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Lynch, Gilardi & Grummer

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]

RETALIATION

Whistle Blower Protection: A cosmetic company's sales manager, who claims she was retaliated against for refusing a manager's demand to fire a clerk who was unattractive and replace her with "somebody hot," can proceed with her claim of retaliation in violation of California law. *Yanowitz v L'Oreal USA, Inc.* Employees need not explicitly state that they are opposing discrimination in order to be protected from retaliation if the employer was on notice of the employee's objection to discrimination (even if unannounced). Further, while adverse employment action must *materially* affect the terms and conditions of employment, the cumulative affects of a series of actions can be considered in determining whether "materiality" exists. *Comment:* This decision will make it easier for employees to maintain claims of retaliation. Employers must now probe for the basis of certain insubordinate behavior if there is some chance that the employee's actions might have been motivated by perceived discrimination. Employers should also state in their employee handbooks and EEO policies that employees should *clearly* state the basis of any complaints regarding discrimination/harassment and direct those to the company's senior human resources officer.

Whistle Blower: An employee was properly terminated for "accessing emails, as well as obtaining confidential information and providing it to a third party." She was not protected by the fact that she (1) had filed a disability claim, (2) a wage loss suit, (3) and two harassment lawsuits. *Glasco v Specialty Laboratories, Inc. (Unpublished)* She wasn't a protected whistle blower because she could not establish that her actions were for a public benefit, rather than her own. *Comment:* Here the Court would not allow plaintiff to hide behind recent complaints which she had made to avoid termination for clearly insubordinate conduct. Also, the Court would not allow plaintiff to transform conduct for personal gain into a matter of "public interest" with resultant whistle blower protection.

ARBITRATION

Judicial Deference: An arbitration award by an arbiter from another state may be affirmed under the doctrine of "arbitral finality" even if it contravenes California Public Policy. *Jones v Human Scale Corporation.* Here, an arbiter applying New Jersey law upheld a non-compete and arbitration agreement involving a California employee who signed an agreement which incorporated New Jersey law. The California Court of Appeal upheld the rulings of the New Jersey arbiter *except* that part of the award which required the employee to pay a part of the arbitration fees as that was prohibited by a California Supreme Court (*Armendariz*) decision.

[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.

Comment: An employee or employer wishing to avoid enforcement of an unfavorable arbitration agreement must take steps to have the matter either (1) arbitrated in California, or (2) apply California law. The plaintiff here tried (unsuccessfully) to do that and once the matter was placed in the hands of the New Jersey arbiter, his case was lost.

Arbitration Waiver: After initially agreeing to litigate a matter in civil court, and spending nearly two years doing that, an employer had waived its right to enforce an arbitration agreement. *Hall v Cinema 7, Inc. (Unpublished)* Employers must act early to enforce their rights under arbitration agreements or risk losing those rights. *Comment:* While most of the cases generally allow some delay (and prosecution in civil court), it is risky to remain in civil court any longer than absolutely necessary.

WORKER'S COMPENSATION

Exclusive Remedy: An employee could not sue for emotional distress related to the conduct of an investigation which included a meeting/interview with him. *Carnohan v Home Depot USA, Inc. (Unpublished)* Here, the California Appellate Court found that the employer's conduct "represents normal conduct in an employment relationship" and thus did not fall outside the bounds of the worker's compensation exclusive remedy bar. *Comment:* So long as an employer's conduct is within the bounds of its normal employment practices and procedures, employers can generally rely on protection through the worker's compensation exclusive remedy bar. Investigations and reprimand letters will generally not form the basis of a libel or emotional distress claim.

False Imprisonment: An employee could proceed with a false imprisonment action against a company after she claimed that she had been held against her will in a store bathroom. *Violetta Spears v Walgreens, Inc. (Unpublished)* Here, plaintiff claimed that her boss asked her to step into the ladies bathroom where the two were alone and then "began yelling at (her)… and stepped past her, blocking the door." When she "began crying and asked to be released from the bathroom (he) refused to move out of her way or let her out." The Court held that plaintiff couldn't proceed with her emotional distress claim because of the worker's compensation exclusive remedy bar "even though the employer's conduct might be characterized as egregious… Spears' allegations (are) insufficient to state a claim for emotional distress because the conduct falls within the employment relationship, even if the conduct is characterized as manifestly unfair, outrageous, harassing, or intended to cause emotional distress." *Comment:* I am not sure that this decision should define the bounds of a supervisor's conduct toward subordinates. If the false imprisonment was outside the worker's compensation exclusive remedy, why wasn't the resulting emotional distress? However, it is clear that criticisms and accusations (even those which are excessive) are usually within the confines of the worker's compensation system. On the other hand, false imprisonment is clearly outside the expected course of employment and not subject to the worker's compensation limitations.

OTHER DEVELOPMENTS

Sexual Harassment: While favoritism toward a paramour by a supervisor will generally not constitute actionable sexual harassment, where "such sexual favoritism in a workplace is

sufficiently widespread, it may create an actual hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as 'sexual playthings' or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or management." *Miller v Department of Corrections.* Here, a deputy warden was having a sexual affair with his secretary and with another subordinate, as well as possibly a third female subordinate. He then promoted these favored subordinates and arranged for some of them to report directly to him rather than to immediate superiors. After this and other acts of favoritism, plaintiff sued claiming that they were disadvantaged in their careers because of the preferential treatment received by the assistant warden's girlfriends – with whom they were competing for job advantages. *Comment:* Inter-office romances are generally dangerous – especially between bosses and subordinates because of the potential that the subordinate can eventually claim sexual harassment. And when the favoritism associated with an array of romantic involvement impacts several workers, an actionable hostile work environment may exist.

