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Labor & Employment Briefing

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

Shift supervisors allowed to share in tips placed in collective tip boxes

by Colleen A. Déziel

Generally, California courts have held that employers cannot take any portion of the tips of its employees. However, what happens if there is a collective tip jar where customers leave tips for the entire crew? The California Court of Appeal has recently held in Chau v. Starbucks (2009) ___Cal.App.4th___ that an employer may set up collective tip pooling and it may allow a service employee to keep a portion of the collective tip, in proportion to the amount of hours worked, even though those employees may have had limited supervisory duties in addition to their customer service duties.

More specifically, a former Starbucks "barista" brought a class action against Starbucks challenging Starbucks's policy permitting certain service employees, known as shift supervisors, to share in tips that customers place in collective tip boxes. The claim was a violation of Business & Professions Code §17200 and Labor Code §351. Section 351 essentially provides that no employer or agent can take in whole or in part any gratuity left for an employee by a patron.

The evidence at trial reflected that the shift supervisors are part-time hourly employees who perform all of the duties of a barista, but are also responsible for some additional tasks including supervising and coordinating employees within the store, opening and closing the store, and depositing money into the safe. The shift supervisors cannot hire, fire, promote, transfer, schedule, or discipline other employees. Approximately 90% of a shift supervisor's time is spent on the tasks of a barista.

The evidence also reflected that each Starbucks's customer is served by a customer service "team," rather than by an individual employee. (Continued on page 2)

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Because of this team approach, a collective tip box is provided for those customers who choose to tip the group of employees, rather than a specific individual. Starbucks has a highly detailed written policy for collecting, storing and distributing the collective tips.

Collective Tip Pooling for "Team" Service Providers okay

The plaintiffs alleged that the shift supervisors were agents under Labor Code §351 and as such, could not partake in the tips. However, the Court of Appeal concluded that it did not matter whether the shift supervisors were agents as defined in the Labor code, but instead found that what was important was the fact that Starbucks customers were leaving tips for all employees who provided service to them, that the collective tip box was for the entire team of employees who were serving customers during that particular shift, that the team included shift supervisors and baristas, that the manner in which the box was divided was appropriate and that store managers and assistant managers were prohibited from participating in the collective tips. The court reasoned that §351 does not provide that merely because an employee falls within the definition of an "agent" that an employer must bar that employee from retaining a tip even it that tip was given directly to him by a customer for services provided to that customer. The court went on to state that the collective tip box also contained monies intended to be shared by the shift supervisors as they too provided services to the customer.

What can employers take away from this?

Having a collective tip pool is allowed under California law, and this case gives direction to those employers who wish to establish one for their customer service employees. Essentially, the more detailed and specific the policy is for this collective tip box, the more likely it will withstand a challenge based on Business & Professions Code §17200. Also, employers should ensure that those participating in the collective tips are in fact primarily servicing the store's customers during their respective shifts, and that the participating employees do not have the authority to alter the employment of another employee, as a store manager would be able to do.

The Ninth Circuit will decide the issue of whether a broad request for information and a general waiver for release of information from certain employees is allowed

by Colleen A. Déziel

In the matter of Nelson v. National Aeronautics and Space Administration, the Ninth Circuit will be deciding the issues of when can an employer require an employee to execute a general waiver for release of information, and what happens when there is a request for information that goes beyond that necessary to ensure the identification of an employee. Until the Court of Appeals rules on these issues, the Ninth Circuit issued an order granting an injunction which would prevent NASA from attempting to collect the waivers and requested information.

In Nelson, NASA required certain employees it designated as "low risk" employees to complete a questionnaire and execute a waiver for release of information. The questionnaire not only required basic information such as address, date of birth and social security number, but also more personal information such as information about any counseling that each may have received. The general waiver would allow NASA to obtain any information relating to activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments or other sources of information.

NASA claims that it adopted the questionnaire and waiver in an effort to implement a Homeland Security Presidential Directive which requires the promulgation of a federal standard for secure and reliable forms of identification. While the Court of Appeals has yet to decide these issues, the few comments the court made in this Order suggest that the Court will not allow NASA to continue to seek the requested information nor will it allow such broad language as is contained in the subject waiver. The Court of Appeals noted that serious privacy concerns as well as serious legal and constitutional questions arise in this matter. Stay tuned, we will keep you updated.

Public employee not subject to patronage dismissal where politics not involved

by Eric A. Schneider

In Nichols v. Dancer (9th Cir. 2009) 2009 WL 1362960, plaintiff Kathleen Nichols worked as an administrative assistant to the general counsel for Washoe County School District, Jeffrey Blanck. Her performance was highly regarded, her evaluations bearing only "commendable" and "competent" marks.

She and Blanck were personal friends. When Blanck found himself in hot water with the District, and the subject of a public board meeting where his termination was issue, Nichols sat beside him. She did not in that hearing openly support him or even speak.

Thereafter, Nichols had a discussion with Blanck. The assistant superintendent of the human resources department believed this communication included "very sensitive information," and was therefore inappropriate. After Nichols had this communication with Blanck, the District asserted that "some files went missing."

