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Labor & Employment Briefing

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

A LITTLE HARASSMENT DOES NOT A HOSTILE WORK ENVIRONMENT MAKE

by Michelle T. Harrington

In *Brennan v. Townsend & O'Leary* (2011) 199 Cal.App.4th 1336, the plaintiff Stephanie Brennan worked for the defendant Townsend & O'Leary Enterprises, Inc., an advertising agency, as an account supervisor and vice president. In August 2004, Scott Montgomery, the agency's executive director, sent an email which was forwarded to Brennan. The email referred to an unnamed employee as the "big-titted, mindless one." Brennan correctly understood that the email was referring to her. She complained that she found the email offensive. She then met with her supervisor and Steve O'Leary who apologized to her about the email and showed her a letter of reprimand signed by Montgomery.

In the fall of 2004, Brennan informed O'Leary that she had learned of other examples of sexual harassment through speaking with some employees and implied that she would leave the agency. O'Leary asked her to stay and told her that he took harassment complaints seriously. The agency then hired an investigator to investigate sexual harassment. Brennan refused to speak with the investigator, resigned, and then sued the agency for sexual harassment.

Brennan testified at trial that she had heard of, but did not witness, derogatory comments made about female clients. She also testified that O'Leary questioned her about her sex life, which she did not find offensive. She further testified about sexually explicit conversations at meetings, including one where O'Leary asked an employee to wear a veil that had a plastic penis attached to it while recounting the events of the employee's bachelorette party. The jury found that Brennan was subjected to sexual harassment and awarded her $250,000 in damages. The agency and Montgomery filed a motion for judgment in their favor notwithstanding the verdict, which the trial court granted. The Court of Appeal affirmed the trial court's ruling finding that, aside from the email, Brennan was never subjected to sexual harassment as the conduct was not directed at her personally.

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WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

This case is a significant victory for employers because it reiterates that isolated incidents of sophomoric sexual behavior do not necessarily constitute a hostile work environment. Keep in mind, however, that the employer in this case promptly addressed the complaint of sexual harassment, reprimanded the offender in writing, and informed the complainant of its actions. Employers can reduce the risk of harassment claims by having and enforcing written, effective anti-harassment policies, training their employees on harassment prevention and promptly responding to complaints.

BE WARY OF ALTER EGO CLAIMS IN EMPLOYMENT LITIGATION

by Vanessa S. Davila

If only an employer may be liable for discrimination under the California Fair Employment and Housing Act (FEHA), then why is it we so often see plaintiffs suing the individual sole shareholder of the corporate employer as well as the corporation itself? It is well established that *Government Code* §12940 limits liability for discrimination to the employer, not to management personnel. However, an employee may still try to get around this obstacle by claiming that the sole shareholder (the "boss") is truly the "employer" under the statutes and, thus, the boss should also be held individually liable for the wrongdoing of the corporation.

In *Leek v. Cooper* (2011) 194 Cal.App.4th 399, the plaintiffs unsuccessfully made this very argument. They sued their former employer and its sole shareholder for, among other claims, age discrimination. The plaintiffs argued that Jay Cooper, the sole shareholder of their corporate employer, Auburn Honda ("Corporation"), was the alter ego of the Corporation and should have co-extensive liability for their discrimination claims. They pointed to evidence that Cooper was the president of the Corporation, that there were no other directors of the Corporation, that Cooper "individually" fired the plaintiffs, that he "individually" made all the policies, procedures and management decisions for the Corporation, that he owned the land on which the dealership was located and that he raised the rent as he saw fit. In their Complaint, the plaintiffs alleged an agency relationship between Cooper and the Corporation through boilerplate allegations, namely, that all defendants were "the agents, servants and employees of their co-defendants, and in doing the things hereinafter alleged were acting within the scope and authority as such agents, servants and employees and with the permission and consent of their co-defendants, and that all of said acts of each of the defendants were authorized by or ratified by their co-defendants." The trial court granted Cooper's motion for summary judgment and ruled that individual managers or supervisors could not be held liable for discrimination under the FEHA, that the plaintiffs had not alleged alter ego liability in their complaint (the plaintiffs' request to amend their complaint was denied) and that the evidence proffered to that effect was unavailing. The plaintiffs appealed.

