for a shortened limitations period than that allowed by statute. As noted above, these facts are markedly different than those in *Dotson* which is, again, the reason the result in *Wherry* was different than in *Dotson*.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

When creating these agreements, employers need to keep in mind that the employee needs to have sufficient time and opportunity to review the agreement and to ask questions if necessary. A copy of the signed agreement should also be provided to the employee once he or she has executed it.

Employers also need to understand that the terms of the agreement must be consistent with existing laws and that the costs of the arbitration will be borne by them, and not the employee. Bottom line, if an employer decides that arbitration agreements are the way to go, we strongly encourage them to seek review of the agreement and counsel by an employment lawyer to ensure that it will be upheld when challenged by an employee.

PREVENTING TROUBLE TOMORROW – PART II

by Kimberly M. Foster

In the last newsletter, we presented Part 1 of a two-part series on things that an employer should keep in mind in the day-to-day operation of its business. In a busy workplace, it is easy to lose sight of the preventative measures an employer should take today to fend off trouble tomorrow. Below is part two in the two-part series. We reiterate that the lists are by no means exhaustive lists. As always, the attorneys of Anderson, McPharlin & Conners LLP are available to respond to specific concerns you may have and to develop a checklist unique to your business. Please refer to our Winter 2010 newsletter for Part 1 of this two-part series which is available on our website at www.amclaw.com.

COUNSELING/DISCIPLINE:

1. Make sure that rules of the workplace are clearly communicated to the employees and enforce the rules;

2. Progressive counseling. Follow discipline procedure (verbal, written warnings) described in the handbook;

3. But make sure that although progressive counseling is the intent of most employers, there are certain circumstances in which an employee may be immediately terminated, including, but not limited to, stealing, aggressive behavior in the workplace, and sexual harassment;

4. Further, make sure that handbook affirms that even though it is the intent of the employer to use progressive counseling, that intent in no way changes the at-will nature of every employee's status with the company;

5. Document performance issues;

6. Conduct exit interviews to explain the cause for the separation of their employment (have employees acknowledge termination notice) and potentially offer a basic severance package for a release of claims; and

7. Be careful when responding to a reference on behalf of a former employee. Generally speaking, employers only verify the duration of their employees' employment, position, and their last rate of pay.

MISCELLANEOUS:

Other things to keep in mind as you operate your business to help ensure that your company is taking steps to decrease the likelihood of a lawsuit down the road are the following practices.

1. Make sure that an employee authorizes a credit report and include on the authorization a check-box that the individual can use to request a copy of the report; employees have the right to review the results of routine background checks;

2. Be careful to include only the last four digits of an employee identification number on documents that are available to the public (this includes materials mailed to the individual);

3. Communicate that all bonuses are discretionary or else they will be treated as earned pro rata and payable as wages upon termination;

4. There is no requirement to offer employees vacation time under California law. If vacation is offered, however, it accrues every day worked and must be paid out as wages—use it or lose it policies are not enforceable; however, you can implement a vacation accrual cap—no longer continue to earn vacation until they take vacation to reduce the accumulated number of unused vacation days below the cap. Vacation pay for short-term employees may be limited by restrictions as to the time of service that must be completed before vacation is earned (3 mos.-6 mos.). These policies must be explicit in the handbook;

5. Be careful with the handling of customers. In California, the employer is vicariously liable for an employee's conduct—even if that conduct is not authorized or ratified—if the employment involved creates the risk that employees will commit torts of the type for which liability is sought (bouncers escorting customers out of the bar); and

6. Employers of 50 or more individuals are required to conduct sexual harassment training, offer FMLA leave, and comply with additional posting requirements.

EMPLOYMENT LAW UPDATES

by Colleen A. Déziel

ACCOMMODATION STILL NOT NECESSARY FOR MEDICAL MARIJUANA USERS

We previously reported that on January 24, 2008, the California Supreme Court issued its decision in *Ross v. Ragingwire Telecommunications, Inc.*, (2008) 42 Cal.4th 920 which addressed the question of whether a person who is authorized to use marijuana for medical purposes under the California Compassionate Use Act (Cal. *Health & Safety Code* § 11362.5) and discharged from employment on the basis of his or her off-duty use of marijuana, has a claim under the California Fair Employment and Housing Act ("FEHA") (Cal. *Gov't Code* § 12900 et seq.) for discrimination based upon a disability or wrongful termination in violation of public policy.

