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Lynch, Gilardi & Grummer

California Employment Law Newsletter: What's New for California Employers?

Ronald J. Souza
Lynch, Gilardi & Grummer
475 Sansome Street, Suite 1800
San Francisco, CA 94111
(415) 397-2800

The following is a summary of the significant employment law developments since my last newsletter. (The publication of this newsletter was delayed by my move to Lynch, Gilardi & Grummer. I anticipate publishing this newsletter with more normal regularity now that my move has been completed)[1].

RETALIATION

Adverse Employment Action: Criticisms regarding job performance following the filing of an age discrimination action were insufficient to constitute "adverse employment action" as would support a claim of retaliation. *Pinero v. Specialty Restaurants Corporation.* Here, plaintiff/employee claims that his employer forced him to resign after learning that he had filed an age discrimination claim against another former employer who was also a city council member in the city where the employer conducted business. However, the court found that the performance criticism that the employee was subjected to was not sufficiently severe to constitute an "adverse employment action" and that other evidence suggested that the criticisms were justified. *Comment:* This is welcome news to employers seeking to fend off retaliation claims founded on conduct which is little more than routine (and justifiable) employment action.

No Causation*:* An employee's retaliation suit founded on conduct which occurred two years before his termination could not support a retaliation claim. *Fernandez v. Waste Management of Lancaster et al.* Here, the plaintiff complained to a supervisor about what he perceived to be harassing behavior by the supervisor to a subordinate. Although the supervisor was disciplined, plaintiff's job duties were reassigned and two years later he was terminated. He claims both acts were "adverse employment action" as would support a claim of retaliation but the court disagreed. *Comment:* To constitute actionable retaliation, a plaintiff must (1) engage in protective activities, (2) be subjected to adverse employment action (3) there must be a cause of relation between the two. Here, the court found that the reassignment to a different position was not adverse employment action and that there was no causal relation between the protected activity and the employee's ultimate termination because of the two-year gap between the two events. The case provides favorable authority for employers on two of the three prongs of plaintiff's proof burden in retaliation cases.

Adverse Employment Action: A California Appeals Court has ruled that transferring an employee to comparable position in another facility isn't an "adverse action" that would support a retaliation claim under the California Fair Employment & Housing Act (FEHA). *McKrae v. The Department of Corrections*. The court found that the employers actions were not a material change in the terms and conditions of employment. *Comment:* Employers should not assume that any disadvantageous transfer could not constitute adverse action. But where the transfer does not entail a demotion, reduction of pay, loss of benefits, change in status, change in

[1] **Note:** 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.

responsibilities, work hours or commute time, the transfers will generally not constitute adverse action that will support a retaliation claim.

Adverse Employment Action: Written warnings regarding attendance problems did not constitute adverse employment action according to a recent California Appellant Court action. *Bustillos v Department of Justice*. In this case, plaintiff (1) was "disabled", (2) did make a complaint regarding discrimination/harassment related to his disability and then claimed that warning notices related to attendance were adverse employment actions caused by his protected complaint. He also claimed that a co-worker's complaint to the DMV, that his epileptic condition made him a dangerous driver, was an adverse action related to his complaint. The Court of Appeals disagreed finding that neither action was sufficiently "adverse" to support plaintiff's retaliation claim. *Comment:* Employers should note that disciplinary action (e.g. warning notices) which are a component of adverse employment actions can support a claim of retaliation. Employers should carefully scrutinize all conduct towards employees who have engaged in protected activity (e.g. making complaints regarding discrimination). The harsh reality is that where an employee engages in protected activity, practically they are somewhat protected regarding employment action that would otherwise be appropriate because of the difficulty the employers will encounter in proving that the employment action was *not* related to their protected activities.

Title IX of the Education Amendments Act, 1972: Complaints related to gender discrimination in a program receiving federal education funding can be the basis of retaliation claim. *Jackson v. Birmingham Board of Education*. Here, plaintiff claimed that he received negative evaluations and was stripped of his coaching duties after he complained to his superiors that his high school girls' basketball team was not receiving equal funding and equal access to sports equipment and facilities in violation of Title IX. A divided U.S. Supreme Court (5-4) held "that when a funding recipient retaliates against a person" "because" he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex" in violation of Title IX. *Comment:* This case will have limited application to employers in general as it applies primarily to public entities which receive Federal funding.