The appellate court affirmed the trial court's grant of summary judgment in favor of Cooper. In so holding, the Court's analysis turned to whether the plaintiffs' Complaint adequately alleged that Cooper was liable to them on an alter ego theory so as to give him notice that such a theory of liability was being pursued against him. It concluded it did not. Fairness dictates that a complaint give the defendant sufficient notice of the cause of action stated to be able to prepare the case. It is important to note that the *Leek* Court distinguished this matter from others that allowed plaintiffs to pursue an alter ego theory at trial and held that when the court is asked to take some action upon an alter ego theory at the pleading stage, more is required than was pleaded here by the plaintiffs. Here, even though the case arose on a motion for summary judgment, it is in fact a pleading case because the pleadings delimit the scope of the issues in a motion for summary judgment, and the question on appeal from this judgment was whether the alter ego theory was sufficiently pleaded to put it at issue for purposes of said motion.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

To recover on an alter ego theory, a plaintiff need not use the words "alter ego," but must allege sufficient facts to show a unity of interest and ownership, and an unjust result if the corporation is treated as the sole actor. An allegation that a person owns all of the corporate stock and makes all of the management decisions is insufficient to cause the court to disregard the corporate entity. Therefore, if the sole shareholder is sued along with the corporate employer on a discrimination claim, a demurrer to the complaint may be a useful tool in extricating the individual defendant from the case, while still in the early stages, provided that the plaintiff is relying on boilerplate allegations,

similar to those alleged by the plaintiffs in *Leek,* to establish an agency relationship between the individual and the corporate employer.

NO LIABILITY FOR RELIGIOUS SCHOOL TERMINATING TEACHER FOR CONDUCT INCONSISTENT WITH CHURCH PRINCIPLES

by Eric A. Schneider

Sara Henry taught pre-school children at a school that was part of the Red Hill Evangelical Lutheran Church of Tustin from 2002 until her termination in 2009. She was married at the time of her hire, but later divorced, had a child with her boyfriend, and was raising the child while living with her boyfriend. When she said that she did not have any plans to marry the boyfriend or live apart from him the Church fired her on the basis that such conduct was inconsistent with the Church's religious tenets.

Henry filed suit presenting two causes of action, one for violation of the Fair Employment and Housing Act relative to her marital status, and a second claim for wrongful termination in violation of public policy as expressed in FEHA, Title VII, and the State Constitution.

The trial was bifurcated with the Church's defenses heard first. Henry was the only witness. She acknowledged "her living arrangement was 'contrary to the religious and moral beliefs of the Church.'"

The trial court found for the Church and entered judgment in its favor.

On appeal, the Church asserted that it was not an "employer" because "'employer' does not include a religious association or corporation not organized for private profit. (Government Code Section 12926(d)." As a consequence, the court upheld the trial court decision for the Church on the FEHA cause of action.

The court then noted that although FEHA did not provide a remedy, a discharged employee could still recover in tort for wrongful termination in violation of public policy. In that regard, it cited *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 942:

> To support a claim for wrongful termination in violation of public policy, a policy must be 'delineated in either constitution or statutory provisions'; it must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual; it must have been well established 'at the time of the discharge'; and must be 'fundamental' and 'substantial.'

In this case, the public policy upon which Henry relied was FEHA. And since the claim under FEHA was precluded because the defendant was specifically exempted from the definition of employer, the common law claim failed as well on that basis.

Henry had also grounded her claim on Title VII, but the religious exemption under that statute has been interpreted to include decisions to terminate an employee whose conduct or religious beliefs were inconsistent with those of its employer. (*Kennedy v. St. Joseph's Ministries, Inc.* (4th Cir. 2011) 657 F.3d 189.)

Finally, Henry had asserted that her termination was violative of the California Constitution on the basis that a person may not be disqualified from entering or pursuing a business, profession, vocation or employment because of sex. In that regard, the court applied the "ministerial exception" relying on *Higgins v. Maher* (1989) 210 Cal.App.3d 1168, 1175:

> . . . "secular courts will not attempt to right wrongs related to the hiring, firing, discipline or administration of clergy. Implicit in this statement of the rule is the acknowledgment that such wrongs may exist, that they may be severe, and that the administration of the church itself may be inadequate to provide a remedy. The preservation of the free exercise of religion is deemed so important a principle as to overshadow the inequities, which may result from its liberal application. In our society, jealous as it is of separation of church and state, one who enters the clergy forfeits the protection of the civil authorities in terms of job rights."

