CALIFORNIA
LABOR & EMPLOYMENT LAW
UPDATE

September 2004

Federal Courts

Disability Discrimination

Ministerial Exception Bars Title VII Claim For Failure To Accommodate. A pastor with ADD, dyslexia and heart problems alleged he could perform his duties with minor accommodations. The church refused to make any accommodations, forcing the pastor to resign. He sued, seeking reinstatement and damages. The trial court granted the church's motion to dismiss, finding that the First Amendment precluded review of the church's ministerial employment decisions. While sexual harassment claims have been allowed to proceed if they do not involve the church's constitutionally protected prerogative to choose its clergy, the court in this case determined that the plaintiff's claim was barred because it was directly related to the employment relationship between church and minister. *Werft v. Desert Southwest Annual Conference Of The United Methodist Church*, 2004 U.S. App. LEXIS 15773 (9th Cir. July 30, 2004).

The NLRB

Employer Properly Fired Union Sympathizers For Falsifying Timesheets And Then Lying About The Falsification. Syracuse Scenery, a small company that manufactures, installs and sells stage scenery, modified its retirement fund resulting in a union organizing campaign. In an unrelated move, Syracuse assigned four employees, who were union supporters, to a two-week project working from 7 a.m. to 3 p.m. daily. When the employees failed to timely complete the project, a Project Manager checked on the status of the job and discovered that the crew left their shift early on four consecutive days. However, the crew's timesheets falsely indicated that they worked a full 32-hour week. Upon being confronted with this, the crew members claimed that their timesheets were accurate. All four employees were fired for falsifying timesheets.

Despite the falsified timesheets and lack of truthfulness, an administrative law judge found that Syracuse violated the NLRA by firing the four employees. The judge found that the employer looked for a reason to get rid of the union supporters, and therefore, the employer's reasons for firing the employees were pretextual. The NLRB reversed. It found that the employees' falsification of timesheets and dishonesty were legitimate and nondiscriminatory reasons for termination. *Syracuse Scenery & Stage Lighting Co*., 342 NLRB No. 65 (2004).

Failure To Notify And Bargain With Union Prior To The Installation Of Surveillance Cameras In The Workplace Violated The NLRA. A brewery installed hidden surveillance cameras in its work and break areas to detect suspected illegal drug-related activity. The surveillance cameras revealed that employees were using these areas for impermissible purposes. Ultimately, sixteen employees were disciplined for misconduct such as sleeping, urinating on the roof, smoking marijuana and/or being away from the work area for too long.

The use of hidden surveillance cameras is a mandatory subject of collective bargaining. However, the employer is not required to inform the union of the location or time in which the cameras will be used, but must advise only of its proposal to use cameras and the general reason for their use. Here, because the cameras were directed in areas where employees were permitted, the employer's unilateral installation of cameras violated the NLRA. As for an appropriate remedy, a divided NLRB determined that a "make-whole remedy" was unnecessary since there was an insufficient nexus between the unfair labor practice and the reason for the discharge. Thus, the employer was not required to rescind the discipline it imposed. *Anheuser-Busch, Inc*., 342 NLRB No. 49 (2004).

Retaliatory Discharge

Opposing Retaliation Of A Subordinate Is Protected Activity Under Title VII. Plaintiff was employed as the municipal court administrator for the city of Beaverton, Oregon. While selecting applicants to interview for a senior court clerk position, plaintiff refused her supervisor's recommendation to pass over a subordinate employee, Susie Perry, for a promotion to the position. Perry previously had successfully sued the city for racial discrimination and retaliation. Before plaintiff conducted any interviews, her supervisor told her to be ready for a lawsuit "when we don't hire" Perry. Yet, plaintiff and other interviewers found Perry to be the most qualified for the job. Plaintiff's supervisor personally interviewed Perry in plaintiff's presence and opined that Perry did not interview well. Plaintiff disagreed and Perry was eventually promoted to the position after a probationary period.

Plaintiff's supervisor put plaintiff on extended probation for problems, raised for the first time, relating to her computer skills, data analysis and attendance. Plaintiff was eventually terminated. Plaintiff sued, claiming, among other things, unlawful

retaliation under Title VII and the First Amendment. The trial court granted summary judgment to the employer. The Ninth Circuit reversed and remanded, concluding that plaintiff had established a prima facie case of retaliation since she had engaged in protected opposition activity. The Court also found that plaintiff offered sufficient evidence to create a genuine issue of fact as to whether her conduct constituted expressive conduct on a matter of public concern under the First Amendment. *Thomas v. City of Beaverton*, 2004 U.S. App. LEXIS 16739 (9th Cir. Aug. 16, 2004).

