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CALIFORNIA EMPLOYMENT LAW NEWSLETTER

What's New for California Employers?

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

DISABILITY DISCRIMINATION

Temporary Disability: A totally but temporarily disabled worker denied additional leave could pursue a disability discrimination claim. *Prock v. Tamura Corporation of America* (unpublished). Further, the Court found that the employee's receipt of disability benefits did not bar claims where he also asserted he could have returned to work if given additional leave but the employer failed to engage in the interactive process when the employee requested an extension of his leave. *Comment:* This ruling should be no surprise as extended leave (within reason) is clearly an acceptable accommodation. And importantly, employers must *always* at least discuss potential accommodations before terminating employees as unable to work.

Light Duty: Neither the FMLA or Americans with Disabilities Act creates an obligation for an employer to provide light duty to an individual who is unable, with or without accommodation, to return to the essential functions of his job. *James v. Hyatt Regency Hotel* (7th Cir.). In this case, plaintiff sustained an eye injury which caused his doctor to order that he could only perform "light duty" with no indication of whether his condition would ever improve and additional paperwork suggested that he would be "unable to work in any capacity." *Comment*: This case affirms that an employee must be able to perform the essential functions of his job, with or without accommodation, in order to be protected by the ADA. Employers are not required to create new jobs or new job duties to accommodate a disability.

Permanent Disability: A police officer who had a heart attack could not perform the essential functions of even an administrative job. *Lui v. City and County of San Francisco*. In this case, the SFPD declined to assign plaintiff to an administrative position as even those positions sometimes required police officers to be available for the strenuous physical activity of a police officer. *Comment*: In this case, the Court found that an "essential function" of even an administrative position with the SFPD included the possibility that the police officer may be called occasionally to perform the full duties of a police officer.

PRIVACY

Laptop Computer Searches: Border agents may not perform forensic searches of travelers' laptops and other electronic devices absent reasonable suspicion of illegal activity. *U.S. v. Cotterman* (9th Cir.). A dissenting justice warned that such law jeopardizes national security and called for Supreme Court review. *Comment*: This case illustrates the continuing tension between law enforcement searches and individual privacy rights.

Random Alcohol Testing: A union employer's random drug and alcohol testing for new safety sensitive employees pursuant to a CBA did not violate the ADA's general prohibition against unwarranted medical examinations. *EEOC v. U.S. Steel Corp* (WestDist Penn). In this case, the Court rejected the EEOC's challenge to random alcohol testing in requiring objective evidence of intoxication before testing. *Comment*: As this is a decision from a jurisdiction outside of California (Pennsylvania), it is uncertain whether California's federal District Court would hold similarly especially considering the employee's protests that the test result was due to diabetes.

Verbal Publication: A person's privacy rights may be violated based on disclosure of private facts, even where the disclosure is verbal as opposed to written. *Ignat v. Yum Brands, Inc.* However, generally the verbal publication must be offensive or objectionable to a reasonable person to

[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. *NOTE*: These cases have not been updated/cite-checked since they were first reported.

be actionable. Disclosure of plaintiff's bipolar disorder to her co-workers was considered offensive. *Comment*: The Court's opinion notes that verbal disclosures may ultimately be more widespread than written disclosures.

OTHER DEVELOPMENTS

FMLA: An employee's wrongful termination claim was properly dismissed where the employee was ineligible for FMLA leave. *Olofsson v. Mission Linen Supply*. In this case, the employer initially told the employee that she could have leave if she made a proper application for the same but later notified her that she was ineligible for such leave because she had not worked the requisite 1250 hours in the preceding year. *Comment*: The Court here signals that there was no room for the creation of FMLA leave protection where statutory eligibility requirements are not met.

Employment Contract: An in-house attorney was successful in pursuing a wrongful termination claim for breach of an implied in fact contract not to terminate him without just cause. *Faigin v. Signature Group Holdings, Inc*. In this case, the Court found that the absence of an express employment at-will agreement and oral assurances of job security created the existence of an implied promise not to terminate without just cause where that did not contradict a written employment agreement. *Comment*: This case underscores the importance of having employees sign acknowledgements of the at-will nature of their employment.

Arbitration: Where an employee was required to sign an arbitration agreement as a condition of applying for a job, said agreement was found to be unconscionable. *Compton v. Superior Court*. In this case, the employee was required to sign the arbitration agreement in order to have her job application even considered. *Comment*: The Court decisions in this area are quite inconsistent. Other courts have found that requiring employees to sign arbitration agreements as a condition of employment is unconscionable, but these agreements may nevertheless be enforceable if other requirements are met.

Sexual Harassment: A graduate student could not pursue a sexual harassment claim against the University but could pursue a retaliation claim. *Summa v. Hofstra University* (2d Cir.). The Court found that the University could not be held liable for sexual harassment by members of its football team because, when notified, it had appropriately responded to plaintiff's complaints regarding athletes' misconduct. However, it did find that there was sufficient evidence that the University's reason for terminating employment was pretextual. *Comment*: This case once again highlights that retaliation claims are many times more problematic than the underlying wrongdoing complained of.

Wage and Hour: Auto mechanics who earned at least minimum wage were entitled to separate hourly compensation for any time not spent performing auto repairs where the compensation did not provide at least minimum wage for all time spent. *Gonzalez v. Downtown L.A. Motors, LP.* In this case, mechanics were paid "flag hours" for certain repairs regardless of the time they spent to complete repairs (i.e., whether they spent less or more than the time allotted). The Court found that this was merely an unlawful wage averaging technique. *Comment*: Any compensation scheme which yields less than a minimum hourly wage for all time worked will generally be found to violate the Labor Code.

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