In its discussion, the court pointed out that the Church had not fired Henry for having her child out of wedlock, but did so because she had professed that she would continue to live with the boyfriend, and that she had no plans to marry him. Inasmuch as she served as a role model, the Church simply could not abide that. *Sara Henry v. Red Hill Evangelical Lutheran Church of Tustin* (2011) 201 Cal.App.4th 1041.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

State and federal courts will enforce exceptions to anti-discrimination statutes to the extent that religious institutions may compel their personnel to comply with the religious principles.

SCOPE OF "EXEMPT" EMPLOYEES UNDER CA LABOR CODE AND FLSA MAY NOT BE AS BROAD AS YOU THINK

by Brian L. Bradford

Sullivan v. Oracle Corp. (2011) 662 F3d 1265 involves an employer, a large software company, which employed hundreds of workers to train Oracle customers in the use of its software. For several years, Oracle classified the workers as teachers who were not entitled to compensation for overtime work under either the federal Fair Labor Standards Act ("FLSA") or California's Labor Code ("Labor Code"). Three nonresidents brought a class action against Oracle in California seeking damages under California law for failure to pay overtime. Likely in response to the class action lawsuit filed in 2003, Oracle reclassified its California-based instructors and began to pay overtime wages, and eventually expanded this reclassification to all instructors, regardless of where they performed work. Oracle did not, however, retroactively provide overtime payments for the work performed prior to the reclassification. The class action suit eventually settled, although certain claims brought under California law "for periods of time they may have worked in the state of California when they were not a resident of the State" were excepted from the settlement.

The plaintiffs brought three claims. The first claim alleged a violation of the Labor Code for failure to pay overtime for work performed in California by instructors domiciled in other states. The second claim alleged a violation of California's Unfair Competition Law, and was predicated on the violations of the Labor Code alleged in the first claim. The third claim also alleged violations of the Unfair Competition law, but based on violations of the FLSA for failure to pay overtime for work performed throughout the United States. The district court granted summary judgment to Oracle for all three claims. The district court held that California's Labor Code and the Unfair Competition Law did not apply to nonresidents who work primarily in other states. The district court also held that the Unfair Competition Law did not apply to work performed outside California for which payment was less than that required by the FLSA.

The Ninth Circuit reversed the district court's ruling on the first two claims, but affirmed the ruling on the third claim. The parties collectively sought a rehearing on all claims. The Ninth Circuit granted rehearing, and certified the questions of law for consideration by the California Supreme Court. On December 13, 2011, the Ninth Circuit issued an opinion that conformed with the California Supreme Court rulings.

The Ninth Circuit recognized California Supreme Court's ruling that the Labor Code and the Unfair Competition Law does apply to overtime based work performed in California for a California-based employer by out-of-state plaintiffs, such that overtime pay is required for work in excess of eight hours per day or in excess of forty hours per week.

The Ninth Circuit further recognized the California Supreme Court's ruling that Unfair Competition Law claims deriving from FLSA violations do not apply to overtime work performed outside California for a California-based employer by out-of-state plaintiffs.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Employers must be careful when assigning classifications of employees for the purposes of compliance with the requirements of the California Labor Code and Federal Labor Standards Act. Employers should consult employment counsel prior to making classifications or reclassifications of employees to ensure they abide by state and federal wage and hour law requirements.

NO INDIVIDUAL LIABILITY FOR REFUSING TO RETURN VETERAN TO WORK

by Colleen A. Déziel

In a case of first impression, a California appellate court has held that plaintiffs cannot hold supervisors personally liable for discrimination under California's Military and Veterans Code Section 394. In *Haligowski v. Pantuso* 2011 DJDAR 16497 the plaintiff, a Lieutenant in the Navy was called to active duty. When he returned from his six month deployment in Iraq and asked for his job back with Safway Services, his immediate supervisor told him he was terminated. The plaintiff sued not only his employer, but the supervisor as well. The trial judge overruled the supervisor's demurrer wherein the supervisor argued that he could not be held liable for the personnel decision he made while employed by Safway Services. The supervisor filed a writ and the appellate court granted it and agreed with the supervisor.

