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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

Remember that to prove a case of retaliation, an employee must prove that he/she (1) engaged in protected activity (e.g. complaining about discrimination); (2) was subjected to adverse employment action; and (3) that the adverse action was caused by the protected activity.

Informal Complaints: Even informal complaints regarding Labor Code violations can be protected activity to support a retaliation claim according to the federal district court with jurisdiction in California (9th Circuit). *Lambert v Ackerley*. Here, several agents for the Seattle Supersonics (NBA basketball team) verbally complained that the company had changed a policy which caused them to lose overtime entitlement. After paying the overtime in question, the company terminated the complaining employees which the Court found to be retaliatory. *Comment:* In analyzing any decisions to terminate (or take other significant employment steps), employers should routinely examine whether the employee to be terminated made any recent complaints implicating public policy issues. This might include interviewing the employee's supervisors to examine whether verbal complaints had been made.

Adverse Employment Action: Reporting threats of violence to local police authority cannot constitute adverse employment action in a retaliation claim. *Brown v Department of Corrections*. Reports to law enforcement authorities are absolutely privileged under Civil Code §47(b). *Comment:* Communications to law enforcement authorities are generally protected and cannot form the basis of a lawsuit of any kind. However, if the motivation for making such claims is clearly unfounded, they can form the basis of other causes of action (e.g., false arrest, malicious prosecution, etc.).

Causation: While a significant lapse of time between the protected activity and the adverse employment action will usually disprove any causal connection between the two, a gap of ten years did not sever the causal link in one recent case. *Hohol v Transtar Industries*. Here, a ten year period elapsed between an initial complaint which was protected activity (here, identifying drug dealing) and a later decision to terminate. However, this case had extenuating circumstances in that the alleged offender (1) expressly acknowledged that he remembered the earlier protected activity several years later, and (2) there was a later court action against the offender in which the victim was to testify against the offender. *Comment:* Ordinarily a significant lapse of time (usually two years or more) will operate to sever the causal connection. But here, intervening acts served to renew the earlier offending activity during the intervening ten year period.

[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.

Again, employers should consider any prior public policy complaints by employees slated for termination.

Adverse Employment Action: A transfer to antoher facility of the employer's is generally not sufficient to constitute "adverse employment action" as would support a retaliation claim. *Christy Walden v Linmac, Inc.* Here, after complaining of discrimination (protected activity), an employer investigated and transferred complainant to a restaurant about three miles away and nominally demoted plaintiff. However, the demotion brought with it a slightly higher pay than the prior position. The Court found that neither act constituted a "significant adverse change in the terms of employment." *Comment:* The standard to assess adverse employment action recently announced by the California Supreme Court (see *Yanowitz v L'Oreal*, last newsletter) requires that there be a significantly "adverse change in the terms of employment" to support a claim of retaliation. This will usually mean a loss of compensation or benefits, although a severe change in the employee's work environment will also suffice.

DISABILITY DISCRIMINATION

Undue Risk: Job applicants with monocular (one-eyed) vision, who were rejected for delivery driver jobs by UPS, are sufficiently "limited" in the major life activities of seeing and working to be considered "disabled" under California law. However, they may still be denied driving positions if they pose a greater risk to public health and safety. *EEOC v United Parcel Service, Inc.* Here, applicants with monocular vision were found to pose a greater than usual public health and safety risk so that although their condition was protected under California anti-discrimination law, public safety considerations overrode the applicants' disability rights claims. *Comment:* This is becoming an increasingly difficult area for employers to evaluate. That is, an employer can (and should) deny employment to disabled employees where their disability poses an undue risk to themselves or to others. However, determining exactly where that line should be drawn can be tricky and involves a careful evaluation of the best available medical evidence.

Disability: A school district's insurance plan that did not provide coverage for invetro fertilization treatment did not violate a teacher's rights under state disability law. *Knight v Hayward Unified School District*. Here, the employee had tried various other infertility treatments that were covered under the health plan so that the failure to include invetro fertilization did not discriminate against infertility in general. Thus the coverage exclusion was not unlawful discrimination, but rather only a limitation on access to one form of treatment. *Comment:* It may seem surprising that the law would protect infertility as a "disability" but the broad expanse of California's disability discrimination law apparently does just that.