Ultimately, the Court concluded that employers did not have to accommodate employees who were using medical marijuana, even if they had a doctor's note. Thereafter, in April 2008, in an effort to overturn the Court's decision in Ross, the California Assembly Judiciary Committee approved Assembly Bill (AB) 2279 protecting medical marijuana patients from employment discrimination. The bill was then sent to the Governor.

In an update to our previous reports, we note that before leaving office, Governor Arnold Schwarzenegger vetoed the bill. As such, the current law remains that an employer may fire an employee who tests positive for marijuana (assuming the test complies with California law and is consistent with company policy) even if he or she has a note from a doctor recommending its medical use. Despite this, because the law in this area remains unsettled and because we expect that either plaintiffs/employees will continue to challenge the law and/or that the assembly will introduce another bill similar to AB 2279, employers should continue to consult with legal counsel before implementing any drug testing policy or taking corrective action against an applicant or employee in connection with medical marijuana use.

SUPREME COURT OF CALIFORNIA GRANTS REVIEW IN ANOTHER MEAL AND REST BREAK CASE, *HERNANDEZ V. CHIPOTLE MEXICAN GRILL, INC.*

We also previously reported on the case of *Hernandez v. Chipotle Mexican Grill, Inc.*, (2010) 189 Cal.App.4th 751, which presented the issue of whether an employer owes a duty not only to "provide" meal and rest breaks, but also to ensure that employees actually take the breaks. In *Hernandez*, the Court of Appeal held that employers must provide such breaks, but that they do not need to ensure that they are being taken. In January of this year, the California Supreme Court agreed to review this case, and as such, *Hernandez* joins *Brinker Restaurant Corp. v. Superior Court* and *Brinkley v. Public Storage Inc.* in the Supreme Court, both of which address the same issue addressed in *Hernandez* (i.e., the proper interpretation of California statutes and regulations governing an employer's duty to provide meal and rest breaks to hourly workers…what does the term "provide" mean?) The *Brinker* and *Brinkley* cases have been pending in the Supreme Court for quite some time, and as such, we can only hope that a decision on each of these matters will be forthcoming soon. We will continue to keep you updated on these very important cases.

An HR Perspective

HAVING FRIENDS VS. BEING FRIENDLY
by Rick B. Friedman, Administrator

If you are a manager, supervisor or H.R. director, it is important that you are respected by your staff. One major step to achieve this goal is that of "being fair" with everyone.

Supervising can be a lonely job…if you are doing it correctly. Going to lunch or becoming friendly with anyone you supervise can create problems you don't need.

It is easy to say "yes, let's meet at noon" when one of your star employees asks if you want to have lunch. A star employee is almost never absent, never tardy, always helpful and pleasant. So why not? A star employee may also, on rare occasion, ask for a day off or want to take a long lunch. Your response is "of course, no problem." But if an employee who has taken too much time off, spends office time on personal calls or comes in late frequently asks for the same considerations, I bet you either deny his/her request or begrudgingly grunt out a "again? oh, okay" response.

We all have employees we like. We spend a little time each day visiting with them. "How was your weekend?" "Did you try that recipe I gave you?" We all have employees we don't like. They get a "good morning" from us, at best. We all have the professional obligation to treat each with fairness and respect. We have to be civil and polite to everyone. It is easy to become friends with the employees you like. If you do that, it won't be long before you will begin hearing "he/she plays 'favorites'" from your staff. I bet you have also experienced having to deal with your friends telling you about "the goof-offs" and what they are getting away with. That information is always good to have and to act upon. But it will create an aura of ill-will at your worksite. If you don't act upon it, your "friend" will be upset. If you do act upon it, the workers involved will feel picked upon and they will know where the information came from.

What if there is a promotion opportunity and you give it to your star employee? Although he/she deserves it, you could potentially be opening yourself and your company to a lawsuit from an employee who did not get the promotion. Confused? Thinking "how can that be?" It might be time to give supervisors in your company a

presentation on *Sexual Harassment and Discrimination Prevention* that addresses issues such as this. Being your friend (even platonically) can be interpreted as a required condition for promotion consideration. Why risk a law suit? It may be frivolous, it may be quickly dismissed. But it will result in your company incurring hundreds – if not thousands – of dollars in legal fees before it is over.

I have the feeling many of you are reading this, realizing it has happened and wondering what to do. It may mean eating alone or backing-off from sharing personal events in your life. But – the end result – albeit lonely – will have a positive impact on your staff's attitude toward working with you, and you may be able to prevent discrimination and/or harassment claims from being presented.

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 or EAS@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.

Employment Practices Group at Anderson, McPharlin & Conners LLP

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

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

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