CALIFORNIA LABOR & EMPLOYMENT LAW UPDATE

April 2004

United States Supreme Court

Supreme Court Will Not Consider San Francisco's Domestic Partner Benefit Ordinance. The United States Supreme Court declined to review a Ninth Circuit decision holding that a San Francisco ordinance requiring contractors to provide domestic partner benefits does not violate the Commerce Clause because the ordinance applies only to employees working on city contracts, not all of the contractor's employees. The petition was filed by an Ohio company that was denied a contract because it would not agree to provide domestic partner benefits. *S.D. Myers, Inc. v. San Francisco*, 2004 U.S. LEXIS 2048 (Mar. 22, 2004).

Supreme Court Lets Stand Decision Barring State Employee's FMLA Claim. The United States Supreme Court denied an employee's petition to review a Wyoming decision barring her FMLA suit because the employee was fired when she failed to return to work after her FMLA leave expired. It was determined that the employee was unable to perform her job and returned to work after she used all of the FMLA leave to which she was entitled. *Brockman v. Wyoming Dep't of Family Servs*., 2004 U.S. LEXIS 1668 (Mar. 1, 2004).

Federal Law and Individual Rights

ADA

Jury To Decide Whether Former Employee-Applicant Was Not Re-Hired Because Of A Disability Or Because The Company Had A No Re-Hire Policy. A 25-year Raytheon employee who battled cocaine addiction tested positive for the drug in 1991. He quit instead of being fired. In 1994, recovered, he applied for his old position, but his application was rejected. The company claimed his application was rejected because it had a policy barring the re-hiring of terminated employees. The employee contended his application was rejected because of his past record of addiction, an ADA violation. Upon remand from the United States Supreme Court, the Ninth Circuit considered whether the employee provided sufficient evidence to avoid summary judgment on his ADA claim and held a jury should decide the issue. *Hernandez v. Hughes Missiles Sys. Co.*, 2004 U.S. App. LEXIS 5402 (9th Cir. Mar. 23, 2004).

Arbitration

Party Who Expressly Submits To A Panel of Arbitrators The Question Of Whether Claims Are Arbitrable Cannot Later Claim The Arbitrators Did Not Have The Authority To Decide The Issue. PowerAgent filed a complaint against EDS alleging a breach of several interrelated contracts. One contract contained an arbitration provision. After the trial court determined arbitration was appropriate, PowerAgent filed a notice of arbitration in which it argued the arbitration panel, not the district court, should determine the arbitrability of certain claims. The panel unanimously found all claims were subject to arbitration. After the panel found for EDS on the merits of the claims, PowerAgent appealed. The Appellate Court held that, although whether a claim is subject to arbitration is usually a decision made by the court, PowerAgent cannot now claim the arbitrators were powerless to decide the issue after having argued they possessed such authority. *PowerAgent Inc. v. Electronic Data Sys. Corp.*, 358 F.3d 1187 (9th Cir. 2004).

FLSA

The Number Of Overtime Hours Actually Worked Caring For K-9 Was A "Pertinent Fact" To Consider In Determining Overtime Compensation Agreed Upon In CBA. A K-9 officer sued the City of Carson for overtime pay associated with the time she spent caring for her police dog. In 1995, the City and her Union agreed to a $60 bi-weekly pay differential to compensate her off-duty time caring for the dog. The City relied on an "informal" survey of how much money other law enforcement agencies provided to their K-9 officers. The flat-fee differential was incorporated into the collective bargaining agreement (CBA).

The City moved for summary judgment claiming it was exempt from the overtime provisions of the FLSA because it had a "reasonable agreement" under 29 C.F.R. Section 785.23. Although acknowledging the flat fee amounted to one hour's pay per week and was insufficient to cover the tasks involved, the trial court found for the City and held the agreement was reasonable since it was negotiated at arms-length between the City and Union.

The Appellate Court reversed and remanded the case stating for the "exemption" to apply, the agreement must be "reasonable" taking into account "all of the pertinent facts." Considering

SEYFARTH SHAW ATTORNEYS LLP

This newsletter is one of a number of publications produced by the firm. For a wide selection of other such publications, please visit us online at www.seyfarth.com.

Copyright © 2004 Seyfarth Shaw LLP
All rights reserved

"some approximation" of the number of overtime hours actually worked is a pertinent fact. Further, Section 785.23 requires more than arms-length negotiations and incorporation into a CBA to make an agreement reasonable. *Leever v. City of Carson*, 2004 U.S. App. LEXIS 4201 (9th Cir. Mar. 4, 2004).