State Courts

Arbitration

The Arbitrator, Not The Court, Must Determine Whether Related Arbitrations Should Be Consolidated. Plaintiff Henry Yuen was the founder and former president of Gemstar and plaintiff Elsie May Leung was its chief financial officer. TV Guide International acquired Gemstar, and as part of the acquisition, plaintiffs signed various written agreements. Each agreement provided that the parties would submit any dispute to binding arbitration. Gemstar fired the plaintiffs for financial irregularities in an accounting report. Yuen and Leung initiated separate arbitration proceedings and would not agree to consolidate the arbitrations. Gemstar filed a motion to consolidate, which the court granted based on judicial economy. On appeal, the appellate court determined that, under the Federal Arbitration Act, the arbitrator should decide whether the parties' arbitration agreements permit consolidation of two arbitration proceedings and directed the trial court to vacate its prior ruling granting consolidation. *Yuen et al. v. The Superior Court of L.A. County*, 2004 Cal. App. LEXIS 1411 (2d Dist. Aug. 25, 2004).

Discrimination and Harassment Under FEHA

Amended Government Code Section 12940(j)(1), Imposing Liability On Employers For Harassment Caused By Non-Employees, Does Not Apply Retroactively. A nurse employee sued her veteran's residence facility, alleging that a resident of the facility harassed her by making unwelcome comments, chasing her with his scooter, and spreading rumors that were sexual in nature. The trial court ruled the employer was liable for the resident's harassing conduct and plaintiff was awarded damages. The appellate court reversed, holding that FEHA did not impose liability on an employer for sexual harassment perpetrated by an employers' client or customer. While the case was pending review before the California Supreme Court, the FEHA was amended to expressly provide for employer liability for sexual harassment by non-employees. In addition, a separate appellate court ruled in *Salazar v. Diversified Paratransit, Inc.*, 117 Cal. App. 4th 318 (2004) that the amended statute applied retroactively because the statutory amendment only clarified existing law. As a result, the Supreme Court remanded this case back to the appellate court in light of the new legislation.

The appellate court again came to the same conclusion, *i.e.*, that prior to the amendment, FEHA did not impose liability on an employer for sexual harassment by a non-employee. Contrary to *Salazar II*, the appellate court here found that the amended language significantly changed the substance of the law. Thus, the court refused to apply the amended statute retroactively because to do so would be "constitutionally objectionable," despite a clear intent by the legislature to apply the statute retroactively. *Carter v. California Department of Veterans Affairs*, 2004 Cal. App. LEXIS 1350 (4th Dist. Aug. 17, 2004).

Public Employee Must Exhaust Internal Administrative Remedies To Assert Claims For Wrongful Demotion And Constructive Termination In Violation Of Public Policy. Plaintiff worked as a print-shop supervisor for the Housing Authority of the City of Los Angeles (HACLA). He received a notice to appear in court to testify in an unrelated civil case. Although management initially told him to comply with the notice, the next day an HACLA attorney advised him not to appear. He went anyway and two weeks later he was demoted for insubordination. He never reported to his new assignment and was fired. He first sought relief through HACLA's internal administrative process, but then abandoned the process and filed a civil action. Because plaintiff failed to show he had exhausted his internal administrative remedies, the court dismissed his action.

In *Schifando v. City of Los Angeles*, 31 Cal. 4th 1074 (2003), the California Supreme Court held a public employee who claims employment-related discrimination was not required to exhaust both the internal administrative remedy in a city charter and the administrative remedy provided by FEHA before filing a FEHA disability discrimination claim in court. In this case, the related issue was whether a public employee, claiming employment-related discrimination and asserting both FEHA and nonstatutory claims for wrongful demotion and constructive termination in violation of public policy, must exhaust his employer's internal administrative remedy for his nonstatutory claims before filing a civil action. The court concluded that the holding in *Schifando* applies to FEHA-related nonstatutory claims only when the resolution of those claims would have a preclusive impact on the FEHA claim. Thus, the trial court erred in dismissing plaintiff's retaliation claim for failure to exhaust his internal administrative remedy, but did not err in dismissing plaintiff's claims for wrongful demotion and constructive termination in violation of public policy. *Williams v. Housing Authority of Los Angeles*, 2004 Cal. App. LEXIS 1321 (2d Dist. Aug. 12, 2004).