In coming to its decision, the appellate court compared this statute to the employment discrimination statute under the California Fair Employment and Housing Act since it contains similar language and embodies similar goals. This was despite the fact that the actual wording of Section 394 seemed to unambiguously reflect that an individual could be personally liable (i.e. "No *person* shall discriminate against any officer, warrant officer…," and "[n]o member of the military forces shall be prejudiced or injured by any *person, employer, or officer or agent* of any corporation, company, or firm…." (emphasis added.)) Essentially, the court explained that it believed the use of the words "person" and "agent" was intended only to ensure that employers would be held liable if their supervisory employees took actions later found discriminatory, and that employers could not avoid liability by arguing that a supervisor failed to follow instructions or deviated from the employer's policy.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

At a time when many of our military men and women will be returning home from war and seeking return to their former jobs, it behooves employers to ensure that they take all steps necessary to ensure that this transition occurs, and that all supervisors and managers are aware of their obligations in this regard. While a supervisor or manager cannot be held personally liable for refusing to return one of our military to his/her former position, the employer certainly will be held accountable for its managers decisions.

WAGE AND HOUR CASE FAVORABLE TO EMPLOYERS

by Eric A. Schneider

Aleman v. AirTouch Cellular (2011) 202 Cal.App.4th 117 involves the wage and hour claims of several AirTouch employees.

Daniel Krofta presented claims for "reporting time pay" and "split shift pay." The trial court granted summary judgment against him as to both.

With regard to reporting time pay, Krofta and other employees had been called upon to attend occasional work related meetings. The meetings would be held prior to the store opening and would last an hour to an hour and a half. The meetings were scheduled in advance and listed on the employees work schedules. Krofta acknowledged that he received payment for all hours reflected on his timesheets, but he contended that he was owed additional compensation as reporting time pay for five instances where he worked less than four hours.

The Second District Court of Appeal interpreted a portion of Industrial Welfare Commission (IWC) Wage Order No. 4 which stated:

> Each work day an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled days work, but in no event for less than two (2) hours nor for more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

Krofta admitted that the meetings that he was required to attend were scheduled, and that he was never sent home from a scheduled period of work before he had worked at least half of the scheduled time. He contended though that regardless of whether the meetings were scheduled or whether he worked more than half of his schedule, the employer was required to pay no less than two hours of wages. AirTouch disagreed, arguing that so long as the meetings were scheduled and he was furnished work for and was paid for at least half the scheduled time, no reporting time was required, even for meetings that lasted less than two hours.

The court agreed with AirTouch, reasoning as follows:

> Krofta's interpretation of Subdivision 5(A)–that "in no event shall an employer pay an employee for less than two hours or work when [the employee] is required to report"–improperly dispenses with a significant portion of the rule. If the entirety of Subdivision 5(A) read "each workday an employee is required to report for work and does report, . . . the employee shall be paid . . . in no event for less than two (2) hours . . ." then Krofta's interpretation would be correct. But this is not how the provision reads. The right to at least two hours of wages is conditional–it is dependent on the antecedent that an employee "is not put to work or is furnished less than half said employee's usual or scheduled days of work.". . . A reading that disregards this condition would render words of the provision meaningless, a result prohibited by the Rules of Statutory Construction . . . Every time Krofta was scheduled to report to work (whether there were a meeting or otherwise), he was furnished at least half the scheduled day's work. He was therefore entitled to receive wages compensating him for the actual time worked, but was owed reporting time pay.

The court next turned to the "split shift" compensation claim. Wage Order 4 defines a "split shift" as "a work schedule, which is interpreted by non-paid non-working period established by the employer, other than bonafide rest or meal period." Wage Order 4 further provides "When an employee works a split shift, one (1) hours pay at the minimum wage shall be paid in addition to the minimum wage for that work day . . ."

The parties were in agreement that on five occasions Krofta worked a short shift in the morning followed by a longer shift later the same day, thus fulfilling the definition of a "split shift." The issue then was whether Krofta was entitled to further compensation in addition to his regular wages.

AirTouch contended that he was not entitled to the additional one hour of pay because each time Krofta worked a split shift, he was paid a total amount greater than the minimum wage for all hours worked plus an additional hour.

The appellate court thereupon calculated what a minimum wage worker would have earned, determining that Krofta's pay at $10.58 per hour exceeded what a minimum wage earner (minimum wage was then $6.75) would have earned for working eight hours plus one additional hour. Since Krofta earned more than that, he was not entitled to the additional one hour of pay.

Within the same case, Mary Katz sought to present claims even though she had signed a release agreement wherein she agreed to release all claims, including wage claims, in exchange for the right to exercise long term incentive awards resulting in an payment to her of $25,796.28. The Court of Appeal affirmed the lower court granting of summary judgment against her on the basis that because her split shift and reporting time pay was disputed by the employer, there was a real dispute such that the settlement agreement was enforceable.

