

CALIFORNIA LABOR & EMPLOYMENT LAW

UPDATE

July 2005

Supreme Court

Arthur Andersen's Criminal Conviction Overturned Based on Improper Jury Instructions. In May 2005, the United States Supreme Court unanimously reversed Arthur Andersen LLP's ("Andersen") obstruction of justice conviction for its role in the Enron debacle. The opinion highlights the level of consciousness of wrongdoing needed in order to support an obstruction of justice conviction.

The conviction rested on what it meant to "knowingly... corruptly persuad[e]" another person "with the intent to... cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding." Chief Justice Rehnquist noted several instances when persuading another to withhold information from the government is appropriate, including compliance with a document retention policy. In finding error in the jury instruction given by the trial court allowing Andersen to be convicted even though it believed its conduct was lawful, the Court held that "[a] 'knowingly...corrup[t] persuader' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material." The Court remanded the case for further proceedings. *Arthur Andersen LLP v. United States*, 125 S.Ct. 2129 (U.S. 2005).

Practice Note: The Court's opinion is important in that it explicitly approves the use of legitimate document retention and destruction policies. It also serves as a reminder that consistent application of such policies is the best practice. When a governmental investigation is reasonably foreseeable or imminent, the corporation must be proactive in safe-guarding relevant, material documents, both electronic and paper. Reminders to apply a document retention and destruction policy when a crisis hits, while not conclusive of criminal intent, may certainly be evidence of criminal intent.

High Court to Decide When Federal Workers Can Bring Constitutional Claims to Court. The Supreme Court has agreed to decide whether the Civil Service Reform Act, 5 U.S.C. 7101 et seq., precludes federal union employees, who are subject to grievance and administrative procedures under a collective bargaining agreement, from pursuing constitutional claims in federal court and obtaining equitable relief. *Whitman v. DOT*, 382 F.3d 938 (9th Cir. 2004), *cert. granted*, 2005 U.S. LEXIS 5032 (U.S. 2005).

Federal Courts

ADA

Attorney Fees In ADA Title III Case Denied Where There Was No Pre-Litigation Unambiguous Warning Notice And An Opportunity To Cure. The plaintiff, a paraplegic, sued Del Taco alleging violations of the Americans with Disabilities Act (ADA) for failure to provide full and equal access to the restaurant. After reaching a settlement, plaintiff requested \$39,795 in fees. Denying the request for fees, the court ruled that "as an exercise of reasonable discretion and common sense, no attorneys' fees are recoverable in the absence of a pre-litigation unambiguous warning notice and a reasonable opportunity to cure the ADA violation." *Doran v. Del Taco*, 2005 U.S. Dist. LEXIS 11360 (C.D. Cal. June 9, 2005).

Labor Law

Court Allows Carpenters' Union's "Bannering." To pressure contractors to stop employing non-union workers, the carpenters' union mounted a campaign against 18 retailers that continued to use the contractors. As part of the campaign, on public sidewalks faced away from the retailers and toward passing motorists union members held up a 4 foot by 15 foot banner stating "shame on [retailer]" and "labor dispute." One of the contractors and two customers filed unfair labor practice charges alleging that the "bannering" violated the NLRA [§8(b)(4)(i)(B)]. The District Court denied the request for an injunction, rejecting the NLRB's argument that the "bannering" amounted to illegal secondary picketing. Finding that the NLRB's

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legal theory was weak, given the stationary and truthful nature of the activity, the Ninth Circuit affirmed the denial of the injunction. *Overstreet v. United Brhd. Of Carpenters and Joiners of Am.*, 2005 U.S. App. LEXIS 10596 (9th Cir. June 8, 2005).

California Courts

Administrative Remedies

No Need For Doctor To Exhaust Internal Remedies That Are Inadequate. In *Payne v. Anaheim Memorial Medical Center*, an African-American doctor, believing that certain members of Anaheim Memorial Hospital's staff had interfered with his treatment of an elderly Hispanic patient during surgery, exposing the patient to added risk, sued the hospital alleging race discrimination and negligence. The hospital moved to dismiss the action arguing that the plaintiff had failed to exhaust his administrative remedies. The trial court found for the hospital finding that the bylaws require exhaustion of the administrative remedies before suit is filed. The Court of Appeal reversed the dismissal finding that because the grievance procedure did not provide the plaintiff a right to a hearing and an opportunity to provide evidence the grievance procedure did not constitute an adequate "remedy" to resolve his complaint. Thus, the doctor was not required to exhaust that remedy before filing a lawsuit. *Payne v. Anaheim Mem. Med. Ctr.*, 2005 Cal. App. LEXIS 1015 (Cal. App. 4th Dist. May 31, 2005).

Arbitration

Covenant Not To Compete In Arbitration Agreement Did Not Violate California Public Policy. Plaintiff, an ergonomic office products salesman, signed an employment contract that contained non-competition and arbitration clauses and a choice of law provision applying New Jersey law. Following the termination of the plaintiff's employment, the employer filed a formal demand for arbitration in New Jersey, contending that the plaintiff had violated the non-competition and nondisclosure of trade secrets provisions of their agreement. The matter was arbitrated in New Jersey and the arbitrator enforced the non-competition clause, ordered the plaintiff to pay the defendant damages for violating the agreement, and ordered the plaintiff and defendant to split the arbitration fees and costs. The employer then moved to enforce the award and the plaintiff moved to vacate it. Disagreeing with the merits of the decision, the court vacated the award finding that the noncompetition clause and division of fees violated California law. The California Court of Appeals reinstated the arbitration award and ordered that it be enforced after the fee division was corrected [and the employer is ordered to pay all of the fees]. Particularly, the Court found that the trial court did exactly what the Supreme Court in *Moncharsh v. Heily & Blasé*, 3 Cal.