Retaliatory Discharge Claims Reinstated Where Store Manager's Retaliatory Intent Was Carried Out By Other Employees. Plaintiff worked for Safeway Stores as a food clerk from 1969 until his discharge in 1998. In 1997, plaintiff believed he discovered sexual harassment of female employees by two night managers in the store where he worked. Starting in December 1997, and several times thereafter, plaintiff complained to the store manager about the harassment. Subsequently, a night manager complained to the store manager that plaintiff had assaulted her. The store manager utilized a security officer to investigate the claim and plaintiff was eventually fired by the district manager, who had no knowledge of plaintiff's prior sexual harassment complaints. Plaintiff sued Safeway for dismissing him in retaliation for his sexual harassment complaints. The trial judge granted summary judgment to Safeway, finding that plaintiff had failed to rebut Safeway's evidence that it had a legitimate reason for firing him.

The appellate court reversed. The Court ruled that as long as the supervisor's retaliatory motive was a substantial factor for the dismissal, the employer may be liable for retaliatory discharge. Here, the evidence raised triable issues as to whether the district manager and intermediate investigator were "instrumentalities by which [the store manager's] retaliatory animus was carried into effect to plaintiff's injury." *Reeves v. Safeway Stores, Inc.*, 2004 Cal. App. LEXIS 1253 (6th Dist. July 30, 2004).

Intentional Interference With Contractual Relationships

Employer May Recover For Intentional Interference With An At-Will Employment Relationship. Defendants, employed as attorneys in a law firm, left their employment with plaintiffs and created their own firm by taking plaintiffs' employees, soliciting plaintiffs' clients and misappropriating plaintiffs' trade secrets. Plaintiffs lost over 144 clients to defendants over the next twelve months. The trial court found for plaintiffs and awarded damages of $150,000. On appeal, the court affirmed the trial court's decision that the interference claims were legally sound and supported by the record, and that the misappropriation of trade secrets claim was supported by substantial evidence.

The California Supreme Court also affirmed, holding that a defendant may be liable under an intentional interference theory for having induced an at-will employee to quit working for the plaintiff. The Court reasoned that allowing recovery in this type of situation guards against unlawful methods of competition in the job market, while promoting the public policies supporting the right of at-will employees to pursue opportunities for economic betterment and the right of employers to compete for talented workers. *Reeves v. Hanlon*, 2004 Cal. LEXIS 7239 (Aug. 12, 2004).

Workers' Compensation

A Jury Should Not Consider The Pain And Suffering Associated With An Industrial Injury In Awarding Damages For A Wrongful Demotion Claim. Plaintiff was a fifty-one year old district sales manager for Interstate Brands Cos. (IBC) with 23 years experience in the bakery business. He worked for a bakery that was bought by IBC and joined IBC's management team in 1995. In 1999, plaintiff was demoted to division sales manager due to performance problems. The demotion reduced plaintiff's salary, changed his position from management to union and changed the nature of his job to require him to load and deliver bakery products. Plaintiff sued IBC for age discrimination and wrongful demotion. In support of his claim for pain and suffering, the trial court allowed testimony that plaintiff's demoted duties aggravated his pre-existing knee injuries, requiring him to undergo bilateral knee replacement surgery. The jury returned a special verdict against IBC, awarding plaintiff $2 million in non-economic damages for his emotional distress over the demotion and knee problems.

The Court of Appeal reversed and ordered a new trial. It held that any emotional distress caused by a subsequent work-related injury following an alleged discriminatory act is subject to the exclusive remedy provisions of the Workers' Compensation Act, unless the discriminatory act was a substantial factor in causing the subsequent injury. Here, plaintiff's demotion was not a substantial factor in his subsequent knee injury. His testimony regarding the emotional distress allegedly caused by his knee injury and surgery should have been excluded. The Court ordered a new trial on all issues due to the error and because the jury was improperly instructed on the burden of proof. *Huffman v. Interstate Brands Cos.*, 2004 Cal. App. LEXIS 1322 (2d Dist. Aug. 12, 2004).

Insurance Carrier Can Sue Alleged To Recoup Death Benefits Paid Following Industrial Accident. A deceased employee's widow recovered an award of death benefits following her husband's death in an industrial accident. The carrier sued third parties under Labor Code Section 3852 to recoup the money paid to the widow. The trial court determined that the carrier could not collect from the third parties because it only had the rights of the former wife who did not have standing to sue. The appellate court reversed, finding that the worker could have sued the third parties for his injuries and since that action survives the worker's death, the carrier could sue also. *Fremont Compensation Insurance Co. v. Sierra Pine, Ltd.*, 2004 Cal. App. LEXIS 1270 (3rd Dist. Aug. 4, 2004).