This case however did not entail a total victory for AirTouch. The trial court had awarded significant attorneys fees in favor of AirTouch and against Krofta ($146,000) and Katz ($140,000). On appeal, Krofta and Katz claimed that the court had erred by finding that their actions are governed by Labor Code Section 218.5 and argued instead that the trial court should have applied Labor Code Section 1194. The appellate court reversed and applied Section 1194 (which allows for fees only to plaintiffs) because 1194 embodies a clear public policy of enforcing California's minimum wage and overtime laws for the protection of workers.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

While California wage and hour laws are generally interpreted in a manner favoring employees, the appellate courts will not allow over-reaching when it strains the language of the applicable statutes.

"SIMILARLY SITUATED" DOES NOT REQUIRE IDENTICAL CONDUCT TO SUPPORT FINDING OF PRETEXT VIOLATIVE OF LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS ACT

by Brian L. Bradford

In *City of North Las Vegas v. EMRB* (2011) 261 P3D 1071, the City of North Las Vegas and the North Las Vegas Police Department appealed a trial court's denial of judicial review of an Employee-Management Relations Board's finding of the Appellants' violation of prohibited labor practices under NRS Chapter 288. Eric Spannbauer, a law enforcement officer for the North Las Vegas Police Department, filed a prohibited labor practices claim, alleging that he was forced to resign in response to misconduct while, five months later, a similarly situated female only received a two-week suspension. Spannbauer asserted, and the EMRB eventually found, that his forced resignation was discriminatory on the basis of sex, in violation of NRS 288.270. The EMRB ordered that the City and Department reinstate Spannbauer to his position of paid administrative leave pending a predisciplinary hearing.

On appeal, the City and police department argued that the EMRB lacked jurisdiction to hear the dispute because Spannberger filed the complaint more than six months after any possible adverse employment action. The Nevada Supreme Court held that the six month filing period acted as a statute of limitations, and was subject to equitable tolling when appropriate. The Court affirmed the EMRB's finding that tolling the statutue of limitations was appropriate because Spannberger filed a claim two months after learning that a similarly situated female officer received more favorable treatment by her employer. The disparity did not occur until five months after Spannbauer's compelled resignation.

With regard to the merits, the Nevada Supreme Court addressed what consitutes "similarly situated" for the purposes of establishing a prima facie claim of unlawful discrimination. The Court adopted an analytical framework that examined the following factors: 1) whether the employees were subject to the same performance evaluation standards; 2) whether the employees engaged in comparable conduct; 3) whether the employees dealt with the same supervisor; 4) whether the employees were subject to the same disciplinary standards; and 5) whether the employees had comparable experience, education and qualifications, if the employer took these factors into account in making its decision.

Based on an examination of these factors, the Court held that the EMRB did not abuse its discretion in finding that Spannbauer established a prima facie case of discrimination based on gender. The Court noted that both Spannbauer and the female employee were involved in allegations of unprofessional conduct. Both employees were subject to an 18-month probationary period and were under the supervision of the same person. Both officers were probationary employees when their misconduct occurred, but received their discipline once the probationary period expired. Finally, the Court noted that Spannbauer was convinced to resign under the threat that he would be evaluated at a disciplinary hearing as a probationary employee, while the female employee was never considered a probationary employee while her conduct was under consideration for discipline.

The City and Department never proffered a legitimate, non-discriminatory reason for the differential treatment, which resulted in a finding of violation of NRS 288,270(1).

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Whether public or private, employers should take all reasonable steps to ensure that its policies are enforced as consistently as possible. It is not sufficient to provide equal discipline for identical breaches of policy: employers must apply discipline consistently across conduct that is similar in nature and severity. Human resources managers must take an active role in monitoring responses to incidents involving potential misconduct or breaches of policy, and ensure that managers are sufficiently trained to be aware of the response to incidents by other supervisors within the organization to ensure as much continuity as possible. Failure to ensure such continuity will expose the employer to claims of discrimination even when a protected class was not part of any consideration for a disparity in treatment.