Vicarious Liability: A store customer could not proceed against the store for an assault which he suffered at the hands of a store employee. *Keller v Armstrong Garden Centers, Inc.* Employers are generally not liable for violent or criminal conduct by their employees unless they have notice of that propensity. Here, the assailant employee had previously been caught spying on women in the ladies bathroom. However, the Court did not believe this conduct, although aberrant, provided notice of this employee's violent propensity toward a customer. *Comment:* An employer who receives notice of an employee's aberrant behavior would do well to examine the same. But here, the employer was able to escape liability because the aberrant behavior was not violent in nature. A different result may have ensued if any aspect of the employee's prior behavior could have been characterized as violent.

Racial Harassment: Plaintiff was able to pursue an action against his employer and supervisor where he had repeatedly complained that his supervisor called him by a non-Arabic nickname ("Manny"), rather than his given Arabic name "Mamdouh." *El-Hakem v BGY, Inc.* The Court found that the use of the nickname was intended to harass plaintiff due to his ancestry or ethnic characteristics. *Comment:* Employers should be vigilant to prohibit all forms of nationality/racial harassment. This is especially so regarding harassment directed at Middle-Easterners in this post-9/11 era.

Individual Liability: The California Supreme Court has held that individuals who are either officers or directors of a company and who are shareholders of the company were not liable for the alleged failure to pay overtime to company employees. *Reynolds v Bement.* Here, along with the company, the plaintiff had sued eight individuals who were officers, directors or shareholders of the company alleging that they "directly or indirectly, through an agent or any other person, employed or exercised control over wages, hours, or working conditions…" The individuals responded that they could not be liable because they were not "employers" under the California Labor Code. *Comment:* There still remains the possibility that the individual officers or directors can be liable for failure to pay wages under other Labor

Code provisions that were not at issue in the *Reynolds* decision.

FMLA: To qualify for FMLA leave, an employee must render some degree of actual care to a family member. *Tellis v Alaska Airlines, Inc*. Here, plaintiff took a cross-country trip to retrieve the family vehicle during his wife's late-stage pregnancy difficulties, and called her on the phone during the three and a half days he was away. *Comment:* There have of late been a number of cases involving employees attempting to claim that questionable activities constitute protected "care" under the FMLA. Employers would do well to clarify in their written policies that meaningful care must be actually rendered to qualify for protection, and if there is any question about whether the activities qualify, human resources should be consulted *before* the leave begins.

Overtime Entitlement: The California Appellate Court has rejected a class action claim that PG&E's policy of taking partial-day deductions from accumulated leave violated the Fair Labor Standard Act's salary basis test interpretation in California law. *Conley v PG&E*. Exempt employees who took partial-day absences had the time automatically deducted from their accumulated leave, but if the employee had not accumulated leave, the policy did not permit a deduction from regular pay. "Because the deductions made from vacation leave banks of exempt employees represent days on which those employees have, in fact, taken at least four hours off work, PG&E's vacation leave policy neither imposes a forfeiture nor operates to prevent vacation pay from vesting as it is earned." *Comment:* This is good news for employers who have previously been unclear (and thus were constrained) from docking accumulated vacation pay for exempt employees for fear that they would lose the exempt employee classification.

At-Will Employment: An at-will employment agreement provides an employer with the same discretion to reduce an employee's salary as to terminate that employee. *Cripps v Fair-Isaac & Company, Inc. (Unpublished)* Here, a highly-compensated director had his generous earnings package reduced due to poor performance. The Court noted that it would be a "legal irony" if an employer could fire an at-will employee but not demote him, reduce his pay, or provide any lesser form of discipline. *Comment:* In exercising this sort of discretion, employers should first consider whether any other contractual promises exist that might limit their ability to reduce salary, etc.

Jury Trial Rights: A pre-dispute agreement between parties waiving rights to adjudicate a lawsuit through jury trial was unenforceable. *Grafton Partners, LP v Superior Court.* Here, a retainer agreement between the company and its accountancy firm provided that any dispute arising from their relationship would be resolved through court trial, without a jury. *Comment:* The constitutional right to resolve civil disputes through jury trial cannot be waived through pre-dispute agreements. Unlike arbitration, there is no statutory procedure to substitute a court trial for a jury trial. So while parties can agree to waive their rights to a jury trial through arbitration agreements, they cannot waive that right in lieu of other forum substitutions.

SLAPP: An anonymous poster to an internet message board criticizing a company and its CEO was protected under California's anti-SLAPP (Stop Lawsuits Against Public Policy) statute. *Ampex Co. v*

Cargle. Here, a company and its CEO sued an anonymous poster to an internet message board for defamation which caused the author of the internet message to respond to the defamation suit with a motion to strike under the anti-SLAPP statute. The Court found that the respondent had met his burden to show that he had made a statement in a public forum in connection with an issue of public interest and that the company had failed to demonstrate a probability that they would prevail on the merits. *Comment:* Anti-SLAPP statutes are becoming a more popular means of attacking defamation lawsuits brought against employees/former employees who have exercised free speech rights.

RICO Lawsuit Trend: In days past, the Racketeer Influenced and Corrupt Organizations Act (RICO) was used by employers against unions, challenging the union-conducted corporate campaigns and strike-related conduct. The latest trend is that employees are suing employers over the hiring of illegal workers alleging that employers intentionally hire these workers to pay them lower wages, thereby depressing the wages of legal workers. "Prime targets" for this new kind of RICO suit are companies with low profit margins that rely on a high-turnover workforce of low-skilled workers. Many times these companies turn to recruiters to provide a regular supply of new workers that appear to have valid documents. U.S.-born employees who feel underpaid, and believe that the foreign-born workers are part of the problem, may support such a legal challenge.

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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.