

CALIFORNIA LABOR & EMPLOYMENT LAW

UPDATE

August 2005

Federal Courts

Americans With Disabilities Act (ADA)

Court Reinstates ADA Claim And Holds That Reading Is A Major Life Activity. Plaintiff, a graveyard shift barge off-loader, was diagnosed with depression and/or bipolar disorder. Plaintiff took two months' FMLA leave, returning to work in May 2001 with restrictions to work day shifts and no more than 12 hours a day or 48 hours a week. In June 2001, defendant terminated plaintiff for violating an equipment abuse policy. Plaintiff sued under the ADA, and the trial court granted the employer summary judgment.

On appeal, the Ninth Circuit reversed, holding that medical evidence is not necessary to establish a genuine issue of material fact regarding the impairment of a major life activity. A plaintiff's testimony may suffice so long as it is detailed enough to convey the existence of an impairment and is not simply self-serving conclusions.

The Ninth Circuit found that plaintiff's testimony about his difficulty sleeping, which is considered a major life activity, and his medication needs was sufficient evidence to avoid summary judgment. Plaintiff also testified about how his condition impaired his ability to read, and the Ninth Circuit specifically recognized reading as a major life activity. The Ninth Circuit remanded the case for a trial on plaintiff's ADA claims. *Head v. Glacier NorthWest, Inc.*, 2005 U.S. App. LEXIS 13379 (9th Cir. July 6, 2005).

Arbitration

Ninth Circuit Wants A Second Look At Whether A Court Or An Arbitrator Should Decide Enforceability Of Arbitration Clause. In a case before a three-judge panel of the Ninth Circuit Court of Appeals, a plaintiff resisting arbitration claimed he had been fraudulently induced into signing a contract containing an arbitration clause. The three-judge panel of the Ninth Circuit Court of Appeals, joining the position of the Second, Fifth and Sixth Circuits, ruled that an arbitrator, not the court, should decide whether the arbitration agreement should be enforced against the resisting party. However, the Ninth

Circuit has now vacated the three-judge panel's decision and ordered that the case be reheard *en banc* (i.e., by all of the Ninth Circuit judges). *Nagrampa v. MailCoups Inc.*, 2005 U.S. App. LEXIS 12782 (9th Cir. June 28, 2005).

Family Medical Leave Act (FMLA)

Driving Cross Country To Retrieve A Car And Calling Wife While On The Road Are Not "Caring For" Her Under The FMLA. Plaintiff, a union employee who worked in Seattle as a maintenance mechanic, wanted time off because his wife was having difficulties with her pregnancy. His supervisor suggested he apply for FMLA leave. Instead of reporting for his next shift on July 5, plaintiff simply left a leave request form seeking leave for July 5-7. On July 6, after having troubles with his vehicle, he flew to Atlanta to retrieve another vehicle he owned so he and his wife would have a working vehicle. He returned to Seattle on July 10. While on the road, he called his wife regularly to check on her pregnancy. His wife gave birth on July 9 and the plaintiff did not come to work as expected on July 11. The employer fired him for unexcused absences. Ultimately, the employer offered to reinstate the plaintiff but insisted on placing a disciplinary letter in his file. Plaintiff refused and opted to sue. The trial court granted summary judgment for the employer because plaintiff had not "cared for" his wife during his FMLA leave.

The Ninth Circuit affirmed summary judgment for the employer. The FMLA requires that leave be "to care for" a family member. Caring for a family member with a serious health condition "involves some level of participation in ongoing treatment of that condition." Instead of staying with his wife and participating in her ongoing treatment, the plaintiff left her for four days to retrieve his car. The court further found that the phone calls were not a substitute for being with his wife and could not be considered participation in her ongoing treatment. *Tellis v. Alaska Airlines, Inc.*, 2005 U.S. App. LEXIS 13975 (9th Cir. July 12, 2005).