Reasonable Accommodation: An employer who failed to accommodate an employee's treatment of a Hepatitis C condition led to a large jury verdict in favor of the employee, which was upheld by the Court of Appeals. *Green v State of California*. Here, the employee's treatment required injections three times per week which caused fatigue, aches and stress or agitation, causing his doctor to request that

he be placed on light duty. The employer initially accommodated the request but a new supervisor later found that his scheduling difficulties along with the doctor's restrictions disqualified him from working as a stationary engineer. A jury disagreed and awarded 2.6 million dollars. *Comment:* Employers must be careful in discharging employees because they are not qualified to perform the essential functions of their job due to a medical condition. Indeed, if a court does not agree with an employer, as a matter of law, it is unlikely that a jury is going to be more sympathetic.

Marijuana Use: A California employer may refuse to hire an applicant who uses marijuana – even if for medical reasons. *Ross v Ragingwire Telecommunications, Inc.* An employer may decline to hire applicants whose marijuana use violates federal law, even if the use does not violate state law. Here, the employee was using the marijuana with a doctor's approval. *Comment:* Note that this does not mean that the employee did not have a protected "disability" under California law – only that the employer did not have to accommodate that disability by permitting use of a substance controlled under federal law.

OTHER DISCRIMINATION

Equal-Opportunity Harasser: A supervisor who harasses both male and female employees, can nevertheless be guilty of gender discrimination, if the quality and impact of the harassment falls more heavily on one gender than the other. *Christopher v EEOC.* Here, there is a triable question as to whether there were differences in the treatment of male versus female employees and whether female employees felt more intimidated and threatened by the supervisor. *Comment:* Generally, a supervisor who does not distinguish between protected classes in berating employees is not displaying actionable discriminatory intent. But this case opens the door for employees to bring lawsuits against general harassers in hopes of developing a distinction between harassment meted out to one protected class as opposed to another. Also, this case for the first time considers the impact on the victim in analyzing the harassment.

Domestic Partners: The California Supreme Court has held that California businesses must treat *registered* domestic partners the same as married couples. *Koebke v Bernardo Heights Country Club.* Here, defendant country club would not extend to one of its member's "significant other" the same golf privileges as it would extend to the spouses of heterosexual members. *Comment:* This is the first ruling under the 2005 version of the Domestic Partners Act. The protection of that act applies only to *registered* domestic partners. It does not protect unmarried or unregistered partners.

Harassment by Customers: Consistent with an earlier Appellate Court decision, employers can be liable for unlawful harassment of their employees by customers. *Galdamez v Potter*. Here, a postal service employee who was born in Honduras, implemented stringent enforcement of postal regulations which had been only loosely enforced in the past. This provoked hostility and opposition by both customers and co-workers which the employer allegedly ignored. These facts led the Appellate Court to conclude that a reasonable jury could find that an employer

ratified or condoned the harassing conduct toward its employee after learning of the same. *Comment:* Harassment by customers, clients or other persons upon whom a company depends for business presents a difficult situation. Many times, the employer can simply remove the employee from contact with the offender, thereby preserving both relationships. But an employer should be careful *not* to simply ignore those kinds of complaints by its employees.

Proof of Discrimination: An employee charging discriminatory demotion has an uphill battle in proving discrimination if the person who demoted him is the same person who previously hired or promoted him. *Coghlan v American Seafood Company*. Here, the owner of the company hired plaintiff and later retained him at a time when other employees were laid off and in fact, gave him favorable job assignments. *Comment*: This is another instance where the law and common sense intersect. Unless there has been a significant change between when a person is hired and a later adverse action, it makes little sense that the decision maker doing the hiring would suddenly develop discriminatory animus toward the person whom he had earlier given the preference.

Discriminatory Intent: Plaintiff's supervisor expressed a longstanding belief that women were ill-suited for the construction industry. This alone provided evidence from which a reasonable trier of fact could conclude that plaintiff (a woman) was subjected to a hostile work environment and the decision not to promote her was motivated at least in part by her gender. *Curry v Nevada Department of Transportation*. Here, the federal district court with jurisdiction in Nevada and California (9th Circuit) had no trouble finding that a reasonable jury could reasonably conclude that plaintiff's supervisor harbored the necessary discriminatory animus in making employment decisions. *Comment:* As soon as a supervisor expresses discriminatory beliefs, a plaintiff/employee has ready-made evidence that any adverse action against any person within the protected class was motivated by discrimination because the supervisor obviously harbored the necessary discriminatory feelings.

