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

A Win for Employers, California Court Rules: It's Not Ok to Lie

by Michelle T. Harrington

In *McGrory v. Applied Signal Technology*, 212 Cal.App.4th 1510 (2013), plaintiff John McGrory was a manager for Applied Signal Technology who issued a written performance improvement plan (PIP) to a subordinate lesbian female employee. The employee refused to sign the PIP and instead lodged a complaint with HR that the discipline was motivated by McGrory's discriminatory bias against lesbians. The company hired an outside investigator to conduct an investigation. Even though the investigator concluded that McGrory did not discriminate against the subordinate employee, he had otherwise engaged in inappropriate conduct, including regularly making inappropriate sexual and racial/ethnic remarks in violation of the employer's policies. The investigator further concluded that McGrory was not truthful in responding to the investigator's questions and was not fully cooperative in the interview process. Based on the investigator's conclusions, the employer terminated McGrory's employment.

McGrory then filed suit alleging claims for wrongful termination in violation of public policy and retaliation, among others. He alleged that he was terminated for being male and participating in an employer's internal investigation. The trial court granted the employer's motion for summary judgment, finding that McGrory's claims lacked merit. McGrory appealed and the appellate court affirmed the trial court's decision.

The appellate court rejected McGrory's claim that his participation in the investigation was "protected activity" under the Fair Employment and Housing Act, California's anti-discrimination law (FEHA), and that he should not have been terminated based on that participation. The court explained that the FEHA does not protect an employee from lying or failing to cooperate fully during an employer's internal investigation of a discrimination claim. The court also rejected McGrory's contention that it was improper for the employer to fire him to protect itself from legal risk, noting that there is no authority requiring an employer to retain an at-will employee until his conduct creates civil liability. The court also

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determined that his gender claim was meritless because the employer disciplined male and female employees alike and there was no evidence that the investigator harbored anti-male bias.

What can employers take away from this?

While this case is a win for California employers, it is crucial to recognize the importance of a timely, thorough and objective investigation of any complaints of discrimination or harassment. Such an investigation will help avert claims of illegal bias by the alleged victim or wrongdoer.

Updates to California's Pregnancy Accommodation Laws in 2013

by Leila M. Rossetti

Effective December 30, 2012, California's Department of Fair Employment and Housing Commission (DFEHC) instituted regulatory changes with regard to California employees' rights to Pregnancy Disability Leave ("PDL"). The more noteworthy changes are outlined herein, but non-government employers with five or more employees (either part time *or* full time) are encouraged to review the new regulations in their entirety, the text of which is available online, to ensure compliance therewith. Many of the regulations, as updated, are now more consistent with existing state and federal regulations with regard to PDL.

Covered Pregnancy Disability

While pregnancy was already a protected disability, the new regulations provide that "perceived pregnancy" is also a protected status, which means that an employer can now be held liable for discriminating against someone whom the employer *perceived* to be pregnant, even if that employee were not actually pregnant. Furthermore, there is no minimum period of employment required for the employee to have been with the employer prior to being eligible for PDL or any accommodations related to pregnancy disability. Finally, the new regulations expand the definition of what constitutes being "disabled by pregnancy," which designation now specifically includes severe morning sickness, prenatal or postnatal care, bed rest, gestational diabetes, pregnancy-induced hypertension, preeclampsia, post-partum depression, childbirth or recovery from childbirth, and loss or end of pregnancy or recovery from loss or end of pregnancy. This list is illustrative only, and an employee can also be considered "disabled by pregnancy" if, in the opinion of her doctor, she is "unable because of pregnancy to perform any one or more of the essential functions of her job or to perform any of these functions without undue risk to herself, to her pregnancy's successful completion, or to other persons."