Title VII

Repeatedly Calling Employee "Manny" Rather Than His Arabic Given Name Constituted Discrimination. Plaintiff, who was of Arabic heritage, sued his employer for discrimination, alleging that the company's CEO called

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him “Manny” instead of his given name of “Mamdouh.” The CEO had also suggested that the plaintiff westernize his last name to “Hank.” The CEO claimed that a “Western” name would increase the plaintiff’s chances for success and would be more acceptable to the company’s clientele. The employer contended no discrimination occurred because “Manny” is not a racial epithet. The court disagreed, noting that “a group’s ethnic characteristics encompass more than its members’ skin color and physical traits,” and that “names are often a proxy for race and ethnicity.” The court held that the conduct was serious and pervasive since the CEO used the name Manny over plaintiff’s repeated objections. Ultimately, the court found sufficient evidence of discriminatory intent to support the jury’s verdict for plaintiff. *El-Hakem v. BJY Inc.*, 2005 U.S. App. LEXIS 14805 (July 21, 2005).

Employer May Be Liable For Failing To Investigate And Remedy Harassment Of Employee By Customers And Community Members. Plaintiff, who was born in Honduras and spoke accented English, was the postmaster for a rural community in Oregon. She made a number of changes in accordance with Postal Service regulations, which were met with hostility and opposition from customers and postal workers. Community opposition was so strong that it culminated in a petition drive to remove her. The Postal Service also initiated a disciplinary investigation based on complaints that she was “rude” and that her insistence on regulatory compliance undermined good customer service. When plaintiff was placed on administrative leave, she sued alleging race, color and/or national origin discrimination. At trial, the court refused to instruct the jury that the Postal Service could be liable for failing to investigate and remedy harassment by customers and community members. The jury found for the Postal Service.

The Ninth Circuit granted plaintiff a new trial, holding that the trial court erred in refusing to instruct the jury as to the Postal Service’s duty to investigate and remedy harassment from third parties such as customers and community members. Almost from the time she arrived, plaintiff received hostile comments from customers and other residents, and she received threats to her life and safety. When plaintiff complained to her superiors, she was told that it was a “redneck” town and that she was “tough enough” to deal with it. The Postal Service did respond by offering plaintiff a position in a town with a larger Hispanic community and by arranging for a diversity specialist to inquire into the situation, but the court noted that this response was only in conjunction with imposing formal discipline against plaintiff. The court held that, weighing all of the evidence, a jury could have reasonably concluded that management-level Postal Service employees knew or should have known of the harassment and failed to take reasonable steps to end or deter it. *Galdamez v. Potter*, 2005 U.S. App. LEXIS 14323 (9th Cir. July 15, 2005).

“Same-Actor” Evidence Creates Strong Inference Against Job Bias. An American plaintiff worked as a commercial fisherman for a Norwegian-owned and managed

company operating fishing vessels in the Pacific Northwest and Alaskan waters. Starting in 1997, plaintiff served as master on the Katie Ann. He then worked in a lower position as mate on the American Dynasty but viewed the change as desirable because he could make more money. In 2001, plaintiff was removed from the Dynasty because it was a poorly performing boat and was offered the position of mate on the Katie Ann. Plaintiff declined the offer, which he considered a demotion, and sued the company for national origin discrimination. The trial court granted summary judgment in favor of the employer.

The Ninth Circuit affirmed summary judgment, holding that plaintiff failed to present sufficient evidence that the employer’s explanations were a pretext for discrimination based on national origin, *i.e.*, that plaintiff was American. The court noted that the plaintiff’s burden is especially steep given the “same actor inference,” which provides that “where the same actor is responsible for both the hiring and the firing of a discrimination plaintiff and both actions occur within a short period of time, a strong inference arises that there was no discriminatory action.” The court also rejected plaintiff’s argument that the same-actor inference should not apply because three years had passed between the hiring and demotion, since there were other favorable actions taken during plaintiff’s employment after the hiring but before the adverse employment decision. *Coghlan v. Am. Seafoods Co.*, 2005 U.S. App. LEXIS 13459 (9th Cir. July 7, 2005).

California Courts

Arbitration

California Law Requires That The Court Decide Whether A Contract Containing An Arbitration Clause Is Illegal. Two parties entered into a loan agreement containing an arbitration clause. Three months later, the lender demanded arbitration, claiming that the borrower breached the agreement. The borrower moved to stay the arbitration so a court could determine whether the loan agreement was illegal and unenforceable because the lender was not properly licensed. The arbitrator stayed the proceedings because he deemed it more economical and expeditious to allow a court to decide the illegality issue. The lender moved the court to compel arbitration, which was denied.

