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California Employment Law Newsletter

What's New for California Employers?

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

SEXUAL HARASSMENT

Vicarious Liability: A company can be liable for the acts of a manager who only indirectly supervised the plaintiff. *Garcia v Brick Container Corp.* This case involved egregious conduct by a company supervisor of which the Court found the company should have been aware because his conduct was so pervasive. His "supervisor" status was enough to impute liability to the corporation for his acts. *Comment:* The definition of "supervisor" under California's anti-discrimination law (FEHA) was found by this Court to be broad enough to include all supervisors who came into contact with the plaintiff – not just those to whom she reported.

Sexual Orientation: Harassment of an employee, due to his sexual orientation, by two of his supervisors was so egregious that a $2,000,000 jury verdict resulted. *Hope v California Youth Authority*. In addition to extreme name-calling, employees subordinate to the plaintiff were encouraged to ignore his authority and to sign a petition criticizing his behavior. These things led to extreme emotional distress, including physical symptoms. *Comment:* Like *Garcia* (above), the conduct was sufficiently extreme and widespread the Court found that the employer should have known about the conduct and failed to take remedial steps. The fact that the harassment was based on sexual orientation rather than gender made no difference.

DISABILITY DISCRIMINATION

Industrial Sabotage: An employee who was terminated for making threats to sabotage the company's operations, was properly terminated. *Ceballos v Berkeley Farms*. Here, after a change of working hours (from four, ten hour days to five, eight hour days) a disgruntled employee (plaintiff) threatened that he was going to make sure that customers' orders (for which he had responsibility) went out incorrectly. He then claimed that his termination was in response to his medical condition (dystonia) for which he claimed that he was taking medication, and which had led to his objectionable behavior because the medication "tends to cause side effects of irritability and anxiety" and "may have led to some angry outbursts on his part in the past." The Court found that the plaintiff had not made a request for a reasonable accommodation of his disability before the decision to terminate him and thus, could not hide behind the later claim of disability discrimination. *Comment:* This case provides valuable authority to employers defending disability discrimination claims. It reinforces an employee's duty to bring a disability and request for accommodation to an employer's attention before that condition is protected by disability discrimination laws. However, it should be remembered that other cases have held that

[1] This summary is intentionally a brief overview of significant legal developments which does not go into an in depth analysis of the cases or statutes mentioned. Our clients are advised to contact their employment attorney before making significant decisions related to the legal developments reported herein.

where an employee's condition is sufficiently obvious, the existence of the disability can be itself provide notice to the employer.

Medicinal Marijuana Use: An employer can refuse to hire an applicant for marijuana use – even where that use is recommended by the applicant's physician. *Ross v Ragingwire Telecommunications, Inc.* Here, the employee was using marijuana to treat chronic back pain and was in compliance with California's Compassionate Use Act of 1996. Nevertheless, the marijuana use was violative of federal law, and thus, valid grounds upon which to refuse to hire. *Comment:* This case reinforces (1) an employer's right to conduct pre-employment drug testing and condition of the offer of employment upon successful passage of the drug test, and (2) employment decisions based on illegal drug use is proper – even where legal under some laws.

AGE DISCRIMINATION

Legitimate Business Reason: An employer successfully defended a claim of age discrimination regarding a demotion, where the employer could show a legitimate business reason for the demotion. *Skidmore v Sutters Place, Inc.* Here, the employment decision was based on a subjective assessment of the plaintiff compared to his peers. However, the fact that three other employees over forty were demoted, three others over forty retained their jobs, helped prove that age was not a substantial factor in the decision to demote. *Comment:* Employers retain the discretion to make employment decisions so long as discriminatory (or other unlawful) motive is not a "substantial factor" in the employment decision. Here, the fact that plaintiff was treated in a manner consistent with other workers provided the additional proof necessary to show that the employment decision was *not* related to age.

Exhaustion of Administrative Remedies: An employee must cooperate with the EEOC as a prerequisite to the filing of a civil suit under the Age Discrimination in Employment Act (ADEA). *Shikles v Sprint/United Management Company.* Here, a federal court with jurisdiction outside California (10th Circuit) found that an employee must exhaust administrative remedies (i.e., file a suit with the EEOC) the same as an employee pursuing an age discrimination claim under Title VII. *Comment:* This case provides useful authority for lawyers defending employers in age discrimination suits under the ADEA as certain remedies and procedural advantages exist under the Age Discrimination in Employment Act (ADEA) that do not exist under Title VII.