Calculation of Pregnancy Disability Leave

The new regulations also updated the manner in which PDL is calculated. California employees are entitled to four months of PDL *per pregnancy*, not per year. Previously, these four months were defined as 88 paid, eight-hour days for full-time employees. Now, the four months of leave, if taken continuously, are calculated as the number of days the employee would normally work within four calendar months, or 17 1/3 weeks. If the employee works varying schedules from month to month, a monthly average is to be calculated prior to the commencement of the leave to obtain the employee's typical work month. If an employee works more or less than 40 hours per week, PDL must be calculated on a pro-rata basis to be consistent with this. Thus, an employee who typically works 20 hours per week would be entitled to 346.5 hours of PDL entitlement while an employee who typically works 48 hours per week would be entitled to 832 hours of PDL.

In addition, the new PDL regulations now define intermittent leave, which is leave taken in separate periods of time because of pregnancy. Intermittent leave must be calculated in minimum increments equal to the shortest period of time that the employer uses to account for other forms of leave. The regulations provide the following example: if the employer calculates vacation time in one-hour increments and sick leave in 30-minute increments, PDL must also be calculated in 30-minute increments, i.e. the shortest period of time the employer uses to account for any leave taken by employees.

The regulations also specify that the right to take PDL is entirely separate and distinct from any leave permissible under the California Family Rights Act. Thus, an employee who is eligible for both CFRA (which requires a minimum employment period and a minimum of 50 employees) and PDL, is entitled to a maximum leave of 29 1/3 workweeks. Employers are cautioned, however, not to confuse these leave entitlements with the requirement to provide a reasonable accommodation under California's Fair Employment and Housing Act, which accommodation may require an extended leave of absence depending upon the circumstances.

If the employer has a more generous leave policy than four months for other types of temporary disabilities, this more generous leave must also be available to employees temporarily disabled by pregnancy.

Reasonable Accommodations

The new regulations specify that PDL is separate and distinct from any right to a reasonable accommodation. The regulations provide examples (which are not exhaustive) of reasonable accommodations:

1. Modifying work practices or policies;

2. Modifying work duties;

3. Modifying work schedules to permit earlier or later hours, or to permit more frequent breaks (i.e. to use the restroom);

4. Providing furniture (i.e. stools or chairs) or acquiring or modifying equipment or devices; or

5. Providing a reasonable amount of break time and use of a room or other location in close proximity to employee's work area to express breast milk in private.

Employers are also not permitted to require an employee to take a leave of absence over her objections, due to her pregnancy or perceived pregnancy. Also, if an employer has a policy of requiring or authorizing a transfer for temporary employees to less hazardous or strenuous positions, this policy must also be applied to a pregnant employee who requests a transfer. It is further unlawful for an employer to deny a pregnant employee's request for a transfer if the request is based upon the employee's doctor's advice or direction and such a transfer can be reasonably accommodated by the employer. The employer is *not* required to create additional employment for this purpose, discharge another employee, transfer another employee with seniority, violate a collective bargaining agreement, or promote or transfer any employee who is not qualified for the job.

Once the employee is released to return to regular work, the employer must reinstate the employee to her same or comparable position. However, an employee returning from PDL has no greater right to reinstatement than she would have if she had remained continuously employed by the employer. A refusal to reinstate by the employer is justified if the employer can prove, by a preponderance of the evidence, either that: i) the employer would not have offered a comparable position to the employee if she had remained continuously at work for the duration of the leave or transfer, or ii) there is no comparable position available. The new regulations define a comparable position as being "available" if there is a comparable position open within 60 calendar days of the employee's date of reinstatement.

An employer is also required to maintain health insurance coverage for an employee on PDL at the same level and under the same conditions as if the employee had remained at work continuously for the period of leave. However, if the employee fails to return to work after the end of her PDL, the employer can recover the amounts paid for health insurance coverage if the failure to return from the leave is not for reasons beyond the control of the employee.

Notice Requirements

The new regulations clarify the notice requirements for both the employee and the employer. The employee is required, to the extent feasible, to provide 30 days advance notice of her need for PDL. The employer may, but is not required to, require medical certification to support the employee's request for pregnancy accommodation or leave. However, only certain information may be requested, as specified in the regulations. Accordingly, employers who wish to require medical certifications from employees seeking accommodations in connection with their pregnancy are advised to utilize the form provided by the DFEHC to ensure that no additional information is sought which is protected by the employees' right of privacy. Please double click here to view Modified Pregnancy Regulations.