The Court of Appeal held that no violation of the U. S. Arbitration Act occurred when the arbitrator deferred to the court on the issue of the contract’s legality. California law obligated the trial court to decide illegality issues when the entire contract might be illegal. *Hotels Nevada, LLC v. Bridge Banc, LLC*, 2005 Cal. App. LEXIS 1074 (Cal. App. 2d Dist. July 8, 2005).

Constitutional Law

Cost-Splitting Requirement Found Unconstitutional. A former police dispatcher challenged the constitutionality of a memorandum of understanding (MOU) between the

city and the San Bernardino Public Employees Association, which required the city and the employee to bear equally the cost of a hearing officer in an employee's appeal. The trial court found in favor of the employee on the issue, and the appellate court affirmed, finding that the employee's due process rights include the right to have a meaningful hearing without having to pay for it. *Florio v. City of Ontario*, 2005 Cal. App. LEXIS 1091 (Cal. App. 4th Dist. June 30, 2005) (order to publish entered July 13, 2005).

FEHA

Employees Can Sue For Sexual Harassment Based On Extreme Sexual Favoritism. The California Supreme Court ruled that two female prison employees may maintain a sexual harassment suit alleging that a prison warden created a hostile environment by giving unwarranted favoritism to his female lovers. Plaintiffs worked at a prison where the warden was having sexual affairs with three female prison employees. The warden's "lovers" received promotions and special reporting duties because of their relationships with the warden. Although plaintiffs did not suffer sexual harassment, one plaintiff lost her bid for a promotion to one of the warden's lovers, who was less qualified. The warden's sexual liaisons were obvious to employees, as was his favoritism toward his lovers. When one plaintiff complained about the sexual favoritism to a regional administrator, she suffered retaliation for complaining. The plaintiff sued for retaliation and sexual harassment and was joined by another employee who also worked under the warden, knew about his affairs and sexual favoritism, and quit after being retaliated against for participating in an investigation into his conduct.

The trial court granted summary judgment in favor of the employer. The Court of Appeals affirmed, finding that sexual favoritism is not actionable sexual harassment. The court reasoned that the female plaintiffs were in no different position than male employees who likewise did not receive the special treatment that the warden conferred on his lovers, and therefore plaintiffs could not demonstrate a hostile environment created by a pattern of harassment based on gender.

A unanimous California Supreme Court reversed and reinstated the sexual harassment claims, holding that pervasive sexual favoritism can support a hostile workplace claim. The Court relied on the EEOC's policy statement on sexual favoritism which recognizes that "if favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment ... regardless of whether any objectionable conduct is directed at them." According to the Court, an actionable sexually hostile environment arises where pervasive sexual favoritism conveys the message that women are viewed as "sexual playthings" or that the way to get ahead is to have sex with the boss. The Court brushed aside the employer's concern that regulating private, consensual relationships in

the workplace contravenes a social policy favoring those relationships and ignores the fact that employment discrimination laws are not intended to create a workplace civility code. The Court defended its decision by saying that it was addressing the impact of the personal relationships, not the relationships themselves, and that "the FEHA already clearly contemplates some intrusion into personal relationships," as in the example of the prohibition against *quid pro quo* harassment. *Miller v. Dep't of Corr.*, 2005 Cal. LEXIS 7606 (Cal. July 18, 2005).

Practice Note: The *Miller* decision reinforces the common sense observation that romantic relationships between supervisors and subordinates are fraught with potential legal problems. Some employers prohibit these relationships, or at least require the supervisor to notify management to permit appropriate monitoring to prevent unfair treatment and to guard against the perception of unfairness. Employers must be cautious, however, about invading personal privacy and avoiding adverse actions based on an employee's lawful off-premises, off-duty activity. *Miller* also reinforces the advice to take seriously any employee complaint of paramour favoritism.

