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SINCE 1978

# 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]

## DISCRIMINATION

*Gender Discrimination:* An employer was not guilty of gender discrimination for terminating a twenty-year employee who refused to follow the company's grooming policy that required female bartenders to wear makeup, stockings, colored nail polish and to wear their hair down and "teased, curled or styled every day you work." *Jespersen v Harrah's Operating Co.* The same policy required male servers to keep their hair short and were not allowed to wear makeup or nail polish. *Comment:* The courts have long upheld grooming policies which differentiate between the sexes so long as the grooming policies do not impose a disproportionate burden on one gender. Here, the plaintiff failed to present evidence of the additional time and money that they were required to spend to comply with the company's grooming policy. (Had this evidence been presented, the outcome might have been different.)

*Religious Discrimination:* A county government did not violate a worker's federal, civil or constitutional rights when it prohibited an employee from discussing his religion with clients, displaying religious messages in his work cubicle or using a conference room for prayer meetings according to the federal court with jurisdiction in California (9th Circuit). *Berry v Dept. of Social Services, Tehama County*. Exercise of free speech and religious freedom are subject to a balancing test which takes into account a citizen's right of expression and a public entity's interest in provided efficient public services. Here, the county felt that entangling the department with religion might carry with it the implication that the department endorses religion. *Comment:* This is one of a number of recent cases which limits an employee's right to express religious beliefs in the workplace that impact co-workers or third parties. courts are generally more inclined to protect expressions of religious belief that are personal to the employee.

*Disability Discrimination:* A receptionist who was terminated after a seven month leave of absence was unable to prove disability discrimination. *Williams v Genentech, Inc.* The court found that the company did nothing wrong in replacing the plaintiff after more than three months of leave where it appeared that there was no certainty that the employee would ever be able to return to work and perform the essential functions of her job. *Comment:* Proving that an employee is not "qualified" (i.e., able to perform the essential functions of their job) continues to be one of the more hopeful ways for employers to defend disability discrimination claims. Disability discrimination claims have been on the rise in recent years and are one of the more tricky forms of discrimination to defend.

*Disability Discrimination:* A temporary county employee was not

[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.

wrongfully denied an accommodation when she was terminated rather than being transferred to a permanent position. *Jenkins v City of Riverside.* Here, plaintiff claimed that she became disabled while working as a temporary county employee which entitled her to a permanent assignment as a reasonable accommodation of her disability. *Comment:* While this case involves a government employee, the principles are applicable to the private sector. So long as an employee's term of employment is truly temporary or for a finite period, that contractual obligation does not have to be changed should the employee happen to become disabled while working in a temporary status.

*Sexual Harassment:* A female writer's assistant on the television show *Friends* failed to show that the "writer's sexual antics and course sexual talk" was severe or pervasive enough to constitute sexual harassment according to the California Supreme court. *Lyle v Warner Bros. Television Products*. Importantly, the employee acknowledged that none of the sexually-charged language or conduct was directed at her or other women in the workplace. *Comment:* This was obviously an unusual workplace where sexual innuendo was part of the creative process necessary to create the television viewing that was part of defendant's business. Generally, sexual comments or antics in the workplace can create a hostile work environment exposing employers to claims of sexual harassment.

## WAGE AND HOUR

*Private Attorney General Act (PAGA):* Employees wishing to sue their employer under PAGA, on behalf of themselves and as class representatives seeking penalties for Labor Code violations, must allege that they have satisfied the new administrative prerequisites of Labor Code §2698, *et. seq. Caliber Body Works, Inc. v Superior court*. Here, plaintiffs did not allege that they had provided pre-filing notice to the Department of Labor and exhausted the other prerequisites to bringing an action. *Comment:* PAGA was amended in 2004 to restrict its use in seeking damages for persons other than the plaintiffs. The new prerequisites require such things as notifying both the employer to be sued and the Department of Labor about the plaintiff-employee's intention to proceed, and on what grounds. After the employer has responded to the pre-filing warning, and the Department of Labor has given permission, the employee may proceed on his/her behalf, as well as others. But, 75% of any recovery must go to the State, which removes a huge incentive for bringing these actions.