The new regulations also contain updated versions of Notice "A" (for employers with less than 50 employees) and Notice "B" (for employers with more than 50 employees) which must be posted, provided to an employee upon the employer's knowledge of the employee's pregnancy, and either included in the employee handbook or distributed annually (electronic distribution is acceptable).

What Can Employers Take Away From This?

If not already accomplished, employers should take immediate steps to ensure compliance with these updated regulations. Notices "A" and "B" should be updated and posted, all policies and procedures should be updated, and all managerial and human resources personnel should be brought up to date on the new regulations and advised as to their implementation.

Employer's Inability-to-Perform Defense in Action

by Vanessa Davila

In *Lawler v. Montblanc North America, LLC*, 704 F.3d 1235 (2013), Cynthia Lawler sued her employer Montblanc North America and its President/CEO because she was terminated from her employment as a store manager while she was out on disability leave. Lawler presented claims for disability discrimination and retaliation under California's Fair Employment and Housing Act, among others.

After removing the matter to the U.S. District Court, Montblanc successfully moved for summary judgment as to all of Lawler's claims. Lawler appealed, but the Ninth Circuit Court of Appeals affirmed the summary judgment in favor of the employer.

Lawler was a store manager at one of Montblanc's boutique retail stores. The essential duties of a Montblanc boutique store manager could only be performed in the store and included responsibility for the hiring, training, and supervising of sales staff; overseeing and developing customer relations; administrating stocking and inventory; cleaning; creating store displays; and preparing sales reports. As a store manager, Lawler worked increasing hours of 60-70 hours per week during the busy holiday season starting with Thanksgiving. Montblanc does one third of its annual business during the two-month holiday season beginning with Thanksgiving and it does not allow its employees to take their vacations during this two month holiday period.

In June 2009, Lawler's rheumatologist diagnosed her with a chronic condition known as psoriatic arthritis and recommended that Lawler work a reduced workweek of twenty hours due to her medical condition. Lawler went on disability leave. On September 4, 2009, Montblanc wrote to Lawler's physician requesting additional information as to the nature and extent of Lawler's condition and asked whether there were any accommodations Montblanc might be able to provide that would permit her to be regularly present at the store and to perform the essential duties of her position as store manager. Lawler's physician responded only by repeating that Lawler's status had not changed and that his recommendation that she be off work until January 5, 2010 had also not changed. Other than requesting that she be allowed to work a reduced 20-hour work week, Lawler made no other requests for accommodations.

Lawler's employment was subsequently terminated by Montblanc on October 13, 2009 citing to Montblanc's need to have a manager in their boutique store. Lawler's suit followed.

The Court of Appeals found that Lawler's disability discrimination claim failed because Lawler had failed to show that she could perform the essential job functions of her position as a store manager with, or without reasonable accommodations. Lawler argued that Montblanc should not have been permitted to meet its burden of showing that she was unable to do her job with or without reasonable accommodation because it had denied her requests for reduced hours and a five-month leave of absence. This argument failed; however, as the plaintiff bears the burden of proving she was able to do the job, with or without reasonable accommodation, and Lawler had not done so. Moreover, as the Court noted, Lawler did not present any claims against Montblanc for failure to reasonably accommodate or failure to engage in the interactive process.

In her lawsuit, Lawler also presented a retaliation claim in connection with an incident where Montblanc's CEO visited the store at which Lawler was manager and allegedly engaged in harassing conduct, vociferously expressed dissatisfaction with the store's appearance, merchandize displays and otherwise criticized Lawler's work performance in front of her staff. The visit occurred while Lawler was on disability and had just gone to the store to use its fax machine to fax over her physician's note to her employer. Lawler subsequently complained about the CEO's treatment of her and later alleged that her employment was terminated, at least in part, because of her having complained about the CEO's allegedly harassing conduct during his visit to the store.

In response to Lawler's retaliation claim, Montblanc submitted that it terminated Lawler's employment because she could not perform her job duties with or without accommodation (this is known as the employer's inability-to-perform defense). On appeal, the parties contested only whether Montblanc provided a legitimate, nondiscriminatory reason for terminating Lawler and whether that reason was pretextual.