LABOR

Labor: Recent California legislation provides that employers who annually receive more than $10,000 in state funds, are not permitted to use those funds to assist or deter unionization efforts by their employees. A recent federal Appellate Court has held that this topic is preempted by the National Labor Relations Act (NLRA) and is void. *Chamber of Commerce of the United States v Lockyer*.

Unfair Labor Practice: A medical center's requirement that employees remove or cover pro-union badges in certain locations and another ban prohibiting the placement of union literature in an employee break room violated federal law. *Enloe Medical Center 345 NLRB No. 54.* Here, employees were prohibited from wearing badges that stated "Ask me about your union," or "Ask me about SEIU," in certain areas of the facility. The NLRB also prohibited a company's email to employees banning the placement of union literature in the break room. *Comment:* Restrictions on speech related to union activities must not be unduly broad, must be expressly

prohibited by broader written company policy, and must serve a legitimate business purpose.

OTHER DEVELOPMENTS

The California Labor Commissioner (through the DSLE) has revised guidelines for forced use of vacation or personal time off (PTO) by exempt employees at the direction of employers. However, the employer must provide "reasonable notice" before an employer can require that of its employees. Deduction from the salary of an exempt employee may be made when the employee is absent from work for one or more full days for personal reasons. But deductions for partial days off are not permitted. *Comment:* Employers should be certain that their policies/handbooks provide notice that employers intend to dock vacation or PTO for unexcused absences of one or more full days. Notice for at least one fiscal quarter must be provided.

Attorneys' Fees: The Appellate Court has eliminated an award of attorneys' fees ($371,000) and costs ($70,000) in a case which resulted in a judgment in the amount of $1. *Benton v Oregon Student Assistance Commission*. *Comment:* Once again, common sense prevails. To be entitled to attorneys' fees under some statutes, a party must "prevail." How does a party "prevail" in any meaningful sense where the conduct of the lawsuit and trial leads to a $1 judgment? However, courts generally award attorneys' fees if anything more than a nominal award is obtained.

Individual Rights: The owner of a business and his wife were not personally liable for back pay owed to a former employee after the company was found to have committed various unfair labor practices in violation of the NLRA. *A J Mechanical, Inc.* Here, the company decided to liquidate its assets to shareholders and directors several months before the employees filed charges of unfair labor practices. *Comment:* This Labor Board decisions compliments an earlier Appellate Court decision reaching the same result. Individual owners, managers or supervisors are not liable for Labor Code violations related to overtime pay. That may not be the case as to other Labor Code violations.

Defamation: Steering clear of the religious freedom issues, an Appellate Court found that plaintiff could proceed with the defamation claim where the day after he was fired (for being gay) the entire congregation was told that plaintiff had admitted to moral and sexual actions that were a sin; had disqualified himself from leadership through a breakdown in character; was a broken man who needed to be restored; had been asked forty or fifty times if he were gay and had lied and said that he was not. *Gunn v Mariners Church.* Plaintiff sued defendant church for defamation and invasion of privacy alleging that "homophobia is not part of the religious doctrine or theology of Mariners Church." *Comment:* As is common, defendants' main exposure resulted from comments made about plaintiff following a termination (rather than the termination itself).

Insurance: An employer must advise its employees when it is discontinuing a long-term disability policy for employees. But the employer's failure to do will not expose the employer to a civil suit for damages. *Peralta v Hispanic Business, Inc.* Employee Retirement Security Act (ERISA) provides that

employers must notify employees of the discontinuance of such insurance, but monetary recovery through civil action for failure to provide that notice is not permitted by ERISA. *Comment:* The only enforcement provided for by ERISA would be a court order requiring a plan to come into compliance with ERISA requirements. So it is clear that employers must give employees fair notice of the discontinuance of insurance benefits. The good news is that an employer's exposure in the event they do not, is limited.

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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.