While all of this was going on, the District transferred Nichols to the human resources position. Nichols wanted to return to the general counsel's office, but she was rebuffed. She asserted that she was forced to retire "to her severe financial detriment," and she sued for retaliation and claims that she was wrongfully constructively terminated.

The District successfully moved for summary judgment, and Nichols appealed. The trial court had found that Nichols was a confidential employee and that her termination was a permissible patronage dismissal. In so doing, the court determined that a "Pickering" balancing analysis should be utilized. Under Pickering, in first amendment cases against a state entity a court "is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public service it performs through its employees." (391 U.S. 563, at 568.)

Further under Pickering, under certain circumstances, a public employer is permitted to take adverse employment action against an employee for engaging in speech that is normally protected by the First Amendment. For example, the patronage dismissal doctrine allows public employers to terminate certain public employees on the basis of their political beliefs and loyalties.

The Ninth Circuit Court of Appeals reversed the summary judgment on the basis that the loyalty that Nichols extended to Blanck was personal, and not political. It held that the patronage dismissal doctrine does not extend to adverse employment actions motivated by the employee's personal rather than political loyalties. Personal disagreements do not give rise to the same potential for electoral frustration that the patronage dismissal doctrine is designed to protect. (Please note that these issues pertain only to public employees and employers. Private employers, under most circumstances, cannot terminate employees on the basis of their political beliefs.)

An employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred

by Michelle T. Harrington

Carmine Scotch, a former instructor at the Art Institute of California ("AIC"), sued AIC for violation of the California Fair Employment and Housing Act ("FEHA"). Scotch alleged AIC violated the FEHA by reducing his employment to part-time status because he was HIV-positive. Scotch alleged that AIC failed to engage in the interactive process, among other claims. The trial court granted summary judgment in favor of AIC and Scotch appealed. The Court of Appeal affirmed the grant of summary judgment to Scotch's employer.

Scotch worked for AIC as a full-time instructor teaching five courses per term. AIC is accredited by the Accrediting Council for Independent Colleges and Schools ("ACICS"). ACICS standards require all faculty members who teach upper division courses to hold graduate degrees or other equivalent professional qualifications.

In preparation for ACICS's on-site accreditation visit, AIC informed its faculty, including Scotch, that AIC was concerned about its accreditation and that half of the faculty would have to obtain master's degrees. AIC requested that Scotch enroll in a master's program so that he could be assigned to upper division courses. He responded that his medical condition required him to limit his time commitments.

AIC suggested that he enroll in a three year rather than a two year program to ease his concern about the time commitments. AIC also indicated it would meet with him again to discuss this issue further. Scotch appeared satisfied with AIC's suggestion. Scotch never enrolled in a master's program. AIC did not schedule a second meeting with Scotch.

Thereafter, AIC experienced a decline in enrollment and cancelled many of its course offerings. AIC also terminated some faculty members who had not enrolled in a master's degree program and changed the status of others from full time to part time. AIC assigned lower division courses to faculty without master's degrees and changed Scotch's status to part time. Scotch resigned indicating that the reduced hours resulted in a loss of his health benefits. His lawsuit for disability discrimination followed.

The interactive process required by the FEHA is an informal process with the employee or the employee's representative, to attempt to identify a reasonable accommodation that will enable the employee to perform the job effectively. The interactive process imposes burdens on both the employer and the employee. The employee must initiate the process unless the disability and the resulting limitations are obvious. Although it is the employee's burden to initiate the process, no magic words are necessary and the obligation arises once the employer becomes aware of the need to consider an accommodation.

The employer's obligation to engage in the interactive process extends beyond the first attempt at an accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed. Both employer and employee have the obligation to keep communications open and neither has a right to impede the process. Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith.

Here, Scotch initiated the interactive process by telling AIC that he needed to avoid stress because of a medical condition. AIC responded by allowing him to finish the master's program in three years rather than two. The Court concluded that AIC should have held another meeting with Scotch to discuss further options. Although AIC did not fully engage in the interactive process, Scotch failed to show that there was a reasonable accommodation that was directed towards the limitations created by his disability. While Scotch contended that a reasonable accommodation would have been to give him priority in teaching assignments, the Court concluded that such an accommodation was not reasonable and not directed to his limitations.

The Court pointed out that in order to prevail on his claim for failure to engage in the interactive process, Scotch was required to identify a reasonable accommodation that was available during the interactive process. Because he was unable to do so, the Court reasoned that he was not damaged by AIC's failure to engage in the interactive process.

What can employers take away from this?

This case is a reminder of the importance of engaging in the interactive process with an employee who has a disability or serious medical condition. Once an employee puts you on notice of a medical condition and its resulting limitations on his ability to perform his job, you are obligated to take affirmative steps to open a dialogue to determine whether an accommodation is possible. This is true even if the employee does not specifically ask for an accommodation. The obligation arises once the employer becomes aware of the need to consider an accommodation.