In evaluating a legitimate nondiscriminatory reason for an adverse employment action, the determinative factor is whether the employer acted with a motive to discriminate illegally. Here, Montblanc showed that its decision to terminate Lawler's employment was because she was unable to perform the essential job functions of her position. The Court found this reason was based on the employer's legitimate business concerns. The evidence showed that Montblanc does one third of its annual business during the two-month period holiday season during which Lawler was on disability and could not perform her job duties. Montblanc needed a store manager and neither Lawler, nor her physician was able to provide Montblanc with any indication as to when, if ever, Lawler could perform her essential job duties.

The California Supreme Court, adopting the three-part burden shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), found that since Montblanc's stated reason for the termination was facially unrelated to prohibited bias (disability), the burden shifted to Lawler to show by way of "specific" and "substantial" circumstantial evidence that Montblanc's stated reason for her termination was pretextual. Lawler argued that the closeness in time between the date she lodged her complaint regarding Montblanc's CEO on August 11, 2009, and her termination on October 31, 2009, established Montblanc's retaliatory intent. She also argued that since Montblanc did not hire a new store manager until May 2010 (seven months after her termination) this showed unlawful retaliatory intent. The court disagreed. Although this was sufficient to establish a *prima facie* case, the Court held that it did not constitute a "substantial" offering by Lawler sufficient to overcome Montblanc's proffered legitimate, nondiscriminatory reason for terminating her employment.

What Can Employers Take From This?

This case reflects just how important it is for employers to engage in the interactive process with disabled employees. This case stands for that proposition that if after engaging in the interactive process an employer legitimately determines that the employee cannot perform the essential job duties of his/her position, with or without any reasonable accommodation, then the employer may lawfully discharge the employee. However, be forewarned that the California Court of Appeal held differently in *Sanchez v. Swissport, Inc.*, 213 Cal.App.4th 1331 (2013), in finding that an employer could still be found liable for terminating a disabled employee even after the employee had exhausted her unused vacation time and four months leave under the Pregnancy Disability Leave Law unless the employer could prove that any additional leave time requested by the employee would result in undue hardship for the employer. For more on *Sanchez v. Swissport*, please see article by Leila M. Rossetti, Esq., immediately below in this issue. As such, engaging in the interactive process with a disabled employee is of critical import. Documenting all aspects of the interactive process is also highly recommended.

Termination of Pregnant Employee After Four Month Leave of Absence Can Constitute Unlawful Discrimination

by Leila M. Rossetti

The California Court of Appeal found that an employer who terminated a pregnant employee after she had used up all of her unused vacation time, in addition to the four months leave permissible under California's Pregnancy Disability Leave Law ("PDLL"), could still be found liable for employment discrimination unless the employer could prove that the provision of additional leave would have resulted in an undue hardship for the employer.

In the matter of *Sanchez v. Swissport, Inc.*, 213 Cal. App. 4th 1331 (2013), plaintiff Ana G. Fuentes Sanchez worked for defendant Swissport as a cleaning agent for approximately a year and a half before

being diagnosed in February 2009 with a high-risk pregnancy which required bed rest until after the birth of her child, anticipated at around October 19, 2009. Upon Sanchez's request, Swissport granted a temporary leave of absence. However, after approximately 19 weeks of medical leave, which included her accrued vacation time plus the four months of pregnancy leave required by the PDLL, Sanchez's employment was terminated. Sanchez sued Swissport alleging, among other things, employment discrimination on the basis of sex and disability, and failure to accommodate the disability, under the Fair Employment and Housing Act ("FEHA").

Swissport moved to dismiss the claims under the FEHA on the basis that, because Swissport had provided Sanchez with the entirety of the four month maximum leave provided under the PDLL, the termination was not unlawful and Sanchez was not entitled to any further accommodation of her disability. The Court disagreed, holding that although the PDLL (which is part of the FEHA) provides for a maximum pregnancy leave of four months, the PDLL also specifies that its provisions are *in addition* to any other rights provided to employees under the FEHA. Pursuant to the FEHA, disabled employees are not limited in the amount of disability leave they may be afforded but rather are entitled to "a reasonable accommodation that does not impose an undue hardship" on the employer. The Court specified that a leave of absence of longer than four months may constitute a reasonable accommodation under the FEHA as long as it does not impose an undue hardship to the employer.