EMPLOYEE ALLOWED TO PROCEED WITH AGE DISCRIMINATION CLAIM WHERE EMPLOYER IS SHOWN TO HAVE DEVIATED FROM ITS NORMAL DISCIPLINARY PROCEDURES AND TREATED YOUNGER, SIMILARLY SITUATED EMPLOYEES MORE FAVORABLY

by Vanessa S. Davila

In *Christine Earl v. Nielsen Media Research, Inc.* (2011 DJDAR 14554), Christine Earl was a recruiter for Nielsen Media Research for more than a dozen years before her employment was terminated in January 2007. Earl was 59 years old. In the months before and after Earl's termination, Nielsen hired five new recruiters (four in their 20's and one in his early 30's) for Earl's region. One of the new recruiters filled the position vacated by Earl. Nielsen paid the newly hired recruiters a salary less than half Earl's salary.

At the district court level, Nielsen pointed to a number of policy violations committed by Earl during her employment as its reason for terminating her employment. When Nielsen moved for summary judgment, the district court found that Earl had established a *prima facie* case of age discrimination under the Fair Employment and Housing Act (e.g., she was over 40 and thus a member of a protected class; she suffered an adverse employment action; she received a satisfactory performance evaluation only months before her termination; and she lost her job to a substantially younger employee), but found that Earl had failed to produce sufficient evidence to allow a reasonable jury to conclude that Nielsen's proffered nondiscriminatory reason for her termination was pretextual. Earl appealed.

The Court of Appeals found that Earl had, in fact, produced enough circumstantial evidence by showing "specific" and "substantial" facts to create a triable issue of pretext. Earl had cited to a number of instances where younger, similarly situated employees with similar violations had received less severe disciplinary actions and, in one instance no disciplinary action whatsoever, as opposed to Earl having been terminated. In addition, Earl produced facts showing that in her particular case, Nielsen had deviated from its normal disciplinary policies in that she was terminated despite her never having received a PIP (Performance Improvement Plan) which Nielsen typically issued to employees on the verge of termination advising them that failure to meet expectations "may result in further disciplinary action up to and including termination." In light of this, the appellate court concluded that Earl had produced sufficient circumstantial evidence so that a reasonable jury could find that Nielsen's proffered nondiscriminatory reason for her termination was pretextual and reversed the district court's grant of Nielsen's summary judgment on Earl's age discrimination and wrongful termination claims.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

This case clearly demonstrates that employers must be diligent in ensuring their disciplinary procedures are uniformly applied to all of their employees -- especially those who are similarly situated; and that all disciplinary actions are documented in the employee's personnel file. Employees are similarly situated when they have similar jobs and display similar conduct. Any deviation from an employer's usual and customary disciplinary policies may later be used to support a disgruntled employee's discrimination claim against the employer should it take an adverse employment action against the employee. An employer must be careful to avoid giving the appearance that other similarly situated employees who engaged in similar violations were treated more favorably or less harshly.

POOR JUDGMENT BY STORE MANAGERS COST AUTOZONE DEARLY

by Eric A. Schneider

Fuentes v. AutoZone, Inc. (2011) 200 Cal.App.4th 1221 presents two key issues which frequently arise out of sexual harassment cases:

1. Did the conduct found by the jury to have occurred constitute severe and pervasive sexual harassment? and

2. Did the trial court abuse it discretion in its attorney fee award?

In *Fuentes*, The Second District Court of Appeals answered "yes" to the first question and "no" to the second and affirmed the judgment.

Marcella Fuentes was a customer service representative (cashier) at an AutoZone store. She claimed that the acting store manager (Garcia) and one of the parts sales managers (Carrillo) engaged in a pattern of practice of sexual harassment. In that regard she pointed to examples of (1) her being requested to turn around to show her posterior to regular customers; (2) one of the managers noting a blister on her lip and attributing it to sexually communicated Herpes; (3) one of the managers making comments about Fuentes having had sex with store personnel; and (4) one of the managers inviting her (and others) to go to a strip club with him and showing her a magazine depicting women in bikinis and asking her why she did not work in a strip club or pose for a magazine to make more money.

AutoZone argued that it was "inherently improbable" that there had been sexual harassment that was severe and pervasive enough to be sufficient to create a hostile workplace because the witnesses described the various incidents differently and there was some discrepancy in dates.

The appellate court rejected that argument on the basis that "doubts about the credibility of [an] in-court witness should be left for the jury's resolution" citing *People v. Cudjo* (1993) 6 Cal.4th 585, 609 and other cases. Further, the court found that "the harassment suffered by Fuentes was both pervasive and severe."

