LYNCH, GILARDI & GRUMMER
A Professional Corporation

ATTORNEYS AT LAW

SINCE 1978

California Employment Law Newsletter

What's New for California Employers?

Ronald J. Souza
Lynch, Gilardi & Grummer
475 Sansome Street, Suite 1800
San Francisco, CA 94111
(415) 397-2800

The following is a brief summary of the significant employment law developments since our last newsletter.[1]

LABOR

Corporate Email Use: A sharply divided National Labor Relations Board (NLRB) ruled by a vote of 3-2 that employers may prohibit employee use of company email systems for non-work solicitation, including union-related solicitations. *The Guard Publishing Company*. The NRLB went on to rule that a company's policy discriminates against union-related communications only if the policy, as stated or as applied, bars or restricts union organizing communications differently than other communications. *Comment:* This long-awaited decision is good news for employers in this unsettled area of the law. Employers are assured that they can implement (or continue using) even-handed policies prohibiting solicitation or other non-work communications by their employees.

Boycott: The California Supreme Court has held that the State's constitutional right to free speech gives unions the right to urge customers in a shopping mall to boycott one of the stores in the mall. *Fashion Valley Mall, LLC v. NLRB.* Here, union members who were employees of the *Union Tribune* newspaper distributed leaflets to customers entering and leaving the Robinsons-May store at the Fashion Valley Mall alleging that Robinsons-May advertised in the *Union Tribune* newspaper and that the newspaper allegedly treated its employees unfairly. *Comment:* This case confirms a labor union's right to advocate to a company's customer base in pursuit of its organizing goals.

Fair Labor Practice: An employer's lawsuit does not constitute an unfair labor practice in violation of the National Labor Relations Act (NLRA), even if filed with a retaliatory motive, so long as it is reasonably based. *BE&K Construction Company*, 351 NLRB 29 (10/3/07). Here, the employer filed an unsuccessful lawsuit against a group of unions contending, among other things, that they had violated antitrust laws by attempting to delay a construction project through picketing, litigation and other tactics. *Comment:* Employers are thus free to bring good faith lawsuits against perceived unlawful union activities.

Exhaustion of Remedies: An employee was foreclosed from pursuing a civil action for unpaid wages outside of the grievance procedure called for in the union's collective bargaining agreement (CBA). *Soremekun v. Thrifty Payless, Inc.* Here, the CBA provided that the grievance procedure was the exclusive means by which an employee could redress pay claims. *Comment:* This case is useful for employers as CBA arbitration clauses effectively limit the attorneys' fees and costs that an employee can generate in pursuing pay claims.

Permanent Strike Replacements: At-will employees can be permanent strike replacements. *Jones Plastic and Engineering*, 351 NLRB 11. An economic striker who unconditionally offers to return to work is entitled to immediate restatement unless the employer hired a permanent

[1] This summary is intended to be a brief overview of significant legal developments and is not an in-depth analysis of the cases or statutes discussed. Our clients are advised to contact their employment attorney before making significant decisions related to the legal developments reported herein.

replacement to continue business operations during the strike. Here, the NLRB ruled that an at-will employee can be such a permanent replacement. *Comment:* This ruling provides employers with an effective means of addressing the staffing difficulties posed by union strikes.

Discrimination Claims: An employee was not required to pursue his discrimination claim under a CBA before filing suit in court. *Ortega v. Contra Costa County Community College District.* In this case, the court expressly found that "the FEHA (California discrimination statute) was meant to supplement, not supplant or be supplanted by existing anti-discrimination remedies, in order to give employees the maximum opportunity to vindicate their civil rights against discrimination." *Comment:* Thus, an employer is not shielded from discrimination suit by a CBA arbitration provision, unless that arbitration clearly waives an employee's right to pursue civil remedies.

