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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

SEXUAL HARASSMENT

Summary Judgment: To be actionable, a claim of harassment required a showing that co-workers' allegedly hostile comments were both extreme and related to race or gender. *Jones v. Department of Corrections.* In this case, plaintiff was not permitted to change her work schedule while male co-workers were allowed to do so, and when she questioned this, she claimed that her male correctional officer counterparts "escalated their abusive and hostile behavior towards her." Further, plaintiff alleged that an incident where a co-worker blocked her attempt to obtain the use of a wheelbarrow and then "grabbed her arm and started 'banging her body around and stuff'" constituted an assault and battery. The court found that the alleged conduct was insufficient to sustain the plaintiff's legal burden that she be permitted to proceed with her lawsuit and dismissed it as a matter of law. Further, the alleged assault and battery was conduct that fell within workers compensation exclusive remedy rules and was dismissed. *Comment:* Not all cases are entitled to proceed to jury trial (or settlement). Plaintiff must be able to show a minimum level of conduct that is potentially actionable before a court will allow the plaintiff's case to proceed.

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.

Summary Judgment: A trial court erroneously dismissed a plaintiff's claim of sexual harassment concluding that the alleged conduct took place outside the workplace and thus was not work related. *Meyers v. Trendwest Resorts, Inc.* Here, plaintiff alleged that her supervisor had made unwanted sexual advances, comments, innuendos of a sexual nature, and numerous non-consensual physical contacts with her body, all of which created an intimidating, oppressive and hostile work environment in the workplace, even though most of the acts occurred outside hours. *Comment:* While conduct that is completely divorced from the workplace is *not* actionable against an employer, where the consequences of the harassment carry over to the workplace, an employer may be liable. Supervisors should understand that any sexual overtures towards subordinates may potentially lead to a claim of actionable harassment – whether on duty or not.

OTHER DEVELOPMENTS

Interference With Prospective Economic Advantage: An employer who hired two truckers employed by a competitor, under one-year employment contracts, could be liable for interference with prospective economic advantage. *CRST Van Expedited v. Werner Enterprises.* In this case, plaintiff did not have to demonstrate that an "independently wrongful act" occurred (as is usually required) because defendant induced the breach of an employment contract as the employees were not at will. *Comment:* While companies are typically free to take steps that impact competitors in the name of competition, a company may not intentionally provoke the breach of a binding contract.

Workers Compensation: An employer discriminated against an employee who filed a workers compensation claim where it required that employee to use his accrued vacation benefits, rather than sick leave, to obtain the medical care for work-related injuries. *Anderson v. WCAB.* Here, the employer permitted employees with non-industrial injuries to use sick leave instead of vacation benefits to attend medical appointments. *Comment:* Employers should carefully review any action that could be considered adverse as to employees who have recently filed workers compensation claims.

Statute of Limitations: An employee was excused from filing an administrative claim alleging discrimination where that employee was pursuing internal grievance procedures pursuant to company policy. *MacDonald, et al. v. Antelope Valley Community College District.* In this case, the plaintiff was pursuing internal grievance procedures when the one-year anniversary of the alleged discrimination passed. *Comment:* Public employees are commonly required to first pursue internal grievance procedures and are excused from other procedural requirements when doing so. The cases are not clear on whether private employers will be treated the same as to their internal grievance procedures. This is in part true because many private employers do not have comprehensive internal grievance procedures as do public employers.

Misclassification: A computer consultant was not an "exempt" employee, and thus was entitled to overtime pay. *Eicher v. Advanced Business Integrators, Inc.* In this case, the computer consultant devoted a majority of his time to providing customer service, training customers, troubleshooting ABI

software during implementation at the customer's sites. The court found that because these duties were not "directly related to management policies or general business operations of his employer or his employer's customers" he was a "production employee," whose principal responsibility was producing the goods and services that the business existed to produce. *Comment:* The application of the Administrative exemption is quite complicated – especially as it applies to computer software workers.

Disability Discrimination: A disabled employee could not sufficiently establish an employer's failure to provide a reasonable accommodation where the employee did not make specific requests for those accommodations. *King v. United Parcel Service, Inc.* In this case, the disability discrimination claim arose after the employer terminated the employee for falsifying time cards. *Comment:* This decision comes out of a rather conservative California Appellate District (3rd District). Employers should recognize that other courts have held that even where an employee has not expressly requested an accommodation, an employer is obliged to engage in the interactive process of discussing accommodations where the employer otherwise becomes aware of a disability.

Damages: A disabled employee, who was wrongfully demoted, was nevertheless not able to recover back pay for the period during which he was unable to work. *Davis v. L.A. Unified School District Personnel.* In this case, the employee was wrongfully demoted while on disability leave for reasons unrelated to employment. *Comment:* The court reasoned that because back-pay damages are a make-whole remedy, it is intended to restore the employee to the

financial situation that would have existed but for the employer's wrongful conduct. Thus, an employee is not entitled to earnings he or she would not have received in any event.

Reverse Age Discrimination: The Equal Employment Opportunity Commission (EEOC) has issued a new rule under the Age Discrimination and Employment Act (ADEA) holding that the ADEA protects only older workers; not younger ones. Employers are not liable under the ADEA when they favor older workers over younger workers, even when both are over 40, and thus covered by the Act. *Comment:* This new regulation was developed to conform EEOC policy to the 2004 U.S. Supreme Court decision, *General Dynamics Land Systems v. Cline*.

Taxation: Federal Circuit Court for Washington D.C. reverses its earlier decision that emotional distress damages are not income subject to taxation. *Murphy v. IRS*. This case affirms that emotional distress damages are taxable under IRC § 61. *Comment:* This decision is bad news for both plaintiffs and defendants attempting to settle employment cases. That is because the net recovery to plaintiff for a given sum of money will be less. Employees and employers settling employment cases should be aware of the tax consequences of their settlements.

Litigation Privilege: Litigation privilege barred a retaliation claim based on investigations undertaken by employer to facilitate its defense of a pending employment lawsuit. *Gallanis-Politis v. Medina*. In this case, it was alleged that plaintiff's supervisors obstructed her efforts to obtain bilingual bonus pay by conducting a pretextual investigation and preparing a report falsely concluding that she was not entitled to bilingual pay. Supervisors successfully challenged the suit (through an anti-SLAPP motion) alleging that the retaliation claim against them arose from protected First Amendment activity as the investigation was concluded and the report prepared in response to a request from counsel for the employer in connection with the employee's discovery requests in the ongoing lawsuit. *Comment:* Anti-SLAPP motions are commonly being used to summarily dispose of lawsuits directed at protected speech (or privilege), as here.

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

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