Fuentes counsel sought by way of fee application $1,892,660 based upon 2006.93 hours at rates ranging from $395 per hour to $675 per hour depending on which fee the five attorneys involved performed the work.

In its opposition, AutoZone referenced an unpublished appellate opinion with respect to a fee application by the same plaintiff lawyers in an unrelated lawsuit. The trial court declined to consider any awards made by other judges involving the same plaintiff law firm, finding that such rulings have no precedential authority and were not binding in the trial court of this matter.

AutoZone's counsel did not suggest what a reasonable fee would be other than relying upon the unrelated unpublished opinion that the court had refused to consider stating that the appropriate hourly rates were either $315 or $425 per hour, depending upon the particular attorney.

The court analyzed the plaintiff billings and determined that about 400 hours were duplicative and approved 1593 hours. It multiplied that sum by the $425 an hour rate it deemed reasonable for a total of $667,025 and then declined to apply a multiplier.

The Court of Appeal found the trial court's analysis to be reasonable and not an abuse of discretion and on that basis affirmed the fee award.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

The plaintiff was awarded $160,000 in damages plus costs of $23,898.76 in addition to the $667,025 in attorney fees. The total was a shade over $860,000. That, of course, did not include fees paid by the defendant to its own counsel.

While we do not have the benefit of knowing what negotiations took place during the course of the litigation (which also included a prior appeal where the Court of Appeal reversed a summary judgment in favor of the defendant), this case currently demonstrates the significant downside to litigating matters of this nature to conclusion particularly where, as here, the conduct of the managers (as concluded by the jury) appears to have been outrageous, and they had been discharged. It would seem likely that the total outlay of over $1 million grossly exceeded what the matter could have been resolved for by way of mediation. It, of course, is always easier to reach these conclusions in hindsight.

CALIFORNIA WHISTLEBLOWER STATUTE, LABOR CODE SECTION 1102.5, DOES NOT REQUIRE THE PLAINTIFF TO PROVE THAT HIS/HER DISCLOSURE WAS FOR THE PUBLIC GOOD

by Colleen A. Déziel

In *Mize-Kurzman v. Marin Community College District* (2012) 202 Cal.App.4th 832, the California Courts of Appeal decided the issue of whether a plaintiff under Labor Code §1102.5, the California whistleblower statute, must prove that his or her disclosure was for the public good, as opposed to for personal reasons. The federally based whistleblower statute has such a requirement.

In *Mize-Kurzman*, the plaintiff, an administrator for the college district, made four complaints to her supervisor over the course of approximately seven months (between February and August of 2006) concerning various district policies that she believed were unlawful. She complained that (1) the district's hiring process had been compromised when a job appeared to have been promised to someone not recommended by the hiring committee (April of 2006); (2) one of the district's scholarship programs was illegal in that certain scholarships derived from public funds were being awarded to students based solely upon their ethnicity or national origin (April 2006); (3) the district was allowing certain students to register when they owed the district various fees (July and August of 2006); and (4) the district was requiring certain students to provide their citizenship status (February 2006).

Before making the above complaints, the plaintiff, without authority from her supervisor, had sought advice from several of the college's legal counsel. The legal fees were incurred by the college. Given the district's rising legal fees, at various times between April and October of 2006 the plaintiff was instructed by her supervisor to stop seeking legal counsel on behalf of the district without authority. She was also instructed to stop circulating questions and issues regarding the legality of certain district policies on the official community college list-server. The plaintiff was reprimanded for ignoring these directives.

During this same time frame, in July of 2006, the district engaged in some reorganization of the plaintiff's position which resulted in the plaintiff's title changing and a significant number of her duties being taken away. Then, in March of 2007 the district released the plaintiff from her administrative assignment and placed her on immediate paid administrative leave. Ultimately, the plaintiff was reassigned as a counselor, as opposed to being terminated, given her tenure rights. This was a significant step down from her previous administrative position. The plaintiff sued the district for, among other claims, retaliation in violation of Labor Code §1102.5.

In a nutshell, Labor Code §1102.5 provides that an employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

At trial, a jury instruction was given which essentially instructed the jury that the plaintiff was required to prove that her disclosures were for the public good and not for personal reasons. In concluding that this instruction contained a misstatement of law, the appellate court reasoned that the motivation of the employee in bringing a complaint was irrelevant as to whether it was a protected disclosure. The appellate court noted that there was nothing within the statute that required such motivation be considered. The court also noted that the legislative history emphasized the intent of Congress to read the statute broadly and to stress that any disclosure is protected if it meets the requisite reasonable belief test and is not required to be kept confidential.