4th 1, 28 (1992) said it could not do — "review the merits of the arbitrator's findings concerning applicable law [including choice of law] and the interpretation and enforceability of the contract's non-competition clause." Notably, the court stated the covenant not to compete did not violate California public policy because it did not punish an employee for obtaining employment with a competitor, it merely restricted the use of confidential customer information while working for a competitor for a period of two years. *Jones v. Humanscale Corp.*, 2005 Cal. App. LEXIS 979 (Cal App. 4th Dist. June 17, 2005).

FEHA

Retaliation Claim Fails For Want of Material or Substantial Alteration In The Terms of Employment. Plaintiff sued Specialty Restaurants Corporation (SRC) for retaliation claiming that he was forced to resign after the SRC learned he had filed an age discrimination action against another former employer, a city council member, in a city where SRC conducted business. SRC tried to convince the plaintiff to drop or settle the lawsuit and advised that his concealing the existence of the lawsuit when he was hired was grounds for termination. Although the plaintiff refused to abandon the lawsuit, he was never fired, demoted, transferred or suffered any wage reduction. The plaintiff ultimately resigned after receiving work related criticism. In granting SRC's motion for nonsuit, the trial court found that the plaintiff failed to present evidence that he had suffered any substantial or material alteration in the terms and conditions of his employment in retaliation for engaging in protected activity. The Court of Appeals affirmed the dismissal of the lawsuit and held "trivial grievances" of the employer's work related criticisms do not amount to an adverse employment action necessary for a retaliation claim. At most, it was a minimum inconvenience, not a material or substantial change. *Pinero v. Specialty Restaurants Corp.*, 2005 Cal. App. LEXIS 994 (Cal. App. 2d Dist. June 22, 2005).

Pregnancy Discrimination Claim Fails — Employer Didn't Know She Was Pregnant. Plaintiff alleges she was fired because she was pregnant. However, Sony contended that she was fired for poor performance, lack of enthusiasm for the job, and an extended vacation during a busy period (and she returned to work several days late). Although, her co-workers knew the plaintiff was trying to and then did become pregnant, Plaintiff's supervisor stated she did not know the plaintiff was pregnant until after the decision to terminate her and her actual termination occurred. According to the court, the plaintiff could not overcome the evidence that her supervisor did not know she was pregnant when she fired her. *Trop v. Sony Pictures Entertainment Inc.*, 129 Cal. App. 4th 1133 (2d Dist. 2005).

Legislative Updates

Federal Developments

All Employer Health Plans Must Provide Notice To Part D Eligible Individuals By November 15, 2005 Regarding Whether A Plan's Prescription-Drug Coverage Is "Creditable" Under Medicare. The Centers for Medicare & Medicaid Services ("CMS") have issued promised guidance and model language for the new notices. The guidance also offers a simplified method of determining whether coverage is "creditable" for employers not seeking to qualify for the new Medicare Part D subsidy for retiree prescription drug coverage.

Performance-Based Compensation Awards For Performance Periods Ending December 31, 2005 Can Be Deferred Under Elections Made As Late As June 30, 2005. Near the end of 2004, Congress enacted Internal Revenue Code Section 409A, altering the structure and operation of nonqualified deferred compensation plans effective January 1, 2005. Among other requirements, Section 409A requires that initial elections to defer compensation be made within specified time frames. Bonus plans that pay awards within two-and-a-half months of the end of the year in which the right to the bonus vests are not subject to these Section 409A rules. However, many plans permit employees to elect to further defer payment of awards.

The Federal Trade Commission's New Rule Regarding The Proper Disposal Of Confidential Consumer Information Went Into Effect On June 1, 2005. Taking out the trash has a whole new meaning for employers and businesses since June 1, 2005 — the day the Fair and Accurate Credit Transactions Act of 2003 (FACTA), required covered entities to start taking "reasonable measures" to keep "consumer information" out of the hands of those who are not authorized to see or use it. The law includes consumer information (or a compilation) in paper, electronic or other forms, but only if it is a consumer report or derived from a consumer report, as those terms are defined by the Fair Credit Reporting Act.

New Leave Mandate Proposed As Part Of Violence Against Women Act Reauthorization. On June 8, 2005, U.S. Senators Joseph R. Biden, Jr. (D-DE), Orrin Hatch (R-UT) and Arlen Specter (R-PA) introduced the Violence Against Women Act (VAWA) of 2005 (S. 1197). Title VII of the bill includes a new mandate, modeled after the Family and Medical Leave Act of 1993, 29 U.S.C. §2601 (FMLA), to permit employees to take leave from work for certain purposes related to domestic or sexual violence. The VAWA builds on a number of state laws protecting victims of domestic and sexual violence. It is doubtless well-intentioned, and would assist some victims who would not otherwise be protected by federal or state laws. Nonetheless, some of the bill's particulars indicate it would be difficult to administer in many instances.

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