"Me Too" Evidence must be considered in evaluating employer's motion for summary judgment

by Glen H. Mertens

On April 30, 2009, the California Court of Appeals issued its ruling in Johnson v. United Cerebral Palsy Foundation, 2009 WL 1154132. That ruling will make it more difficult for employers to obtain summary judgment in employment cases where the plaintiff has dredged up other employees and former employees who are willing to attest that they, too, were victims of the same type of inappropriate conduct that is the subject of the plaintiff's lawsuit.

In the Johnson case, plaintiff Johnson was working as a counselor for the defendant organization when her doctor determined that she was temporarily disabled due to her pregnancy. At the doctor's direction, Johnson took one week off from work. Upon her return to work, she was terminated. The defendant/employer argued that Johnson had been fired because she had falsified a timesheet and a billing record in an effort to collect wages that she had not earned.

The defendant/employer filed a motion for summary judgment, arguing that it was undisputed that Johnson had submitted a timesheet and billing record that did not accurately reflect her hours worked and that such dishonesty had been the reason for her discharge. Johnson opposed that motion by filing, among other things, declarations from other women who alleged that they had suffered similar misconduct as employees of the defendant. Specifically, the declarations were from ex-employees who stated that they also had been fired after becoming pregnant or that they supposedly knew people who had been fired after becoming pregnant. These declarants stated that they had been fired by the same supervisors who oversaw plaintiff Johnson's work and who were involved in the decision to terminate Johnson's employment. The former employees also stated in their declarations that they knew of occasions when other employees who had been found to be "dishonest" in some respect had not been fired by the defendant-employer, suggesting that Johnson would not have been fired for her alleged "dishonesty" had she not been pregnant.

The trial court did not consider the "me too" declarations of the former employees, finding their statements to be inadmissible. The trial court granted summary judgment in favor of the defendant-employer, finding that there was no dispute in the evidence that plaintiff Johnson had been terminated for dishonesty. Not surprisingly, Johnson appealed that summary judgment ruling.

The Court of Appeals held that the contested declarations from the former employees were admissible and that such declarations "constitute substantial circumstantial evidence which is sufficient to raise triable issues of material fact as to the reason for plaintiff's termination . . . [W]e can say as a matter of law that the 'me too' evidence presented by the plaintiff in [this] case is per se admissible under both relevance and Evidence Codes section 352 standards." As plaintiff Johnson had, according to the Court of Appeals, presented evidence from which a jury might conclude that the defendant-employer's proffered reason for the plaintiff's termination was a "pretext" designed to camouflage its "discriminatory animus" toward the pregnant plaintiff, the court concluded that there was a dispute in the evidence as to the reason for plaintiff's termination.

Under well established rules governing summary judgment motions, once the court determined that the plaintiff had introduced enough evidence to create a dispute of that nature, the trial court's order granting summary judgment in favor of the defendant-employer had to be overturned. The appellate court sent the case back to the trial court, where a full-blown trial on the merits of the plaintiff's pregnancy discrimination claim would have to be conducted in the absence of a settlement.

Employers in California should assume that former employees who have chosen to contest disciplinary action through civil lawsuits will spend a great deal of time and resources trying to unearth other employees and ex-employees who are willing to support the plaintiff's claims by declaring (and ultimately testifying) that they, too, were mistreated by the employer in the same manner as the plaintiff.

Although the Johnson case dealt only with pregnancy discrimination, the same rationale could easily be applied by a court to permit the same type of "me too" evidence in cases alleging other types of discriminatory activity and even claims based on totally different types of allegedly "intentional" misconduct (e.g., intentional failures to pay overtime, retaliation for having reported allegedly unsafe working conditions, etc.)

Although the case against a terminated plaintiff may appear to be relatively "air tight," such that the plaintiff really cannot put on much evidence challenging the "bona fide" of his or her disciplinary action, the holding in the Johnson case may permit that plaintiff to dodge the proverbial "summary judgment bullet" by presenting evidence from ex-employees who themselves may have no viable claims against the company but who may exact some measure of "revenge" against the company simply by stating under oath that they, too, were "abused" by the employer in a manner similar to that alleged by the plaintiff in the pending lawsuit.

As a practical matter, the Johnson case really should not change the way employers investigate and effect disciplinary action. All employers in California should refrain from "arbitrary" disciplinary actions that are not justified by the employee's actual misconduct, and, conversely, employers should not refrain from taking disciplinary action that is otherwise warranted simply out of a concern that the disgruntled employee may be able to enlist the help of one or more co-workers who have "me too" stories to tell.

What the case does suggest, though, is that an employer may wish to retain personnel records on employees who have been discharged or otherwise disciplined for a longer period of time than the law strictly requires, because those records may be necessary to address testimony from those employees to the effect that they were mistreated by the employer back when they were working for the company. The Johnson case all but forces the employer-defendant into the position of having to reconstruct the disciplinary actions taken against the "me too" witnesses so that it may present evidence to the jury demonstrating that those "other" employees (as well as the plaintiff) were treated fairly.