Adverse Employment Action: Criticism that amounts to little more than "knit picking" is insufficient to constitute "adverse employment action" as would support a retaliation cause of action. *Pinero v Specialty Restaurants Corporation.* Here, the Court noted that a "statutory claim for retaliation" may be predicated on an unfavorable evaluation only where the "employer wrongfully uses the negative evaluation to substantially and materially change the terms and conditions of employment…." That did not occur here, as the employer "did nothing affirmative to effect a material change in any term or condition of Pinero's employment as a result of learning about his lawsuit against" a city official. *Comment:* As may be expected, California applies a more liberal test for determining whether an adverse employment action has occurred. The "deterrence test" requires that conduct be "based on a retaliatory motive and (be) reasonably likely to deter (complainants) or others from engaging in protected activity." Even applying this more liberal test, the Court could not find that adverse employment action had occurred in this case.

DISABILITY DISCRIMINATION

Minnesota Multi-Phasic Personality Inventory Test (MMPI): A popular psychological test routinely used by some employers has been found to be violative of the ADA by a Federal Court (outside of California). *Karraker v Rent-A-Center, Inc.* The Court held that the MMPI "is a psychological test… designed, at least in part, to reveal mental illness" which violates the ADA's restrictions on "medical examinations", including those for mental illness. The Court thus found that "no matter how the (MMPI) test is used or scored," it "has the effect of hurting the employment prospects of one with a mental disability" and so violates the ADA. *Comment:* While this is not a California Federal Court, it is instructive to California employers using these types of tests. While prior California cases seem to affirm the validity of such tests, California courts may follow suit should this issue be again raised in this state.

"Regarded As" Disabled: The U.S. Supreme Court has declined to clarify whether the Americans with Disabilities Act requires an employer to provide a reasonable accommodation to an employee who is "regarded as" disabled. *Philadelphia Housing Authority Police Department v Williams*. In a Philadelphia Federal Court case, an employee charged that the department perceived him as emotionally incapable of returning to his job after he took leaves for depression. The employer argued that the lower Court's finding that the employee was entitled to a reasonable accommodation where he was "perceived" to be disabled (whether or not he was) was "an unworkable finding". *Comment:* The law of disability discrimination has become one of the most tricky (and perilous) areas of discrimination law. The obvious question here is what accommodation would be appropriate of it is determined that no real disability existed?

Perceived Disability: A fire fighter who was required to take an unpaid leave of absence (for two years) was not allowed to return to work because the employer determined that he had physical restrictions which prohibited him from safely performing the minimum requirement duties of the position. *Whitehall v City of Santa Rosa*. The Court dismissed portions of the lawsuit claiming disability discrimination, but allowed him to proceed with the portion of the claim alleging that he was subject to discrimination because he was "perceived" to be disabled. *Comment:* Like *Williams* (above) the employer complied with the law of disability discrimination, but the employee was nevertheless allowed to proceed with a lawsuit claiming that the employer's actions were predicated on a perception of disability.

Medical Examination: An employee was not entitled to proceed with a lawsuit after refusing to submit to the employer's request for a medical re-examination, and provide a copy of medical records, after an extended administrative medical leave. *Hockenberg v Inglewood Unified School District*. Here, the employee took a three-month medical leave and was released to return to work by her treating doctor who recommended certain job restrictions. Pursuant to its policy, the district requested that the plaintiff submit to a further examination with a third physician, but the employee refused alleging discrimination. The California Appellate Court agreed that the employee was obligated to submit to the further medical examination as a condition of reemployment. *Comment:* This is another area in which disability discrimination

law is ill-defined. The U.S. Supreme Court has held that an employer has the right and duty not to return an employee to work where the return to work poses a substantial risk of re-injury to himself or others. *Eschezabal v Chevron*. Further, the employer has the duty to obtain the "best available evidence" in deciding whether the employee can be returned to work without such a risk. On the other hand, an employer who requires further examination of an employee who has received a full return to work from his/her own doctor can claim that the further examination is a retaliation based on a "perceived" disability. Stay tuned.