Bottom line, what was important to the determination was whether the nature of the communication was such that the employee conveyed a reasonable belief that there had been a violation of state or federal law. Thus, even though only internal personnel matters may have been implicated, the fact that the plaintiff had a reasonable belief that a law had been violated was sufficient.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Even when an employee on thin ice makes a complaint that seems entirely motivated by a desire to avoid some sort of adverse employment action being taken against him or her (i.e., trying to avoid a termination or demotion), it is good practice for the employer to be cautious and reflective in its decision regarding that employee's continued employment. A judge or jury cannot consider, and cannot even hear evidence of the employee's true motivation in making the complaint. And, if an employer has not properly documented the employee's troubled history, the judge or jury is left with only the employer's word that the termination, or other adverse employment action, was not based on the employee's whistleblower activities. (This is yet another reason employers need to ensure that they are properly documenting employee policy violations.)

IN NEVADA, DREDGE DEFERENCE MAY NOT APPLY OUTSIDE OF PRISON CONTEXT

by Brian L. Bradford

In *Richardson v. Nevada Department of Transportation*, the plaintiff appealed a district court order granting a petition for judicial review in an administrative law and state employment action in favor of the Nevada Department of Transportation ("NDOT"). Richardson was terminated from his employment as a pilot with NDOT after failing to timely report an engine overspeed incident in one of Nevada's state planes. Richardson's failure to report the speeding incident violated several guidelines, including the Nevada Administrative Code, NDOT policies and Federal Aviation Administration ("FAA") regulations.

Richardson originally appealed the termination and a hearing officer reversed the termination. Although the hearing officer found that the failure to report demonstrated lack of judgment and warranted disciplined, NDOT should have applied the principles of progressive discipline. Accordingly, the hearing officer reinstated Richardson by recommending demotion, and later clarified that the demotion must be within the pilot class, after Richardson was forced to perform non-piloting duties.

NDOT sought judicial review, and the district court reversed the decision of the administrative hearing officer. The district court found that the hearing officer erred in failing to defer to NDOT's disciplinary decision and not recognizing and applying additional deference pursuant to *Dredge v. State ex rel. Department of Prisons*, 105 Nev. 39, 769 P.2d 56 (1989). In *Dredge*, the Nevada Supreme Court held that a decision by the Nevada Department of Collections to dismiss an employee is entitled to defenses "whenever security concerns are implicated in an employee's termination." Richardson appealed the district court decision, arguing that NDOT is not entitled to this deference.

On November 15, 2011, the Nevada Supreme Court issued an order reversing the district court order. The Court questioned whether a *Dredge* deference can apply to this case, as *Dredge* concerned a termination in the prison context. Assuming such deference is available, the Court held that NDOT failed to establish that serious threat to individual security or safety *Dredge* demands. Specifically, the Court noted NDOT's failure to provide expert proof of the safety threat the violation posed. Further, the Court noted that while Richardson violated FAA regulations, the FAA declined to treat the matter as meriting discipline, rather requiring that the incident remained on Richardson's record for two years.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

State employers seeking to justify an employment decision pursuant to Dredge must be wary. The Nevada Supreme Court has questioned whether *Dredge* deference is available outside of the prison context. However, assuming it does exist, employers must be able to establish that security concerns are implicated in an employee's termination in a manner to create a record for a hearing officer.

EMPLOYMENT UPDATE

by Colleen A. Déziel

A much anticipated decision from the California Supreme Court should be forthcoming in the very near future. As we previously reported, approximately three years ago the California Supreme Court accepted for review several

cases in which one of the issues to be decided was whether employers must ensure that non-exempt employees take their meal and rest breaks, or whether it is sufficient that the employer simply make those breaks available to qualifying employees and not take any steps to discourage them from being taken.

Oral argument on these cases was finally held last November 8, 2011, and based upon the questions presented to the plaintiff's attorneys by the Supreme Court justices, it appears that the Supreme Court may be leaning towards an interpretation that is favorable to employers, that is, employers need not "ensure" that meal and rest breaks are taken. It also appears that the Court will decide the issue of whether its decision will be retroactively applied. This would greatly affect the numerous existing lawsuits that are pending with regard to the rest/meal break issue. We will continue to keep you posted.

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.

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

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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