Former employee's defamation claim regarding employer's statements to EDD fails

by Vanessa S. Davila

In Dible v. Haight Ashbury Free Clinics, the California Court of Appeal rejected Leah Dible's defamation claim against her former employer Haight Ashbury Free Clinics (Clinic) for statements made by the Clinic to California's Employment Development Department (EDD) in response to Dible's claim for unemployment benefits.

Leah Dible was an employee of the Clinic who performed psychotherapy and social work, and whose duties included providing psychological counseling services to jail inmates. While working for the Clinic in this capacity, an inmate for whom she had certain responsibilities committed suicide. Dible argued that the inmate's death was due to the Clinic's managerial and institutional problems rather than her conduct in failing to prevent the suicide. The Clinic disagreed and terminated Dible's employment.

Dible filed a claim for unemployment benefits with the EDD. The Clinic contested the claim because "her negligence caused the death" of an inmate. Dible filed a lawsuit against the Clinic alleging that it wrongfully terminated her for the "false" reason that she was responsible for the inmate's suicide and further claimed that the Clinic's statements to the EDD were defamatory.

Specifically, Dible claimed that a representative from the Clinic told an EDD caseworker that she was a licensed clinician whose negligence had caused the death of an inmate. Dible also questioned the Clinic's "motive" in making its comments to the EDD, saying that the Clinic intended to silence or discredit her because she had asked about the Clinic's managerial and institutional problems which she claimed contributed to the inmate's death.

The trial court dismissed all of Dible's claims except for the defamation claim. The Clinic attacked the defamation claim by filing an anti-SLAPP (strategic lawsuits against public participation) motion, which is designed to provide special protections to a party exercising the right to free speech in regard to issues of public concern. The trial court granted the Clinic's motion, dismissing Dible's defamation claim, by finding the Clinic's alleged conduct

arose from its exercise of its right to free speech. Dible appealed and the Court of Appeal affirmed the trial court's decision.

In making its anti-SLAPP motion, the Clinic had to first show that the act about which Dible complained was taken "in furtherance of its right of petition or free speech under the United States or California Constitution in connection with a public issue." Once the court found that the Clinic made such a showing, the burden shifted to Dible to demonstrate a probability that she could prevail on the merits of her defamation claim. Dible failed to prove that she had a probability of prevailing on her defamation claim.

The court found that Dible did not suffer any damages because even if the Clinic made statements about her alleged responsibility in the inmate's death, the EDD still awarded her unemployment benefits.

The court found that the Clinic's statements to the EDD were made in the course of an "official proceeding" and that issues regarding "institutional problems" at the jail were matters of public concern therefore falling within the free speech protections of the anti-SLAPP statute. The court also found that the "motive" of the Clinic's representative in making said statements to the EDD was "irrelevant."

Dible also tried to support her defamation claim by arguing that the Clinic had told her directly that she was responsible for the inmate's death. However, the Court of Appeal held that the Clinic's statements made directly to Dible could not constitute defamation as they had not been "published" to third parties, an essential element of a defamation claim.

What can employers take away from this?

Employers would be wise to take note of the Court of Appeal's decision in *Dible* when contesting a former employee's claim for unemployment compensation from the EDD. Anti-SLAPP motions could prove to be a useful tool in dealing with expensive lawsuits stemming from an employer's statements to the EDD.

Arbitration award unforeseeable if it does not specify the remedy to be given to the prevailing employee, but this is not grounds to vacate the award

by Colleen A. Déziel

In a contractual arbitration proceeding in Mossman v. City of Oakdale, the California Court of Appeal addressed the question of whether an arbitrator's award is enforceable which directs the parties to "work out" the details of the make-whole remedy of an employee. The court held that while the arbitrator had resolved all of the issues submitted at the arbitration, the fact that the arbitrator did not specify the "make whole" remedy rendered the award unenforceable. However, the court also held that this did not mean that the award should be vacated, and instead, remanded the matter to the arbitrator to complete the award with regard to the remedy to be given to the aggrieved employee.

More specifically, the arbitrator in this matter found that the employer had violated its own policy in not providing the complaining employee with the opportunity to transition into another similar open position as opposed to falling victim to a lay-off which would render her unemployed. In so finding, the arbitrator gave the parties 30 days within which to (1) work out the details of the remedy (i.e., make the employee whole), and (2) if they were unable to do so, to submit any unresolved issues to the arbitrator for resolution. The parties did not act within the 30 day time frame.

Thereafter, the employer sought to have the award vacated arguing that the arbitrator refused to decide an issue submitted to her for resolution. The court disagreed. As noted above, the court found that the arbitrator did not fail to resolve the issues submitted to her for resolution, as the make-whole remedy granted to the employee is a common remedy found in labor law cases.

The court noted that the purpose was to return the aggrieved employee to the economic status quo that would exist had it not been for the employer's conduct, and further found that the language of the award contemplated reinstatement of the employee and the payment of lost wages and other lost benefits. The court stated that while this language did not result in an enforceable judgment, this did not necessarily mean the award itself should be vacated. The reason for this was that the issue of remedy had been decided.

What can employers take away from this?

