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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]

RETALIATION

Individual Liability: Individual supervisors cannot be personally liable for retaliation claims under California's Fair Employment and Housing Act (FEHA). *Jones v. The Lodge at Torrey Pines Partnership.* Individual supervisors still can be personally liable for "harassing" conduct. *Comment:* There is still an open question whether an individual supervisor can be personally liable for retaliation that takes the form of harassment. Stay tuned.

Adverse Action: Plaintiff filed a complaint with the EEOC, after which he was treated badly at work. *Wysinger v. Auto Club of Southern California.* He was no longer invited to be on management committees or to apply for management positions; he was treated "coldly" and ignored at management meetings; his employer ignored his request to accommodate his disability (lupus, heart condition and arthritis); he received unfavorable job evaluations; and staff was transferred from his office creating hardship for him. The jury awarded $204,000 of economic damages; non-economic damages of $80,000; and $1 million of punitive damages. The court thereafter added another $978,791 of attorneys' fees. *Comment:* Besides demonstrating how costly these cases can be, this case illustrates the kind of conduct which can be seen to be retaliatory.

HARASSMENT

Racial Harassment: A single incident (albeit extreme) of racial name calling was insufficient to create a "hostile work environment" necessary to support a harassment lawsuit. *Johnson v. Riverside Health Care System, LP.* In this case, plaintiff (a physician) was called by a co-worker (fellow physician) a "f___ing n_____." *Comment:* Rarely will a single verbal incident constitute a severe or pervasive hostile environment. The cases holding that a single event can be actionable harassment usually involve physical contact of some kind.

"Me too" Evidence: The U.S. Supreme Court ruled that evidence of employees not supervised by plaintiff's supervisor or manager could nevertheless testify regarding harassment that they had experienced. This evidence has come to be known as "me too" evidence. *Sprint/United Management Company v. Mendelsohn.* In this case, other employees were allowed to testify that their managers had also discriminated against them on the basis of age. *Comment:* This evidence can be damaging as it tends to show a corporate culture of pervasive discrimination. Note: Because this is a decision regarding the Federal Rules of Evidence, it may not directly impact discrimination cases brought under state law.

[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.

DISCRIMINATION

Pretext: An employee failed to show that an employer's stated reasons for failing to promote her and for ordering her to be drug tested were pretextual. *Surrell v. California Water Service Company.* An employee must show that an employer's stated business reasons for employment decisions were not genuine in order to prevail. In this case, the co-worker that got a promotion instead of plaintiff had a demonstrably better educational background and had received relevant training as to the new assignment. Further, plaintiff demonstrated slurred speech and was drug impaired at work, justifying the drug testing. *Comment:* While this case was easy, it is important for the employer to carefully analyze employment decisions affecting persons from protected classes.

Reverse Discrimination: A KNTV news anchor unsuccessfully sued his employer for replacing him with an African-American male. *Hicks v. KNTV.* Here, the employer claimed that it terminated plaintiff because of his aloof style. *Comment:* Because the successful qualities of media personalities are so subjective, employers will generally be granted wide latitude in accessing what qualities to reward.

Marital Status: Defendant employer declined to promote an employee because such would have violated the company's anti-nepotism policy. *Dickenson v. California Department of Corrections and Rehabilitation.* The court held that although the promotion would have violated the company's policy, it nevertheless had a duty to reasonably accommodate the married couple and avoid discriminating against them because of their marital status. *Comment:* This case reminds us that company policies treating employees differently because of protected status (e.g., marital status) must be carefully scrutinized.

SLAPP

Letter to Customers: Following an employee's discharge, the employee's former employer sent a letter to its customers claiming that the employee misappropriated trade secrets and suggested that customers not do business with the former employee to avoid potential involvement in a lawsuit. The employee obtained an immediate dismissal of the suit, alleging a violation of the Strategic Lawsuits Against Public Participation (SLAPP) statute. *Neville v. Chudacoff.* In this case, an employer suspected that a former employee had misappropriated a customer list and began soliciting customers to start a competing business. *Comment:* SLAPP lawsuits are more commonly being used as a vehicle to attach defamation lawsuits.

Magazine Interview: An employer's lawsuit against a former employee was dismissed as an unlawful attempt to stifle the former employee's free speech. *Nygard, Inc., et al. v. Timo Uusi-Kerttula, et al.* In this case, the former employee gave an unflattering interview to a magazine describing his work experiences at the company. The employer sued the former employee and the magazine for breach of contract, defamation, and breach of the

employee's duty of loyalty. *Comment:* An employer, particularly a public figure, will find it very difficult to control negative statements made by former employees, especially involving matters of public interest.