Creating a New Position: An employer was not required to remove a union employee from a position in order to accommodate a co-worker's request to return to work under the ADA. *Soone v KYO-YA Company, Limited*. Here, plaintiff had worked for thirty years as a bartender before filing a claim for worker's compensation benefits for a back injury. When his physician released him to return to work on "light duty," the only light duty positions were already filled by co-workers who were also union employees. The Federal Court affirmed the dismissal of the plaintiff's lawsuit, noting that employers are not required to create vacancies for disabled employees. *Comment:* Here, the co-employees' rights under union contracts trump other employees' rights under the ADA.

OTHER DISCRIMINATION

Age Discrimination: The U.S. Supreme Court has decided that plaintiffs may bring actions under the Age Discrimination and Employment Act (ADEA) alleging that an employment policy had a "disparate impact" upon employees over the age of forty, even when there is no evidence that the employer intended to discriminate against older workers. *Smith v Jackson*. After holding that such lawsuits could be brought under the ADEA, the Court then found no basis to support the older worker's claim of disparate impact resulting from the city's actions. *Comment:* In California, this case will probably have little real impact, as these kinds of cases can already be brought under other laws. The extent to which decisions motivated by economics, such as those related to salary and benefits, might create a disparate impact, is still an open question to be decided on a case-by-case basis.

Knowledge of Protected Classification: A trial court found that the employer had insufficient knowledge of plaintiff's pregnancy to support a claim of discrimination by plaintiff. The Appellate Court found that even if there was a triable issue as to the employer's knowledge, the record established that plaintiff was fired for poor job performance, and not due to pregnancy discrimination. *Trop v Sony Pictures Entertainment, Inc.* Plaintiff claimed that her supervisor said, "What were you thinking? How could you possibly be my assistant and be pregnant? How did you think that would ever work?" The supervisor denied saying these things and provided several documented instances of poor performance. *Comment:* The Appellate Court did the trial court a favor in not reversing the summary judgment, as the supervisor's comments (if true) were probably enough to give plaintiff the right to present her case to a jury. But the ambiguity of the supervisor's knowledge combined with clear performance problems apparently compelled the Appellate Court to have mercy on the trial court.

"Employee" Classification: Where a volunteer was given all of the trappings of employment (uniform, badge, policy identification card, regular work schedule), the fact that he was an unpaid volunteer prevented him from being an "employee" under the protection of the Fair Employment and Housing Act (FEHA). *Comment:* While FEHA makes employer's responsible for certain acts of harassment by volunteers, and volunteers have certain rights under other California statutes, volunteers are not "employees" entitled to bring suit under FEHA.

WAGE AN HOUR

Chargebacks Against Commissions: A California Appellate Court has held that it is lawful for an employer to retrieve portions of commissions paid on sales which are subsequently cancelled. *Steinhebel v Los Angeles Times Communications.* Here, the employee was working under a sales agreement that required that "a charged back order" (when a customer does not keep the paper for at least twenty-eight days) was not a commissionable order, although the employee received commission advances against which the cancelled subscriptions were subsequently deducted. The Court held that this policy was violative of neither the California Labor Code nor the California Unfair Business Practices statute (Business and Professions Code §17200). *Comment:* This case clarifies a previously uncertain area of California wage and hour law. The case clarifies that employers may advance commissions and subsequently retrieve them if the sale does not last.

Meal Period Breaks: Under the California Labor Code and Wage Orders, non-exempt employees who work at least five hours are entitled to an uninterrupted meal period of at least thirty minutes and a second meal period if they work more than ten hours. But there has been confusion regarding just when meal periods have to begin and what would happen if an employee chooses not to take a required meal break. The California Division of Labor Standards Enforcement (DLSE) has issued the proposed regulations that provide some clarity in this area. Definitions of "work," "day," etc., are provided. Also, if an employee does not take a required meal break, the employer would be considered to have "provided" a meal period if the employee is (1) informed of the right to the meal break, (2) afforded the opportunity to take a meal break, and (3) maintain accurate records for covered employees has required by the Labor Code.

Employee claims for meal breaks based on protections provided by state law are not preempted by Federal labor law. *Valles v Ivy Hill Corporation*. *Comment:* Employers cannot seek refuge in Federal law regarding employees' claims under the State Labor Code provisions providing employees with rights to meal period breaks.