Wage and Hour

Employer Can Deduct From Exempt Employees' Vacation Leave Banks For Partial Day Absences. Pacific Gas & Electric employees believed they were misclassified as exempt from overtime and sought class certification for several classes of employees: (1) a salary-basis class consisting of all exempt employees, and (2) various job duties classes consisting of employees who held jobs in specific categories. The trial court denied the motion for class certification in its entirety. The appellate court agreed that the salary-basis class should not be certified and noted that nothing in California law precludes an employer from deducting from exempt employees' vacation leave banks, when available, for partial-day absences from work. According to the court, because the vacation leave pay is used to make up for partial-day absences it merely regulates the timing of the pay. It does not impose a forfeiture or prevent vesting as it is earned. *Conley v. Pacific Gas & Elec. Co.*, 2005 Cal. App. LEXIS 1122 (Cal. App. 1st Dist. July 21, 2005).

Workers' Compensation

The Recently Enacted Apportionment Provisions Of SB 899 Must Be Applied To Pending Cases. Plaintiff injured his back in August 1999 while working as a welder. In September 2000, his employer stipulated that the plaintiff suffered a 46% level of permanent disability. A WCJ approved the agreement and issued an award in March 2001. Plaintiff petitioned the WCAB to reopen his disability claim alleging the industrial injury caused a new and further disability. On April 9, 2004, the WCJ concluded that the permanent disability had increased to 70%. The doctor's report indicated that the increased disability

was caused equally by the industrial injury and osteopenia (a bone condition). On April 19, 2004, the Legislature enacted a series of reforms to the Workers' Compensation Act (SB 899), including a new apportionment statute. The WCAB granted the employer's petition for reconsideration in light of the new apportionment statute and remanded the matter for a determination whether SB 899 should apply and, if so, whether it would result in a different outcome. Plaintiff petitioned the Court of Appeal for review and the petition was granted.

In order to fairly allocate legal responsibility, "apportionment" segregates industrial injuries from non-industrial factors. Prior to the enactment of SB 899, apportionment was "concerned with the disability, and not its cause or pathology." Under SB 899, "[a]pportionment shall be based on causation." SB 899 was an "urgency statute," that became effective on April 19, 2004. According to the court, the Legislature intended that the statute be applied immediately. Thus, the court concluded that the apportionment provisions of SB 899 must be applied to all cases, including plaintiff's, that are not final on April 19, 2004, regardless of when the injury occurred or the existence of an interim decision. *Marsh v. WCAB*, 2005 Cal. App. LEXIS 1024 (Cal. App. 5th Dist. June 28, 2005).

Legislative Updates

Federal Developments

New EEOC Guidance Issued On The ADA's Application To Employees With Cancer. The EEOC provides guidance for employers on discussing cancer with a job applicant, treating an employee's voluntary disclosure about the disease, and reasonable accommodations under the ADA. The EEOC has deemed cancer a disability under the ADA. The guidance can be accessed at: <http://www.eeoc.gov/facts/cancer.html>. See Daily Lab. Rpt. No. 143 (July 27, 2005), A-16.

Bill Introduced To Bar Sexual Orientation Discrimination At Federal Agencies. Rep. Henry Waxman (D-Calif), introduced a bill that would expressly bar sexual orientation discrimination. Rep. Waxman said that the bill was necessary to clear up current confusion caused by the Civil Service Reform Act's failure to mention sexual orientation as a protected status. The bill currently has 10 sponsors and has been referred to the House Government Reform Committee. See Daily Lab. Rpt. No. 130 (July 8, 2005), A-7.

California Developments

Emergency Heat Stress Regulations Being Drafted. The California Division of Occupational Safety and Health is drafting emergency regulations to protect workers from heat stress. The regulations were prompted by the deaths of three farm workers and a construction worker. The regulations will focus on providing cool drinking water, shade, and employee training on emergency procedures. See Daily Lab. Rpt. No. 144 (July 28, 2005), A-11.

Governor Signs Bill Clarifying ID Law. On July 21, 2005, Gov. Schwarzenegger signed SB 101, which clarifies an existing state law requiring employers to use only the last four digits of an employee's Social Security number, or a unique employee identification number, on checks, drafts or vouchers issued by the employer. See Daily Lab. Rpt. No. 143 (July 27, 2005), A-15.

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