What Can Employers Take Away From This?

The *Sanchez* holding serves as another reminder to employers of the importance of the "interactive process" in dealing with disabled employees. California has stringent laws protecting disabled employees, which require employers to interact in good faith with a disabled employee in order to determine what accommodations are required, whether such accommodations are reasonable, and whether providing such accommodations would result in an undue hardship to the employer (i.e. if no other employee is able to assist with the duties left unattended by the disabled employee; if hiring a temporary replacement is not an option; and if the requested accommodations would be excessively costly).

If the requested accommodation is a leave of absence which has a foreseeable end and which would not result in an undue hardship for the employer, the employee is entitled to such an accommodation and failure to provide the same could result in liability for the employer.

Employer's Exercise of Business Judgment in Terminating Employee Significant in Pregnancy Discrimination Action

by Leila Rossetti

The California Court of Appeal recently confirmed that employers are free to exercise their business judgment in making employment decisions as long as these decisions are not rooted in any discriminatory practices on the part of the employer.

In *Veronese v. Lucasfilm LTD.*, 212 Cal.App.4th 1 (2012), plaintiff Julie Gilman Veronese applied for a position as an assistant to the manager of the home of George Lucas. The position consisted of family caretaking, and assisting the manager, Sarita Patel, who was tasked with overseeing construction and maintenance of the property, among other duties. Lucasfilm hired Veronese to a one-month employment contract, with the possibility of extension into a full-time position, scheduled to commence on June 30, 2008. On June 27, 2008, Veronese informed Patel that she was pregnant and was struggling with morning sickness. Patel told her to delay her start date, that her health was the most important consideration and that the "job isn't going anywhere."

Veronese learned she was expecting twins, but expected to be able to commence working by the end of July, but soon thereafter she suffered a miscarriage of one of the twins. Patel became concerned about the increasing stress level of the position and the fact that, due to ongoing construction, the dust and paint fumes could be detrimental to Veronese's pregnancy. However, it was decided that Veronese would begin on August 11 for a shortened trial period to last until the end of August. On August 7, Veronese wrote a long e-mail stating that she did not understand why her one month trial period had been shortened, she had been "led to feel as though [she was] no longer a good fit for the job due to [her] pregnancy," and she wanted an assurance that she was still a serious candidate for a full-time position.

Patel found Veronese's letter to be "very revealing" and felt that it raised "red flags" with regard to Veronese's candor, integrity, flexibility, and especially a perception of a sense of entitlement and a selfishness on the part of an employee whose role was to be providing assistance and support. Someone else was hired for the assistant position and Veronese filed suit alleging, among other things, pregnancy discrimination.

The jury found in favor of Veronese on the pregnancy discrimination claim and she was awarded $113,830 in damages and over $1.1 million in attorney's fees. The appeal dealt with technicalities of jury instructions; however, the rulings are instructive to employers on several issues. First, the Court held that the jury should have been instructed that they could not find that Veronese was discriminated against on the basis of her pregnancy if they believed the termination was a decision based on business judgment rather than anything motivated by discrimination or retaliation. The Court specified that an employer may terminate an employee for any reason, even one that the jury finds to be wrong, mistaken or unwise, as long as the termination was not motivated by illegal discrimination. The Court stated that a jury, if properly instructed on this issue, could very well have found that, even if Patel's reaction to Veronese's August 7 e-mail was an overreaction or was improper, it did not support a claim for discrimination because "Patel was entitled to exercise her business judgment, without second guessing."

The Court also held that the jury should not have been instructed that a potential hazard to an unborn child is not a defense to pregnancy discrimination. The Court clarified that, although blanket company *policies* which are based upon fetal-protection may be discriminatory, an employer is not banned from considering the health and safety of an unborn child as part of a legitimate decision-making process.

What Can Employers Take Away From This?