Because Firefighter/Paramedics Are "Responsible" For Fire Suppression, They Are Exempt From Overtime. Seventy firefighter/paramedics sued San Francisco to recover overtime pay. The issue was whether they were engaged in "fire protection activities," and thus, exempt from overtime pay. The Court considered whether the plaintiffs had the "responsibility" to engage in fire suppression under 29 U.S.C. Section 203(y). The Court determined the proper definition of "responsibility" is "the duty to perform an action if it is part of one's job to do so." Here, when called upon to fight a fire by their superiors the paramedics assisted, which is enough to constitute having the "responsibility" to engage in fire suppression. *Weaver v. City & County of San Francisco*, 2004 U.S. Dist. LEXIS 3421 (N.D. Cal. Feb. 27, 2004).

Note: This precise question arose in a district court case out of Los Angeles. There, the court found the dual function of firefighter/paramedics is not exempt since the employees did not have the responsibility to engage in fire suppression when assigned to ambulances. The case, *Cleveland v. Los Angeles*, No. 03-55505, is currently pending before the Ninth Circuit. The *Weaver* court distinguished *Cleveland* on its facts, finding it was not persuasive authority.

Retaliation/Wrongful Termination

Conduct Must Violate A Statute, Rule Or Regulation To Rise To The Level Of Protected Activity. Plaintiff, who worked as an outside salesperson for Motion Industries for one year, was fired for poor sales performance. Plaintiff sued alleging the company terminated him in retaliation for raising safety concerns before he was hired. In particular, plaintiff alerted the *San Francisco Chronicle* and a State Senator of safety hazards on a Motion Industries project. The court held plaintiff had not engaged in protected activity because the alleged safety hazards did not violate any federal or state statute, rule or regulation, and entered summary judgment for the employer. *Love v. Motion Indust., Inc.*, 2004 U.S. Dist. LEXIS 4016 (N.D. Cal. Mar. 8, 2004).

Title VII

Court Reinstates Long-Time Employee's Hostile Work Environment And Disparate Treatment Claims. George McGinest, an African-American GTE employee for 23 years, alleged he was subjected to a racially hostile work environment, and denied promotions due to his race and in retaliation for his complaints about a hostile environment. The trial court granted summary judgment for the employer, finding the incidents comprising the hostile work environment claim were sporadic and, for the most part, adequately remedied.

The Appellate Court reversed and reinstated the employee's hostile environment and disparate treatment claims. The Court stated, like the framework used for sexual harassment claims, the standard for determining whether an environment is racially hostile should be assessed from the perspective of a reasonable person belonging to plaintiff's racial or ethnic group. The Court found plaintiff endured at least several racial incidents per year for ten-to-fifteen years, including being called derogatory names, being exposed to racist graffiti, and being denied proper equipment. The Court also found the company's response, which included painting over the graffiti and counseling some employees who made comments, was inadequate because it did not stop the behavior. Additionally, the company did not discipline any of the harassers until the plaintiff filed a charge with the EEOC. The Court also noted the company's anti-harassment policy did not contain a statement of zero tolerance and did not provide employees with a step-by-step process for complaining about discrimination or harassment. *McGinest v. GTE Service Corp.*, 2004 U.S. App. LEXIS 4632 (9th Cir. Mar. 11, 2004). This case highlights the importance of following a zero-tolerance policy and taking appropriate disciplinary action when necessary.

State Law and Individual Rights

Arbitration

Defendants Waived Their Right To Invoke Contractual Arbitration By Unreasonably Delaying Their Demand Until The Day Before Discovery Closed. An employee filed a complaint for unpaid wages in July 2002. The Company answered with a general denial and did not raise arbitration as an affirmative defense. In a November 2002 case management statement, the Company advised the court an arbitration agreement existed and it might file a motion to stay the proceedings. However, in a February 2003 case management statement, the Company struck that language and stated it was retaining new counsel. Then, the parties were ordered to mediation, took depositions, and engaged in other discovery. One day before a discovery order was to take effect, the Company moved for an order compelling arbitration.

The Appellate Court agreed with the trial court's decision to deny arbitration because the Company waived its right to arbitration. The record contained ample evidence the Company had delayed in asserting its right to arbitration, failed to plead arbitration as an affirmative defense, and engaged in conduct wholly inconsistent with a desire to arbitrate, all causing prejudice to the employee. *Nakajima v. Versatile Media One, Inc.*, 2004 Cal. App. Unpub. LEXIS 2227 (Mar. 11, 2004).

FEHA

A Supervisor Need Not Be Fully Accountable and Responsible For An Employee's Performance or Work Product to Be a Supervisor. Plaintiff was an investigator for a County District Attorney's Office. She performed her duties "under the direction of" the deputy district attorney assigned to a case but was supervised by the senior and chief investigators. In January 1997, plaintiff was reassigned and "B. Enos" directed her in almost all of her duties. For over a year, Enos behaved inappropriately toward plaintiff.