IMMIGRATION

H-1B Petitions: On April 1, 2005, the U.S. Citizenship and Immigrations Services (USCIS) began accepting H-1B Petitions against the 2005-2006 quotas for that category of foreign workers. Further, the quota for such immigrants are increased by 20,000. Also, the law expanding that quota reinstated the requirement that employers pay those workers 100% of prevailing wages.

Wal-Mart Settlement: The government recently announced that Wal-Mart Stores has agreed to pay $11,000,000 in a civil settlement to resolve charges that it knowingly used cleaning contractors that employed undocumented workers. Several of the contractors had pled guilty to criminal charges for their involvement in the illegal employment of undocumented workers. *Comment:* While it is doubtful that the government would target small and mid-sized companies, employers would do well to assure that independent contractors providing services to them, are not blatantly violating immigration laws.

OTHER DEVELOPMENTS

Punitive Damages: The California Supreme Court has weighed in on its interpretation of the U.S. Supreme Court's recent limitation on punitive damages, announced in *State Farm Mutual Auto Insurance v Campbell.* In *Campbell* the Court held, among other things, that punitive damages exceeding a single digit ratio between compensatory and punitive damages are subject to scrutiny on constitutional grounds. The California Supreme Court held that "what ratio is reasonable necessarily depends upon the reprehensibility of the conduct, the most important indicia of reasonableness of the award – which in turn is influenced by the frequency and profitability of defendant's prior or contemporaneous similar conduct." *Johnson v Ford Motor Company*. In *Johnson* the Court found that the reduction of a $10,000,000 punitive damage award to $53,435 probably did not leave enough to deter reprehensible corporate fraud in the future. But in the companion case of *Simon v San Pablo U.S. Holding Company, Inc.*, the Court found that a $5,000 compensatory damage award and a 1.7 million dollars punitive damages award in a real estate fraud case was unconstitutional and therefore reduced the punitive damages award to $50,000. *Comment:* If the punitive damages award is under a single digit ratio (i.e., 9:1, or less) it will probably be upheld as constitutional. Conversely, double-digit awards will be presumed to be unconstitutional and carefully scrutinized to determine whether the reprehensibility of the conduct justified the greater ratio.

Non-Compete Agreements: An employee was ordered by the Court to cease soliciting his former employer's employees and customers, and to cease from using or disclosing the former employer's trade secrets or other confidential information that he had stolen. *ReadyLink Healthcare v Cotton*. Because it was proven that the employee had misappropriated trade secrets and remained an imminent threat to misuse that information to solicit the former employer's employees and customers, the Court issued a restraining order precluding such conduct. *Comment:* While California law generally disfavors restraints on a former employees' ability to compete with the former employer, that rule does not extend to blatant instances of theft of former employer secrets and confidential information.

Employee Penalized: Where an employee was found to have brought a clearly unmeritorious lawsuit under FEHA, a victorious employer was awarded attorneys' fees against that employee. *Bustillos v Department of Justice*. Here, the employee had claimed discrimination retaliation against his employer founded on a co-worker's report to the DMV that he was unfit to drive due to his epileptic condition. The Court agreed that the claim was without

substance and gave the employer a reduced fee award of $43,315. *Comment:* While it is rare that a Court will award attorneys' fees to a victorious employer, against an employee, there is some authority (such as this case) for that remedy. Where employers can demonstrate that an employees' suit is clearly unfounded, attorneys' fees might be awarded. (Collection is another matter.)

SLAPP: An employer successfully stopped an employee's claim for defamation based on the employer's statements in a reporting form acquired by the NASD. *Fontani v Wells Fargo Investments, LLC.* Here, the employer successfully argued that Wells Fargo's statements in a Form U5, required to be prepared in every case where an NASD employee is fired, is "an official proceeding" for which the employer cannot be sued. Here, the employer successfully invoked the Stop Lawsuits Against Public Policy (SLAPP) laws, which is more often invoked by employees or other litigants. *Comments:* This was a resourceful use of the SLAPP laws to bring a defamation suit to an early end. While employers should generally avoid defamatory or other negative statements against terminated employees, where mandated by government reporting requirements, employers enjoy some protections.

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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.