If a matter is being determined by binding arbitration, and if the arbitrator gives the employer the opportunity to fashion the remedy by negotiating with the complaining employee, it would seem that this would be a great opportunity to attempt to minimize the damage. In this matter, the employer spent considerable fees in attempting to have the award vacated, just to have it referred right back to the arbitrator for the arbitrator to decide the appropriate remedy. The employer could have taken this opportunity to find an appropriate available position for the employee, as opposed to paying her ongoing lost wages, and to negotiate with the employee concerning past earnings.

In disability discrimination suit, California Court of Appeal rules that employers cannot rely upon employee's physician's medical certification stating that employee 'could not perform work of any kind' as a basis for employee's dismissal

by Michelle T. Harrington

The plaintiff, Nadaf-Rahrov, began working for The Neiman Marcus Group, Inc. (Neiman Marcus) as a clothes fitter in 1985. Between 1997 and 2003, she had recurrent problems with back and joint pain. Dr. Joel M. Klompus, her treating physician, informed Neiman Marcus that the plaintiff needed various accommodations, including time off work and a shortened work week, which Neiman Marcus provided.

In December 2002, Dr. Klompus informed Neiman Marcus that the plaintiff had carpal tunnel syndrome in both hands and osteoarthritis in her fingers. In November 2003, the plaintiff requested family medical leave of about one month. Dr. Klompus signed a Certification of Health Care Provider, which described her conditions as pain in multiple joints (back, ankles, shoulders and fingers). He wrote that the condition started in July 2003 and that the disability would likely extend to January 2004.

In response to the question "[I]s the employee unable to perform work of any kind?" Dr. Klompus responded "yes." When asked to list the essential duties of the job that the plaintiff was unable to perform, he wrote "all." Neiman Marcus granted the plaintiff family medical leave until December 2003.

Thereafter, Dr. Klompus extended the plaintiff's leave through March 5, 2004. All of his medical notes in support of the extensions (up to one dated February 2004) indicated that the plaintiff was "unable to work" or "unable to return to work." In a letter dated January 21, 2004, the plaintiff informed Neiman Marcus that she could not return to her fitter job due to her disability and she asked to be reassigned to another position. Dr. Klompus wrote Neiman Marcus a similar letter a few days later, confirming the plaintiff's disability and recommending she be reassigned to a position "that would not involve bending, standing or kneeling."

Neiman Marcus's human resources manager, Kelly Butler, indicated that the January 2004 letters from the plaintiff and her doctor prompted her to have multiple phone conversations with the plaintiff about her qualifications, restrictions and available positions. Specifically, Butler indicated that she understood from the plaintiff's doctor's notes and from the discussions with the plaintiff that the plaintiff was completely prohibited from performing work of any kind.

Butler further stated that she informed the plaintiff that she would explore other opportunities at Neiman Marcus as soon as the plaintiff's restrictions were modified to allow her to perform some type of work since without a release there was no point in discussing available positions where the plaintiff was not qualified for anything. The plaintiff

acknowledged that Butler told her that she should call when she was released to return to work so that Butler could look for other jobs for her and that she (plaintiff) agreed to do so.

In a letter dated February 16, 2004, Butler wrote to the plaintiff and informed plaintiff that her "FMLA approved leave is exhausted as of February 1, 2004," that the plaintiff's latest doctor's note indicates she was unable to return to work prior to March 5, 2004 and that Neiman Marcus was not able to hold her position open.

The plaintiff's doctor extended her medical leave four more times through August 16, 2004. The doctor's note dated June 28, 2004, extending her leave through August 2004, stated that the plaintiff was "unable to return to work as she is having increased pain. I am extending her disability for an additional 6 weeks. I believe she may be able to return to work on 8/16/04 but not in her previous position."

On July 14, 2004, Neiman Marcus terminated the plaintiff, who by that time had exhausted her remaining sick and vacation benefits. Neiman Marcus's human resources manager, Butler, took the position that the plaintiff did not have a release from her doctor to perform work of any kind at the time of her termination. Further, Butler stated that even with a release, she concluded that given the plaintiff's restrictions, she was not qualified to fill any open and available position within Neiman Marcus. Also, Butler contended that the plaintiff did not provide her with any reason to believe that her condition was likely to change anytime in the near future and, in fact, their conversations led Butler to believe just the opposite.

The plaintiff sued Neiman Marcus and Butler, as well as others for various claims, including disability discrimination, failure to accommodate and failure to engage in the interactive process in violation of the California Fair Employment and Housing Act (FEHA).

The trial court granted summary judgment to Neiman Marcus and Butler. It found that the undisputed facts established that the plaintiff was not able to perform the essential functions of her fitter position or any other available position at Neiman Marcus. The court further found that Neiman Marcus reasonably accommodated the plaintiff by providing six months of leave beyond the requirements of the Family Medical Leave Act and it was not required to wait indefinitely for her medical condition to improve to the point where she could perform an available job.

The Court of Appeal reversed the order granting the motions for summary judgment. The court concluded, in relevant part, that factual issues existed as to whether the plaintiff was able to perform the essential functions of an available vacant position that would not be a promotion.