WAGE AND HOUR LAWS

Overtime Exemption: Former managers of a fast-food chain were found to be exempt "Executive Employees" under California's labor laws. *Bailey v N & M Restaurants.* The fact that these employees occasionally undertook non-managerial duties did not entitle them to overtime pay as non-exempt employees. *Comment:* This is one of a few recent cases which strengthen an employer's right to claim an exemption from overtime pay for certain employees who may be close to non-exempt status. The fact that the managers would at times clean up minor spills or do other cleaning chores was not sufficiently significant to impact their exempt status.

This is especially so where it is customary in the industry for executive personnel to perform incidental tasks rather than delegate all such tasks to subordinate employees.

Learned Professional Exemption: A recent opinion letter from the Labor Department's Wage and Hour Division, clarifies that sales engineers who primarily perform engineering tasks qualify for the learned professional exemption under the Fair Labor Standards Act (FLSA) even though they also do some non-exempt work. *Wage and Hour Opinion Letter, FLSA 2005 – 28 8/26/05. Comment:* Like *Bailey* (above), this case provides employers with reinforcement for exempt classifications for employees who at times perform menial tasks (outside their usual exempt duties).

WORKER'S COMPENSATION

Undocumented Workers: Illegal immigrants injured on the job, are nevertheless entitled to worker's compensation. *Farmer's Brothers Coffee v WCAB.* Further, federal immigration laws do not preempt California State worker's compensation rules in this regard. *Comment:* Consistent with other Court decisions regarding undocumented workers, the Court found that those workers are entitled to many of the same rights under state law as documented workers.

Direct Victim Threat: An employer can discharge a disabled employee, without violating CLC §132(a), where the employer has a good faith belief that the employee's further employment could pose a risk of re-injury to himself or others. *County of San Luis Obispo v WCAB.* The Court found that an employer is not guilty of retaliatory discrimination when the employee cannot perform the customary duties of his job without risk of injury to himself or others. *Comment:* This is important authority for California employers who have good faith reason to believe that an employee is not able to return to work following an industrial injury. This case is in line with federal authority on this issue in the disability discrimination context as announced by the United States Supreme Court in the case of *Chevron, Inc. v Eschazabal.*

LEGISLATION

Posters: An employer must post a notice ten days before an election announcing employee's rights to time off to vote. The Secretary of State has issued a poster for employers to use which can be found on-line at: http://www.ss.ca.gov/elections/Outreach/posters/toveng.pdf

Employers are also required to distribute to employees a notice regarding sexual harassment. The easiest way to do this is to simply hand it out with the next paycheck. Again, the DFEH has provided a form notice for general use at: http://www.dfeh.ca.gov/publications/dfeh%20185.pdf

2005 Legislation: The democrat-controlled California legislature ended its session in early September. Because our republican governor vetoed (or threatened to) much legislation, there was little legislative activity which impacted California employers. The only significant developments were as follows:

- SB101 requires employers to use no more than the last four digits of an

employee's SSN on existing employee identification numbers or paychecks by January 1, 2008.

- Employers can pay an employee's final wages by direct deposit provided the employee has authorized this method of wage payment (AB1093).
- The deadline for filing of a complaint with the California Department of Fair Employment and Housing (DFEH) has been extended to one year from the date that the person attains the age of majority (AB1669).

EMPLOYER ALERT: DEADLINE APPROACHING

The deadline is approaching for California employers to provide the legally required sexual harassment prevention training for all supervisory employees. California employers with fifty or more employee have until **December 31, 2005** to provide that training. Any supervisory employees hired after July 1, 2005 must receive training within the first six months of employment. Employers must provide two hours of training every two years on laws prohibiting sexual harassment, prevention of harassment, correction and remedies.

The law specifically requires that the prevention training be "interactive." This means it is no longer acceptable to merely hand supervisory employees printed documents or a CD-ROM. Employees must demonstrate an understanding of the concepts covered in the training.

Comment: LGG can provide this training, or review training that is being provided by employers, to determine whether the training is compliant with this new law.

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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.