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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]

DISCRIMINATION

Continuing Harassment: An employer could not be held liable for fostering a racially hostile work environment in violation of Title 7 of the Civil Rights Act (Federal Anti-Discrimination Statute). *Wilson v. Moulison North Corp.* In this case, the company properly disciplined the alleged offenders for their initial misconduct and the victim did not adequately report an alleged resumption of the harassment. The court found the alleged victim's failure to put the company on notice of the renewed harassment was "fatal to his claim of employer liability." *Comment*: This decision states "federal law in a jurisdiction other than California." While this case may have diminished impact on California courts, it is some authority for the proposition that employees must take advantage of available procedures to redress discrimination/harassment or potentially lose their right to complain regarding the same.

Disability Discrimination: An injured/disabled employee's termination was proper where the employer could not make a reasonable accommodation of the employee's disabilities, and the employer made an appropriate attempt to follow-up regarding the employee's recovery. *DFEH v. Lucent Technologies, Inc.* In this case, the plaintiff/employee was a telecommunications installer for Lucent, whose job required a gamut of physical activities, including running cables, drilling holes, setting frames, wiring cell cabinets filled with electronic components, etc. After months of leave, and repeated inquiry by the employer regarding plaintiff's recovery, plaintiff's own doctor placed restrictions on the employee's ability to lift which were inconsistent with his job duties. *Comment*: This is an important case in a difficult area for employers. It helps to define how far an employer must go in extending a leave of absence as a reasonable accommodation for disability.

FMLA

Medical Certification: An employee who refuses to provide sufficient medical certification under FMLA was lawfully terminated. *Lewis v. United States and Donley*. In this case, defendant employer asked plaintiff to complete a medical certification form issued by the employer, but instead plaintiff provided a certification stating that she was "diagnosed with post-traumatic stress disorder" and needed therapy, medical treatment, bed rest, two prescription medications, and 120 days off work, and refused to provide further medical information. As a result, the employer, (Air Force) immediately converted her leave to unexcused and terminated her employment. *Comment*: This is a useful case for employers who face protected leave and inadequate documentation to verify the need for the leave. While this case involves federal law, it is from the federal court with jurisdiction in California (Ninth Circuit), and thus useful for employers seeking guidance on the propriety of terminating an employee who is on ostensibly protective leave.

[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 statues discussed. Our clients are advised to contact their employment attorney before making significant decisions related to the legal developments reported herein.

Demonstrated Prejudice: A plaintiff/employee must demonstrate prejudice in order to be entitled to relief under the FMLA. *Hearst v. Progressive Foam Technologies, Inc.* In this case, the court upheld an employee's termination for job abandonment despite the fact that the employee was on FMLA leave at the time of the termination, but because the employee would be physically unable to return to his job duties on the expiration of the leave. *Comment*: Again, this case comes from a federal court with jurisdiction outside California and thus may have diminished impact on California cases. However, again, the case provides at least some precedent that can be used by employers in fending off lawsuits by employees terminated while on protective leave.

MISCELLANEOUS

Sexual Harassment: A supervisor's lewd sexual comments to an employee did not constitute unlawful harassment where not sexually motivated. *Kelley v. Conco Companies*. In this case, a supervisor angered by an employee's performance called him a "bitch" and that he had a "nice ass" and that he wanted to "f___ (Kelley) in the ass." Coworkers later used language similar to plaintiff's/employee's supervisor and also called the plaintiff a "narc" and a "snitch" and repeatedly threatened him with physical violence. Despite the egregious nature of these comments, the court found that they were not sexually motivated and thus not actionable sexual harassment. *Comment*: The principle of this case is sound (i.e., that the offending conduct must be sexually motivated). However, there is certainly some risk that another court may find the same conduct to be sexually harassing and thus actionable.

Wage and Hour: A California Supreme Court ruled that work performed in California by non-resident employees for a California-based employer is covered by the California Labor Code and its Unfair Competition laws. *Sullivan v. Oracle Corporation.* Here, the employer hired instructors who were not residents of California to provide instructions to workers at its California locations. *Comment*: This decision lays to rest the controversy about whether California's somewhat onerous labor laws apply to non-residents working in California.

Social Networking Policy: The National Labor Relations Board (NLRB) is making clear its position regarding social media communications. (1) Earlier this year, the NLRB pursued an employer in Connecticut after the company fired an individual for posting a negative comment about her supervisor on her own Facebook page, using her home computer to do so. While the case was settled on confidential terms, the employer has since revised its policy to be less restrictive. (2) In April of this year, an employer avoided a threatened complaint by the NLRB for inappropriately reprimanding a reporter for a message posted on Twitter, through an agreement to negotiate a new social media policy. (3) On May 9th of this year, the NLRB issued a complaint alleging that Hispanic United, a Buffalo nonprofit that provides social services to low-income clients, violated the NLRA when it fired five employees after they used Facebook to criticize working conditions. (4) Most recently, the NLRB pursued a car dealership, which terminated an employee after the employee posted a criticism of the quality of food/beverage served by the dealership at an event promoting the new BMW models. The NLRB alleged that the Facebook posting was protected, concerted activity within the meaning of the NLRA because they were

discussions among employees about the terms and conditions of their employment. *Comment:* The NLRB has increased its focus on social media communications and is taking the position that employer policies cannot impose limitations on electronic communications where those postings include discussions regarding the terms and conditions of employment. (This may be so irrespective of whether the employer is unionized or not.)

Class Actions: The US Supreme Court overturned a lower court's decision allowing approximately 1.5 million current and former female employees of Wal-Mart, at 34,000 stores, to proceed with a single class action. *Wal-Mart Stores, Inc. v. Dukes*. The court found that there was an insufficient similarity of questions of law or fact that were common to all of the plaintiffs in the case. *Comment*: This five to four ruling by the Supreme Court was a huge relief to Wal-Mart and similarly situated employers. Class actions are typically *very* expensive to defend and settle due to the collective number of claims involved. It is far more difficult for employees to find attorneys to prosecute individual claims so that the threat of litigation is greatly diminished by the refusal to certify a class for single-lawsuit treatment.

Strategic Lawsuits Against Public Policy (SLAPP): A labor union distributing flyers during labor disputes that made allegedly disparaging comments about an employer's manager, fail to show that the flyers concerned matters of public interest for purposes of anti-SLAPP litigation. *Price v. Operating Engineers Local No. 3.* In this case, the union placed flyers at an apartment complex in which the plaintiff lived that warned plaintiff's neighbors, among other things to be aware of Price and to protect their families and property because there was "no telling what he might do." Price/plaintiff sued the union. *Comment:* This case is good news for employers who are often subject to defamatory accusations by unions and other supposed public interest groups criticizing employer policies. Employers must use care in attacking such entities with defamation lawsuits in view of anti-SLAPP laws.

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