The *Veronese* ruling is a positive one for employers in that it confirms that employers are entitled to make legitimate decisions based upon their business judgment as long as the decisions are not founded in any form of illegal discrimination. The ruling further confirmed that, while the implementation of a blanket "fetal-protection" policy which serves to place women at a disadvantage can constitute discrimination, it does not necessarily follow that employers cannot make decisions with a conscience or with consideration and empathy for the health and safety of an unborn child.

This ruling should also serve as a cautionary tale in several respects. Veronese obtained a jury verdict in her favor in an employment discrimination action despite never working a minute for Lucasfilm. Accordingly, employers should remember that employment laws extend not only to current employees but to potential, prospective and anticipated employees as well.

Employers should also take note of the award of attorney's fees in an amount of over $1.1 million. While this particular award was vacated by the Court of Appeal due to the reversal of the opinion, it is not uncommon for a case brought under California's Fair Employment and Housing Act to result in an award

of counsel fees in an amount exponentially higher than the actual damages awarded to the employee. Thus, in evaluating the value of claims and complaints for settlement purposes, employers should be mindful that even a claim which does not appear to have resulted in a great deal of damage to the employee can result in substantial liability to the employer if attorney's fees can be recovered under the applicable statute.

Baltazar v. Forever21, Another Court Ruling in Favor of Arbitration Agreements

by Eric A. Schneider

Maribel Baltazar sued Forever 21 for constructive wrongful termination, harassment, and discrimination relating to her being Hispanic. The defendant moved to compel arbitration pursuant to the Federal Arbitration Act (FAA) based upon an arbitration agreement. The trial court denied the motion, and Forever 21 appealed. The Court of Appeal reversed the order denying the motion.

As a threshold matter, the court first determined that the question should be decided under the California Arbitration Act (CAA) rather than the FAA because the employment did not involve interstate commerce.

Next, the Court addressed the plaintiff's claim that the arbitration agreement was procedurally and substantively unconscionable rendering it unenforceable. The court agreed that it was procedurally unconscionable because the plaintiff had no opportunity to negotiate. But in order for the agreement to be determined to be unenforceable, it also has to be found to have been substantively unenforceable as well.

Baltazar asserted that the agreement was substantively unconscionable in four respects, each of which the court addressed.

Unilateral Arbitration

The plaintiff complained that the agreement required that she litigate her claims through arbitration, while the employer was free to pursue any claims that it might have in the forum of its choice. The plain language of the agreement however required both sides to submit claims to arbitration.

Availability of Provisional Relief

The agreement provides that either party can apply to a California court for any provisional remedy including a temporary restraining order or preliminary injunction. While a clause requiring arbitration for claims more likely to be brought by employees would be one-sided, that is not the case here because the agreement does not limit access to courts for provisional remedies to any particular type of claim.

Forever 21's Protected Information

The agreement provides that the parties agree that Forever 21 has valuable trade secrets and proprietary and confidential information, and that they would take all necessary steps to protect that information from public disclosure. The court did not find that to be harsh or one-sided because:

1. It is narrow—the limitation extended only to trade secrets which would likely be made subject to a protective order in a court forum; and

2. Clothing designs are not copyrightable and must otherwise be protected.

Arbitration Notwithstanding the Agreement's Unenforceability

The court found that the plaintiff's contention that the agreement provides that even if the court found the agreement to be unenforceable, the employer could still compel that the employee's claims be arbitrated unavailing because that is not what the agreement states. Instead it provides that if the court finds the American Arbitration Association rules to be unenforceable, an alternative means of arbitration would be employed. The point is moot in any event because the AAA rules are fair.

What Can Employers Take Away From This?

While the Supreme Court has granted review of this case, and therefore it cannot be cited at this time, it is instructional nonetheless. This is yet another case wherein a court has favored arbitration as did the United States Supreme Court in the case of *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (U.S. 2011). Arbitration can present a favorable forum for employers, but they should not act in knee-jerk fashion because there are significant downsides as well.