Plaintiff filed a complaint alleging various employment claims stemming from her alleged harassment by Enos. At trial, the jury concluded plaintiff had not proven Enos was her supervisor. The trial court instructed the jury concerning the definition of a supervisor. The instruction stated a supervisor is, among other things, a person having "the responsibility to direct them" (i.e., employees). The court then instructed the jury that "the person giving the direction must be directly responsible for the performance of his or her department or unit and must be fully accountable and responsible for the performance and work product of the employees in his or her department or unit." The Appellate Court held this instruction was error, and stated a supervisor need not be fully accountable and responsible for an employee's performance or work product. *Chapman v. Enos*, 2004 Cal. App. LEXIS 309 (Mar. 10, 2004).

Plaintiffs Who Were Unable To Perform One Particular Job Are Disabled Under The FEHA Since They Are Limited In The Major Life Activity Of "Working." Longtime employees of United Parcel Service (UPS) who were monocular (could only see out of one eye) and excluded from working as full-time, package-car delivery drivers, filed suit against UPS under the FEHA, claiming disability discrimination based on their vision impairment. An issue of first impression in California, the court had to decide whether plaintiffs are disabled within the meaning of FEHA.

The Court held plaintiffs are limited in the major life activity of "working" and thus, are disabled under FEHA. Unlike the ADA, FEHA only requires the impairment to *limit* an individual's ability to participate in a major life activity (the ADA requires that it *substantially limit a major life activity*). An impairment limits a major life activity if it makes achieving that activity more difficult. The court explained when the Legislature amended the FEHA in 2001, it expressly added "'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments." The Legislature departed from the ADA and federal court decisions holding that the inability to perform a single, particular job is not enough to establish a substantial limitation on the major life activity of working. The court acknowledged UPS's argument that its interpretation of the FEHA will open the floodgates of disability litigation. The court responded that to be entitled to relief, the plaintiffs still must show they could drive as safely as the other drivers. *Bryan v. United Parcel Serv.*, 2004 U.S. Dist. LEXIS 3382 (N.D. Cal. Mar. 2, 2004).

Note: The court noted because of the importance of the issue decided, the case is appropriate for an immediate appeal.

State Law Requiring Employers Who Provide Prescription Drug Benefit To Include Contraceptives Is Constitutional As Applied To Catholic Charities Of Sacramento. In 1999, the California Legislature passed the Women's Contraception Equity Act ("WCEA") in an effort to eliminate gender discrimination in health care benefits and improve access to prescription contraceptives. The law requires those employers who provide prescription drug coverage to their employees to include prescription contraceptives under their drug plan. WCEA exempts a "religious employer" from having to comply with its mandate. To be a "religious employer," an entity must: (1) have as its purpose the "inculcation of religious values"; (2) primarily employ persons who "share the religious tenets of the entity"; (3) primarily serve persons who "share the religious tenets of the entity"; and (4) be a tax exempt nonprofit organization.

Although Catholic Charities of Sacramento did not satisfy this definition, it filed a declaratory judgment action seeking a ruling that WCEA is unconstitutional under the Establishment and Free Exercise Clauses. Both the Superior and Appellate Courts rejected Catholic Charities' motion for injunctive relief, finding no reasonable likelihood that Catholic Charities would prevail on the merits of its claim (that the law is unconstitutional).

In a 6-1 ruling, the California Supreme Court held the WCEA is constitutional on its face, and as applied to Catholic Charities. The majority rejected Catholic Charities' contention that the law interfered with matters of internal church governance, stating the law only implicates the "relationship between a nonprofit public benefit corporation and its employees, most of whom do not belong to the Catholic Church." It also rejected Catholic Charities' claim that the law violates the Free Exercise Clause. The majority noted Catholic Charities could avoid conflict with the WCEA by simply not offering prescription drug coverage. Moreover, the law serves a compelling state interest (remedying gender discrimination) and is narrowly tailored to achieve that interest.

The majority also rejected Catholic Charities' claim that WCEA discriminates against the Catholic Church because its "religious employer" exemption fails to include Catholic Charities, an organization affiliated with the Church. Although the Legislature considered and rejected a more expansive definition of a "religious employer," the decision not to adopt a broader exemption was not evidence that the Catholic Church was being discriminated against. *Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County*, 32 Cal. 4th 527 (Mar. 1, 2004).

Legislative Update

Federal Developments

EEOC Statistics. The EEOC has posted a comprehensive breakdown of enforcement and litigation statistics for FY 2003 at its Website: http://www.eeoc.gov.

This newsletter is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents please contact the firm's Labor & Employment Law Practice Group.

ATLANTA
One Peachtree Pointe
1545 Peachtree Street , N.E., Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON
Two Seaport Lane, Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
312-346-8000
312-269-8869 fax

HOUSTON
700 Louisiana Street, Suite 3700
Houston, Texas 77002-2731
713-225-2300
713-225-2340 fax

LOS ANGELES
One Century Plaza
2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK
1270 Avenue of the Americas, Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO
400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO
560 Mission Street, Suite 3100
San Francisco, California 94105
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.
815 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS
Boulevard du Souverain 280
1160 Brussels, Belgium
(32)(2) 647 60 25
(32)(2) 640 70 71 fax