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California Employment Law Newsletter

What's New for California Employers?

FEBRUARY 2007 EDITION

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

RETALIATION

Adverse Employment Action: A letter of instruction, and unimplemented suspension, and a transfer to another facility did not constitute an adverse employment action sufficient to sustain a claim of retaliation. *McRae v. Department of Corrections*. These acts did not constitute a "substantial and material adverse effect on the terms and conditions of (plaintiff's) employment" as is necessary to prove unlawful retaliation. *Comment*: The decisions of different courts vary greatly as to what acts are sufficient to constitute actionable retaliation. While the standard has been applied by the California Supreme Court, the various districts of the Appellate Courts within the State seem to apply it differently.

Anticipated Action: A retaliation action was allowed to proceed against an employer on the grounds that the employee might be able to prove that adverse employment action was based on "anticipated" testimony that the employee might give before a governmental agency. *Romaneck v. Deutsche Asset Management.* Here, the "protected act" necessary to prove retaliation was the employer's belief that an employee *might* testify adversely before the SEC. *Comment*: This case is one of a number in which a court is willing to permit an employee's retaliation action to proceed based on an employer's speculation of adverse employment action. Retaliation actions continue to be one of the most difficult for employers' counsel to defend.

LABOR

An employer violated the National Labor Relations Act (NLRA) by interfering with its employees' right to engage in union activities by punishing an employee and for threatening reprisals for an employee's membership in the union. *Hacienda Hotel, Inc. and UNITE HERE, Local 11*. In this case, the employer dealt directly with employees within the bargaining unit (rather than the union representative). Later, the employer was found to have threatened an employee with reprisal by acting in a threatening manner. *Comment*: Unionized employers must deal with the union representative regarding the alteration of the conditions of employment that are defined in a collective bargaining agreement (CBA). Further, employees who engage in lawful organizing activity cannot be subject to adverse behavior by an employer.

IMMIGRATION

An employer did not violate the NLRA by suspending and discharging employee for lying about her country of origin on her work permit. *Sara Lee dba International Baking Company and Earth Grains*. In this case, a Mexican employee had "fixed" her papers to state that she had come from Guatemala, which caused the employer to feel that she had deceptively

[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.

obtained work authorization. *Comment:* While unions typically react strongly to employers actions based on immigration status, employers are usually on solid grounds in disciplining employees who have misrepresented their immigration status in any way.

Harassment: General animosity by supervisor to a subordinate, including general scorn and contempt and a lack of sympathy for disability was not sufficient to create individual liability for harassment by a supervisor. *Roby v. McKesson*. However, the same conduct could constitute discrimination that is actionable against the employer if the conduct was found to be motivated by unlawful bias. *Comment*: This case is good news for individual supervisors who cannot be sued for conduct that is a normal incident of supervisory activities by a supervisor.

Negligent Supervision: An employer is not guilty of negligent supervision in failing to take measures to protect one of its employees from threatening emails from another employee. *Delfino v. Agilent Technologies, Inc.* In this case, an employee (who identified himself as "crack-smoking Jesus") used his email to threaten co-workers with violent acts. When the company eventually identified the employee, they fired him. *Comment:* Every so often, the law and common sense intersect. This is such an occasion. How could an employer be liable for the acts of one employee against the other where the employer did not know the identity of the offending employee, and when that was learned, immediately fired the offending employee.

Employee Privacy: Class action litigants are able to learn the identity of other potential class members through their employer. *Pioneer Electronics v. Superior Court*. Here, the affirmative consent of potential class members to disclose their identity is not required where those members were first notified and then given the opportunity to object to disclosure of their identities. *Comment:* This is an important case for class action litigants in that it makes access to the identity of potential companion litigants more accessible.

USERRA

An employee who served as a detective for more than 25 years successfully proved that he was subject to a pattern of discrimination following several tours of duty in the military. *Wallace v. City of San Diego*. In this case, the employee had served several successive tours of duty (including Iraq, Operation Desert Storm, and Bosnia.) *Comment:* Employers should use care in dealing with employees returning from military service. Juries and courts typically give great deference to such employees in their employment actions.

Vicarious Liability: An employer was not liable for an accident caused by an off-duty employee who was transporting a wine bin to collect grapes intended for his personal use. *Pettigrew v. WCAB*. While transporting the bin in the back of his pickup, it fell into the roadway injuring a motorcyclist. *Comment:* Even the pro-claimant WCAB, could not see its way to find the employer liable for the conduct of an off-duty employee engaging entirely in personal activities.

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

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