In support of their contentions that the plaintiff was unable to perform any work, the defendants relied upon Dr. Klompus's medical certification in November 2003 to the effect that the plaintiff was not able to perform any work. To counter this evidence, the plaintiff presented the declaration of Dr. Klompus stating that he intended the Certification of Health Provider to indicate only that the plaintiff was unable to perform the essential functions of her job as a *fitter*, not that she was unable to perform any work at all.

Dr. Klompus further opined that he did not release the plaintiff back to work because he believed she could not perform the job of a fitter. Even though Dr. Klompus's declaration contained statements contrary to his earlier notes and medical certification, the Court of Appeal held that a factual dispute existed as to whether the plaintiff was able to perform work.

The defense also relied upon the plaintiff's own descriptions of her restrictions (no bending, standing or kneeling), which they argued demonstrates that she was unable to perform any work. The Court of Appeal found that the plaintiff's physical restrictions of no bending, standing or kneeling did not prevent her from performing any work whatsoever with or without accommodation. For example, the court indicated that she could have performed desk work with accommodations.

Lastly, the defendants relied upon Butler's professional opinion, based upon her familiarity with the job requirements of available vacant positions, that the plaintiff could not perform the essential functions of those jobs. Here, the Court found that evidence of additional jobs presented by the plaintiff that were available through November 2004 (four months after plaintiff's doctor released her back to work) was relevant because it may have

been a reasonable accommodation for Neiman Marcus to extend the plaintiff's leave for a limited time until a position became available that she could perform.

What can employers take away from this?

If you receive a request for an accommodation by an employee that seems to contradict his doctor's note or medical certification, you should let the employee know that his doctor's notes indicate he is unable to perform any work and ask him to have his doctor provide you with a description of his restrictions. Once an employee informs you of the need for accommodation, you must take affirmative steps to make reasonable accommodations to enable the employee to continue performing his job.

A non-exhaustive list of possible reasonable accommodations include making facilities accessible to and usable by disabled individuals, job restructuring, offering part-time or modified work schedules, and acquiring or modifying equipment or devices. If an employee is unable to perform the essential duties of his job, even with an accommodation, then you must attempt to reassign him to a vacant position that he is able to perform with his restrictions (which does not amount to a promotion, e.g., increased pay) and for which he is qualified. In order to determine the employee's qualification for the position, you should identify the essential duties of the proposed vacant job and discuss such duties and the employee's employment history and education with the employee.

Keep in mind that it could be a reasonable accommodation to provide the employee with minimal training on how to perform the functions of the vacant position if the employee's background and experience suggest he may be qualified for the job with such training (if it would not impose an undue burden or hardship on the employer to provide such training).

Age discrimination summary judgment overturned

by Eric A. Schneider

In DeJung v. Superior Court WL5265525, Cal.App.1 Dist., December 19, 2008, Theodore DeJung served as a full time commissioner[1] for the Sonoma County Municipal Court for 14 years. Beginning in 1996, he began to share his full time position with a retiring judge with the approval of the court's presiding judge.

That arrangement worked satisfactorily until 2004, when the plaintiff's judicial partner decided to retire. At that point, a former public defender contacted the commissioner to suggest that he be appointed to share the position after the partner retired. He approached the presiding judge in that regard only to be informed that the court's executive committee had decided not to continue splitting the full time commissioner position. DeJung responded that in that case, he would want to continue as a full time commissioner. The presiding judge replied that he would discuss it with the executive committee.

Thereafter, the presiding judge told Commissioner DeJung that "they want somebody younger, maybe in their 40's." Later in response to an inquiry from a bailiff, the presiding judge said, "Ted's [referring to the plaintiff, Theodore DeJung] a great guy, but we're looking for someone younger."

The court engaged a screening panel which reviewed 53 applications and selected 12 candidates for interviews. Commissioner DeJung was among those 12 interviewees, but he did not get the job. He then brought a complaint for age discrimination. The defendant Superior Court brought a motion for summary judgment which was granted on two grounds: (1) governmental immunity; and (2) no triable issue of fact as to the alleged age discrimination claim. DeJung appealed, and the court reversed with regard to both issues. The governmental immunity issue will not be discussed in this article.

The Superior Court had granted the motion with regard to age discrimination citing McDonnell Douglas Corp. v. Green (1973) 411 U.S. 492, which provides that when a plaintiff proffers circumstantial evidence, California courts

[1] A commissioner is a judicial officer who has not been enrobed as a judge.

apply the three stage burden shifting test established by the United States Supreme Court for trying cases of employment discrimination, including age discrimination, based on a theory of disparate treatment.

The Appellate Court however observed that California has adopted the rule that "the McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination," citing Trop v. Sony Pictures Entertainment, Inc. (2005) 129 Cal.App.4th 1133, 1144, quoting from Transworld Airlines, Inc. v. Thurston, (1985) 469 U.S. 111, 121. The court further noted that this was a case where there was a triable issue as to discriminatory animus based upon the statements attributed to the presiding judge.

What can employers take away from this?