*CBA / Meal Breaks:* The California court of Appeals recently invalidated a California Industrial Welfare Commission's (IWC) exemption of employers subject to collective bargaining agreements (CBA) regarding this Labor Code requirements regarding meal breaks. *Bearden v U.S. Borax, Inc.* Here, the California court of Appeals held that the IWC exceeded its authority by creating a meal-period exemption that is not included in the State's Labor Code.

*Unfair Business Practices:* Wage and hour violations can properly be redressed through claims of unfair business practices (Business & Professions Code §17200). *Harris v Investor's Business Daily*. Here, telemarketers who sold newspaper subscriptions sued their

employers claiming violations of state and federal labor laws, including overtime pay requirements. *Comment:* The availability of unfair business practices claims is significant in that it makes available to plaintiffs (1) a longer statute of limitations (four years) and (2) injunctive relief (e.g., a court order that an employer do or refrain from doing certain activities).

## MISCELLANEOUS

*Class Actions:* A federal judge recently halted a proposed overtime class action against Wal-Mart involving claims of 27,050 assistant managers. *Sepulveda v Wal-Mart Stores, Inc.* Here, the court found that the claims of the assistant managers were too individualized and that injunctive relief would fail to address the concerns of a majority of the class members since they were no longer with the company. *Comment:* The defeat of a class certification is a huge victory for an employer in these cases. Usually, the denial of the class certification leads to an early resolution of the case because the financial incentive for plaintiff's counsel to pursue these actions individually is radically diminished.

*Unfair Labor Practices:* An employer which subcontracted the work of employees who were union-supporters on the eve of a union election may have been guilty of unfair labor practices. *Healthcare Employees Union, Local 399 v NLRB.* Federal labor law prohibits employers from conduct designed to discourage employees from union membership or organization. *Comment:* Once an employer becomes aware of a union's campaign to organize its workers, special rules apply to its further communications with its employees. Counsel should always be contacted should an employer get wind that a union is attempting to organize. There are effective measures which can be taken to avoid the organization, but great care must be exercised.

*Arbitration:* An employer's attempt to compel arbitration of a former employee's discrimination claim under a CBA was unsuccessful where the union had not clearly waived its member's right to go to court regarding statutory discrimination claims. *Lopez v Fox Television Animation.* Here, the CBA required "the parties to agree to continue to comply with all applicable federal and state laws relating to non-discriminatory employment practices," but did not go on to clearly indicate that those claims were also subject to mandatory arbitration. *Comment:* While courts are generally disposed to enforce arbitration agreements in CBAs, that disposition does not apply to statutory discrimination claims which are not clearly embraced within the agreement.

*Wrongful Termination (Public Policy):* A maintenance mechanic was permitted to proceed with suit against a former employer which fired him for refusing an assignment to clean up a contaminated area where chemicals were stored. *Stephens v Valley Industries.* The Appellate court found that because the employee may have had a reasonable, good faith belief that the assignment was unsafe, his refusal may have been protected by public policy considerations. *Comment:* Employers should use care in disciplining employees who have voiced concerns regarding safety issues in the workplace. This is so even if the employee turns out to be wrong, so long as he had a reasonable good faith belief in his stated concern.

*Workers' Compensation:* A house painter who worked for a homeowner less than fifty-two hours or earned less than $100 during the preceding ninety days was not an "employee" for purposes of workers' compensation. *CSAA v WCAB.* Here, the worker had injured himself while setting up a scaffold to accomplish the contracted work. The Workers' Compensation Appeals Board (WCAB) initially found in the employee's favor, but the California Appellate court reversed that decision. *Comment:* The homeowner here was extremely lucky as failing to provide workers' compensation to an eligible employee waives most of an employer's legal defenses and subjects the employer to *both* (1) damages under workers' compensation laws, and (2) general civil liability.

*Employment Agreements:* An employment agreement requiring a California employee bringing an action for discrimination was properly required to proceed in New York, under New York law. *Olinick v BMG Entertainment.* Here, the California Appellate court upheld the provision in an employment contract requiring that employment disputes be brought in New York under New York law. *Comment:* Choice of law and choice of forum provisions in employment contracts can be valuable tools for employers seeking to defend employment claims.

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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.