Undocumented Aliens: Undocumented aliens enjoy employee status/protection under the National Labor Relations Act (NLRA). *Hoffman Plastics Compound Inc. v. NLRB.* In this case, at a hearing regarding pay, plaintiff, a Mexican national, admitted that he obtained employment at defendant by submitting someone else's birth certificate and that he had no lawful right to work in the U.S. *Comment:* This case supplements prior case law effectively extending the full protection of the law to undocumented workers. Other case law has extended that protection in cases involving Labor Code violations and discrimination.

SETTLEMENTS

Attorneys' Fees: An employee who accepted a statutory offer, under California Code of Civil Procedure section 998 (CCP § 998) which did not expressly include settlement of attorneys' fees, was able to obtain the proceeds of the settlement offer and then seek reasonable attorneys' fees. *Engle v. Copenbarger*. In this case, the CCP § 998 offer proposed a settlement on the following terms: "The judgment shall be in exchange for a release and discharge of any and all claims, of whatever nature (substantive and procedural) which the employee may have against defendants." However, the employee refused to later sign a release which provided for a waiver of costs and attorneys fees. *Comment:* Employers and their attorneys must be clear to specify in settlement offers that the settlement contemplates payment of fees and costs as well as indemnity.

USERRA Claims: A release of rights in a severance agreement may not preclude later claims arising from violations of the Uniform Services Employment and Re-Employment Rights Act (USERRA). *Perez v. Uline, Inc.* In this case, the employee accepted the benefits of the severance agreement but successfully pursued a further claim for damages under USERRA, claiming that he was removed from his position solely because "he was apt to be called to active duty and was, in fact, absent for one week due to a military obligation." *Comment:* This case obviously makes it difficult to settle USERRA claims, as employees cannot waive their rights to additional compensation for USERRA violation.

DISABILITY DISCRIMINATION

Interactive Process: An employer was tagged with a $2.2 million verdict for failure to engage in the "interactive process." *Wysinger v. Automobile Club of Southern California.* In this case, the employer ignored an employee's letters asking to discuss health and commute problems which he was experiencing due to failing health. The employee made between 6 and 12 requests for accommodation, and submitted a letter from his doctor describing his health issues. *Comment:* It is most important for employers to make a clear record that it engaged in discussions with disabled employees as to potential accommodations. Recent cases have demonstrated that it can be as problematic for employers to fail to discuss accommodations for actual or perceived disabilities.

Bona Fide Occupational Qualification: A bona fide occupational qualification standard did not apply to an employer's assertion of a business necessity defense. *Bates v. United Parcel Service, Inc.* Here, the employee alleged discriminatory safety qualification in violation of the Americans With Disabilities Act (ADA). *Comment:* This case demonstrates that rote standards rigidly applied, will generally not avoid a claim of disability discrimination.

OTHER DEVELOPMENTS

Sexual Harassment: An employee lost a claim for sexual harassment but prevailed on a claim of retaliation related to the sexual harassment claim. *Mokler v. County of Orange*. Here, the employee complained about sexual harassment which the court later found to be insufficient to be actionable. However, the employee was discharged shortly after the complaints and the discharge was found to be related to the complaints made. *Comment:* This case once again demonstrates that an employee can be successful in a claim of retaliation for a complaint of sexual harassment, even where sexual harassment is later found not to have occurred. If the court finds that the complaint was made in good faith, but that the employer acted adversely in response to the complaint, the employer is liable.

Legislation: San Francisco has enacted an ordinance that creates a city-sponsored health care access program (HAP) labeled "Healthy San Francisco." *San Francisco Health Care Security Ordinance:* The ordinance requires covered employers to make minimum health care expenditures for their employees, which they may do through their own health plans and programs or by paying into the HAP. *Comment:* Only employers doing business with the City of San Francisco, with more than 20 employees, are covered by the ordinance.

If you have questions regarding any of the aforementioned employment law developments, contact your LGG attorney or Ron Souza at rsouza@lgglaw.com.

I:\RJS\Client Newsletter\RJS Client Newsletter 1.08.doc