ATTORNEYS' FEES AWARD

Discrimination Suit: An employee was awarded $1.1 million in attorneys' fees after recovering only $30,300 of actual damages in a discrimination lawsuit. *Harmon v. City and County of San Francisco.* The Appellate Court affirmed the award of substantially all these attorneys' fees notwithstanding the relatively small amount of the underlying judgment. *Comment:* This case illustrates that most discrimination lawsuits involve large potential verdicts – frequently due to the potential for attorneys' fees.

Retaliation: An employee recovering only $11,500 for a retaliation claim was awarded $871,000 in attorneys' fees as the "prevailing party." *Chavez v. City of Los Angeles.* The trial court had denied the attorneys' fees as excessive in view of the small amount of damages recovered, but the Court of Appeal reversed upholding the attorneys' fees award. *Comment:* As indicated, attorneys' fees sometimes present the largest potential component of a verdict in a discrimination or retaliation suit.

Excessive Fees: The Court of Appeal slashed a plaintiff's attorneys' fee award in a suit for unpaid wages. *Harrington v. Payroll Entertainment Services, Inc.* In this case, plaintiff claimed $714.08 in unpaid wages, and the case ultimately settled for $10,500. The court awarded $500 in attorneys' fees in response to plaintiff's counsel's attorneys' fees request for $46,277. *Comment:* The award of attorneys' fees seems to vary greatly from case to case, and depends on the judge involved.

FAMILY LEAVE

CFRA: In the California Supreme Court's first decision regarding the California Family Rights Act (CFRA), it held that an employee's ability to work for a different employer while on family leave did not necessarily mean that the employee did not have a "serious health condition" as was necessary to qualify for protected leave. *Lonicki v. Sutter Health Central.* The Court also rejected plaintiff employee's argument that an employer must seek a tie-breaking third opinion regarding the seriousness of the health condition. *Comment:* This case was sent back to the trial court for a jury determination on whether the employee's health condition qualified for protected leave. It did not rule that the leave was/was not protected.

Military Families: Injured armed forces members are entitled to additional protected leave under the Family Medical Leave Act (FMLA). This is a result of legislation passed in January of this year, which also creates two new categories of FMLA leave: "Active Duty Family Leave" and "Injured Service Member Leave."

IMMIGRATION

Increased Penalties: Effective March 27, 2008, the Department of Homeland Security (DHS) increased penalties levied on employers for various

employment-related immigration violations. Examples of the new penalties are: (1) First violation for knowing employment of unauthorized alien – $375 (previously $275); (2) First violation maximum penalty $3,200 (previously $2,200); and (3) Multiple violations maximum penalty $16,000 (previously $11,000.

"No-Match Letter" Guidance: The DHS released a supplemental proposed rule which retains the substance of the original proposed "no-match" rule. A California federal district court had previously enjoined the implementation of the earlier no-match rules as too arbitrary.

OTHER DEVELOPMENTS

Grievance Remedies: A union employee was not required to "jump through hoops" that would have been a waste of time in redressing a grievance. *CDF Firefighters v. Maldonaldo.* Here, rank and file firefighters were not required to go through grievance procedures before seeking a reversal of over $22,000 in fines levied against them. *Comment:* While this case has relevance primarily to union members, it illustrates that courts will not require employees to go through pointless formalities in seeking to redress legitimate grievances.

Wage and Hour: Individual owners and officers of a garment company were not "employers" who were liable for unpaid wages in violation of the Labor Code. *Bradstreet v. Wong.* In this case, husband and wife owners of a manufacturing corporation failed to pay wages due to cash shortages. *Comment:* The employees' remedies here were limited to what they could recover from the corporation. Note, however, that this case did not discuss whether the "corporate veil" could be pierced as a sham entity.

Arbitration: In response to a complaint regarding discrimination/ harassment, defendant employer sent the employee a form requesting a written description of the complaint as well as a written agreement to submit the matter to arbitration. *Metters v. Ralph's Grocery Company.* Here, the employee claimed that he understood that he had to sign the form in order for his complaint to be investigated, and did not understand that he was agreeing to binding arbitration. The court found that the complaint form did not appear to be a contract, nor did it alert the employee to the fact that he was agreeing to binding arbitration. *Comment:* An employer cannot condition the investigation of a discrimination complaint on an employee's agreement to arbitrate the dispute.

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