Aber v. Comstock – Filing a Complaint for Harassment is not Considered Defamation or Extreme and Outrageous Conduct

by Eric A. Schneider

In *Aber v. Comstock* (2012) 2013 Cal. Lexis 1326, plaintiff Lisa Aber brought suit against her employer and two of its employees based upon an alleged sexual assault by one of the employees. Defendant Michael Comstock cross-complained against Aber presenting causes of action for defamation and intentional infliction of emotional distress. Aber then filed a special motion to strike the cross-complaint under the anti-SLAPP Statute (Strategic Lawsuit Against Public Participation.)

The trial court granted the motion, and Comstock appealed. The Court of Appeal affirmed. We note that this is not a published opinion, and therefore it cannot be cited, however, its principals and rulings should be followed as this case gives us insight as to how the appellate court could rule in a similar set of circumstances.

Comstock had alleged in his cross-complaint that Aber had published false statements (that he had sexually assaulted her) to friends, fellow employees, medical professionals who had treated her, and police. In her SLAPP motion, Aber submitted excerpts from the EEOC website dealing with sexual harassment in employment.

In his opposition to the motion, Comstock presented a good deal of deposition testimony and his own declaration. In the latter, Comstock asserted that:

1. He had received an e-mail from one of the other individual defendants stating that Aber had been telling fellow employees that she got him (Comstock) fired, and that there was an ongoing investigation as to what Comstock had done; and

2. He had learned that Aber was making false statements about him to a nurse at the hospital, the police, the employer's HR manager, Aber's friends, and other employees.

The appellate court cited to *Hecimovich v. Encinal School Parent Teacher Association* 203 Cal.App. 4th 450 (2012) relative to the two-step process for analyzing Anti-SLAPP motions:

1. Has the defendant (or in this instance cross-defendant) made a threshold showing that the challenged cause of action is one arising from protected activity, i.e., that the facts underlying the [cross-]complaint fit one of the categories within the Anti-SLAPP statute; and

2. If so, has the plaintiff (cross-complainant) demonstrated a probability of prevailing on the claim.

Aber asserts two bases for placing the case within the Anti-SLAPP statute. Firstly, the statements at issue were made in connection with matters under review by an official proceeding or body. Secondly, the statements were made in connection with a matter of public interest. The court determined that Aber's first contention was sufficient such that the second base need not be evaluated.

The communication with the police clearly falls within the statute because it was to an official body, and her statement to the nurse did as well because the nurse was a mandated reporter of assaultive or abusive conduct.

The court accepted Aber's statement to the HR manager as protected under that portion of the Anti-SLAPP statute as statements made prior to litigation or other official proceedings because they were necessary to address an anticipated affirmative defense used in sexual harassment cases—that the plaintiff failed to take advantage of corrective and preventive opportunities to avoid harm. Ironically, the defendants indeed asserted that affirmative defense in this case.

The court then turned to the statements that Comstock alleged Aber made to "friends," (none of whom were identified). In so doing, it employed the "mixed cause of action analysis," where part of the claim (the statements to the police, nurse, and HR manager) represent protected activity and those to the "friends" do not. And it found the statements to the friends to be "incidental."

The court then examined the question of whether Comstock was likely to prevail on his claims. It found that Comstock had not met his relatively low threshold of showing through admissible evidence that he would prevail.

With regard to the defamation claims, rather remarkably he failed to deny Aber's allegation that he had sexually harassed her. Further he had not submitted any admissible evidence that Aber had defamed him.

He also failed to establish that he was likely to prevail on his claim for intentional infliction of emotional distress. One of the elements of that tort is that the (cross-) defendant had engaged in extreme and outrageous conduct. Plainly and simply, reporting a sexual assault to a nurse and the HR manager is not extreme and outrageous conduct.

What Can Employers Take Away From This Case?

Defendants should be careful about vindictive cross-complaints designed to gain settlement leverage; and

1. Defendants should examine whether they can employ the powerful Anti-SLAPP statute themselves relative to claims asserted by plaintiffs in defamation causes of action.

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 EAS@amclaw.com or CAD@amclaw.com). We will be happy to provide comments or options on steps that can be taken in an effort to help you reach successful conclusions.

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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