The bottom line is that in cases where there is admissible evidence as to actual discriminatory animus, the fact that there may have been a legitimate nondiscriminatory business reason for the adverse employment action will not necessarily assure summary judgment for the defending employer.

According to the United States Supreme Court, the employer now bears burden of production and persuasion in disparate-impact claims under the ADEA

by Vanessa S. Davila

In Meacham v. Knolls Atomic Power Laboratory, aka KAPL, Inc., et al., twenty-eight former employees of a government contractor laid off as a result of an involuntary reduction in work force brought a lawsuit against their former employer alleging violations of the Age Discrimination in Employment Act (ADEA). After a jury verdict in favor of the employees, the employer (KAPL) appealed. The United States Court of Appeals for the Second Circuit affirmed. Meacham sought certiorari, noting conflicting decisions assigning the burden of persuasion on the reasonableness of the factors other than age. On petition for writ of certiorari, the United States Supreme Court vacated and remanded. On remand, the Court of Appeal vacated and remanded with instructions to enter judgment as a matter of law for the employer KAPL.

When the National Government ordered its contractor, KAPL, to reduce its work force, KAPL had its managers score their subordinates on "performance," "flexibility," and "critical skills;" these scores, along with points for years of service, were used to determine who was to be laid off. Of the thirty-one employees let go, thirty were at least 40 years of age.

Meacham, along with other laid off employees, sued KAPL asserting a disparate-impact claim under the ADEA. To show such an impact, Meacham relied on a statistical expert's testimony that results so skewed according to age could rarely occur by chance; and that the scores for "flexibility" and "criticality," over which managers had the most discretionary judgment, had the firmest statistical ties to the outcomes. Meacham alleged that KAPL "designed and implemented its workforce reduction process to eliminate older employees and that, regardless of intent, the process had a discriminatory impact on ADEA-protected employees.

The jury found for Meacham on the disparate-impact claim, and the Second Circuit initially affirmed. However, the United States Supreme Court vacated the judgment and remanded in light of its intervening decision in Smith v. City of Jackson, 544 U.S. 228, 125 S.Ct. 1536. The Second Circuit then held for KAPL, finding its prior ruling untenable because it had applied a "business necessity" standard rather than a "reasonableness" test in assessing the employer's reliance on factors other than age in the layoff decisions, and because Meacham had not carried the burden of persuasion as to the reasonableness of KAPL's non-age factors.

The City of Jackson case confirmed that an ADEA disparate-impact plaintiff must "isolat[e] and identif[y] the *specific* employment practices that are allegedly responsible for any observed statistical disparities." Smith v. City of Jackson, 544 U.S. 228, 241. A plaintiff falls short by merely alleging a disparate impact, or "point[ing] to a generalized policy that leads to such an impact." Id. It is important to note that this is not a trivial burden, and it ought to allay some of the concern that recognizing an employer's burden of persuasion on a "reasonable factors other than age" (RFOA) defense will encourage strike suits or nudge plaintiffs with marginal cases into court. "That said, there is no denying that putting employers to the work of persuading the fact finder that their choices

are reasonable makes it harder and costlier to defend than if employers merely bore the burden of production." Id. (*Emphasis Added.*)

A provision of the ADEA creates an exemption for employer actions "otherwise prohibited" by the ADEA but "based on reasonable factors other than age." The issue presented to the Supreme Court was whether an employer facing a disparate-impact claim and planning to defend on the basis of RFOA must not only produce evidence raising the defense, but also persuade the fact finder of its merit. The United States Supreme Court held that the employer must do both.

What can employers take away from this?

An employer defending a disparate-impact claim under the ADEA now bears both the burden of production and the burden of persuasion for the "reasonable factors other than age" (RFOA) affirmative defense under 29 U.S.C. § 623(f)(1). It would seem that the more clear and plain the employer's "factor other than age" is, the shorter the step for that employer from producing evidence raising the defense, to persuading the fact finder that the defense is meritorious. An employer's cost of defense could likely increase. However, it would likely be in cases where the reasonableness of the non-age factor is obscure for some reason (i.e., it may take more evidence to establish the non-age factors and more persuasion).

The nation's high court hands employers a victory reading the burden shifting requirements of Title VII claims out of the ADEA

by John A. Hugie, Law Clerk

In Gross v. FBL Financial Services, Inc. (2009) 557 U.S. ___ [No. 08-441], the plaintiff filed suit against his employer alleging that he was demoted because of his age in violation of the Age Discrimination and Employment Act (ADEA). Gross began working for FBL in 1971 and thirty years later held the position of claims administration director. In 2003, following a restructure of the organization, Gross' position was renamed claims project coordinator, and many of his former duties were transferred to a new position – claims administration manager.

Gross was 54 when the restructure took place, and most of his duties were transferred to the new position, which was taken up by someone he previously supervised. His replacement was in her early 40s. Although Gross and the new claims manager received the same compensation, he considered the reassignment a demotion and filed suit in federal court in 2004 alleging violations of the ADEA.