Wrongful Discharge

Wrongful Discharge Claim Reinstated Based On Employee's Complaint About And Refusal To Engage In Employer's Fraudulent Billing Scheme. Plaintiff was a route sales representative for Aramark from 1991 to 1998. He alleged that Aramark used several fraudulent techniques resulting in its customers paying for products and services not actually received. Aramark fired plaintiff in 1999 for overcharging customers and not reducing inventory. In response, plaintiff filed a grievance through his Union which ended in a deadlock. Plaintiff then sued Aramark alleging that he was wrongfully terminated in violation of public policy for complaining about the fraudulent business practices and refusing to implement those practices. The trial judge dismissed the lawsuit, finding that federal labor law preempted the claim.

The Court of Appeal reversed, finding that there was no federal labor law preemption because Aramark failed to show that the single plaintiff had engaged in concerted activity. The Court held that plaintiff's complaints and refusal to engage in fraudulent billing practices was sufficient to overcome summary judgment, especially since there were triable issues of material fact as to Aramark's motive for firing plaintiff. *Haney v. Aramark Uniform Servs., Inc.*, 2004 Cal. App. LEXIS 1308 (5th Dist. Aug. 11, 2004).

Employee Was Fired Because He Violated Company Policy By Sending E-Porn, Not Because He Was Gay. Plaintiff, a gay computer engineer, sent and forwarded pornographic e-mails with his co-workers in an attempt to hide his homosexuality. The employer discovered it had a systemic workplace problem involving e-porn. During the investigation, plaintiff revealed that he is gay and that he was the victim of same-sex harassment in the workplace. The employer's prior offer to promote and transfer plaintiff to London was suspended during the investigation into the e-porn. Eventually, the promotion and transfer were rescinded and plaintiff was fired. Thereafter, he sued for sexual orientation discrimination and retaliation. The trial court granted summary judgment in favor of the employer, finding that plaintiff could not prove the employer's termination reasons were pretext for discrimination. The Court

of Appeal affirmed, explaining that even if an employer's reasons are not sound, if they are nondiscriminatory, they are not actionable. *Sanchez v. Thomas Weisel Partners*, 2004 Cal. App. Unpub. LEXIS 7246 (1st Dist. Aug. 3, 2004).

Legislative Updates

Federal Development

IRS Guidance Paves Way For HSAs. On July 23, 2004, the Internal Revenue Service ("IRS") issued Notice 2004-50 which provides even more guidance with respect to health savings accounts ("HSA"). The 30-page guidance consists of eighty-eight questions and answers, giving responses that will make it easier for employees and employers to find HSAs as attractive health care options when combined with a high deductible health plan ("HDHP").

Highlights: Among the many questions answered, Notice 2004-50 provides as follows:

- HDHPs may have reasonable lifetime and annual limits on benefits.
- HDHPs may offer a prescription drug discount card.
- Certain prescription drugs may be "preventive" and do not disqualify an HDHP.
- Individuals over age 65 can contribute to HSAs if they are not enrolled in Medicare, as mere eligibility for Medicare is not a disqualifier.
- Any person may contribute to an eligible individual's HSA.
- Employers cannot restrict the use of HSAs to payment of medical expenses, but rather, HSAs must be available for any withdrawal by the individual.
- Employers may match HSA contributions through their Section 125 cafeteria plans.

One Thorny Issue: Whether an employee assistance program ("EAP"), wellness program or disease management program is considered a "health plan" is important because individuals are unable to participate in an HSA if they are covered by a health plan that is not an HDHP. Nevertheless, an individual may contribute to an HSA if the EAP, wellness program or disease management program does not provide significant benefits in the nature of medical care or treatment.

State Developments

Reform of Private Attorneys General Act Needed. On July 27, 2004, Governor Schwarzenegger announced an agreement with the California Legislature on a state budget deal that includes reform of the Labor Code Private Attorneys General Act of 2004, now codified in Labor Code Section 2699. This statute, passed in the waning days of Governor Gray Davis' administration, created broad new rights for employees to seek large monetary penalties against employers for violating the Labor Code. The statute encouraged ruinous lawsuits based on hypertechnical violations, leading detractors to label it the "Sue Your Boss" law.

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 77002-2797
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