At trial, Gross introduced evidence that suggested his reassignment was motivated by his age. FBL argued that the new position better suited his particular skill set. The trial court gave the jury a Title VII "mixed motives" instruction. The jury was told to find for Gross if he proved (by a preponderance of the evidence) that age was a motivating factor in FBL's decision to demote him. "Motivating factor" was defined for the jury as anything that 'played a part or role in the decision.' The court instructed the jury that it must find for FBL if the evidence showed Gross would have been reassigned regardless of age. The jury found that Gross established age was a motivating factor and awarded him damages.

The Eight Circuit Court of Appeals reversed and remanded for a new trial, finding error in the jury instructions. Referring to the United States Supreme Court case of Price Waterhouse v. Hopkins (1989) 490 U.S. 228, the court held that a "mixed motives" instruction could only be provided where plaintiff introduced direct evidence that age was a 'substantial factor' in the decision. The court defined direct evidence as that which 'shows a specific link' between the discriminatory animus and the adverse employment decision. It determined that the evidence presented by Gross was circumstantial and not direct and that it was improper to instruct the jury on "mixed motives" absent direct evidence.

The United States Supreme Court, with Justice Thomas writing for a 5-4 majority, held that the language of Title VII and the ADEA are so materially different that decisions regarding Title VII were not applicable to interpreting the ADEA. The Court held that the burden shifting and "motivating factors" instruction were written into Title VII by Congress. As Congress also amended the ADEA at the same time, the fact that such provisions were not added to the ADEA was evidence of Congress' intent that the ADEA be interpreted differently than Title VII.

The Court then turned to the statutory language of the ADEA interpreting the phrase "because of…age" to mean that age had to be the "but for" cause of the adverse employment action. Justice Thomas insists that for a plaintiff to succeed on an ADEA claim for disparate treatment, the plaintiff must prove (by a preponderance of the evidence) that age had a determinative influence in the challenged employment decision.

For Gross, it meant that he would need to show either through direct or circumstantial evidence that age was not merely a motivating factor, but was the reason for his reassignment (i.e. but for the fact that he was 54, he would not have been reassigned to a claims project coordinator position).

What can employers take away from this?

For California employers where age discrimination claims under state law are much more employee friendly, this decision has little impact. However, in cases where the employee files under the ADEA, this decision means that employees will have to prove that it is 'more likely than not' that age was the reason for the adverse employment action. Employers will be free of the burden shifting scheme of Title VII claims and need to present evidence of a non age-based reason for the employment decision.

An HR Perspective

When you have to offer constructive criticism…

by Rick B. Friedman, Administrator, Anderson, McPharlin & Conners LLP

Wouldn't it be nice if everyone we hire was the perfect employee? That isn't always the case and HR Managers frequently find counseling sessions are necessary. Following is a suggestion on how to handle these type of sessions.

WHERE: It is very tempting to snap, "Get back to work," when you spot an employee visiting in a hallway or on a personal call. But that could be very uncomfortable for the employee and others who are within earshot. It does not matter that you are right and they are the ones goofing off. Count to ten, take a breath, lose the anger. That is when to call the employee into your office and – privately – counsel with words like "I was disappointed this morning when I saw you on a personal call when you should have been working. Please remember to limit personal conversations to breaks and lunch hours."

HOW: Many think a counseling session must start with kind words such as, "you are doing a good job." Then begin addressing the problem(s) with "But…" First a compliment, then criticism is not advisable. Your employee stops listening after "you are doing a good job" and your next points are minimized. Also, if you start with a compliment, what happens when you really WANT to offer praise? Your employee braces and waits for the criticism that usually follows.

BE BRUTALLY FRANK. If a problem is severe enough, do not hedge an unpleasant conversation with vague words. Clearly identify the problem(s) and what the next step might be. Instead of: "I wish you could work a little faster." Make the point: "Your productivity is below my expectations. If I do not see improvement within the next 30 days, you will not be able to continue working here." Use concrete examples: "You produced 50 widgets yesterday. You should be able to produce a minimum of 70 per day."

END on a positive note. "I just wanted to let you know that I see this as a problem that you can solve, and I am confident I will not have to discuss this with you again."

DOCUMENT, DOCUMENT, DOCUMENT. Do not wait until you have spoken to the employee three or four times before putting it in writing. Even if your company has a policy of requiring a number of *verbal* warnings before a *written* warning is generated, drop a small memo into the employee's personnel file with each conversation or even an observation (i.e, "I walked by ____'s desk this morning and noticed that he/she was doing personal work. I am hopeful this was a one-time event and will not say anything to _____ at this time.") The employee does not have to see it or sign off on it. If a time comes when you must consider disciplinary action, you will be glad you have some notes in the file to help you recreate a chronology of escalating performance issues.

FOLLOW-UP. If you have stated you expect a change within a certain period, create a reminder for yourself to check at the end of that period and meet with the employee again. With any luck, you will be able to say, "We spoke 30-days ago, and I see you took my comments to heart and have improved. Keep up the good work!" If performance has not improved, at least the employee will not be totally surprised when you state: "I did not see enough improvement to allow you to continue working here…"

Have a question?

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

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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