CALIFORNIA
LABOR & EMPLOYMENT LAW
UPDATE

November 2004

Supreme Court

Supreme Court Fall 2004 Term

Supreme Court To Hear Argument Concerning Whether A Plaintiff May Bring A Disparate Impact Claim Under The ADEA. The U.S. Supreme Court opened its fall term on October 4. Of interest to employers is a case that will decide whether employees may bring a disparate impact theory claim in an age discrimination case filed under the Age Discrimination in Employment Act (ADEA). Oral argument is set for November 3, 2004. *Smith v. City of Jackson*, 351 F.3d 183 (5th Cir. 2003), *cert. granted*, 124 S. Ct. 1724 (2004).

Denial of Certiorari

Supreme Court Declines To Hear Appeal From Catholic Charities on Contraception Issue. Finding that Catholic Charities was not a "religious employer," the California Supreme Court extended a state law that requires contraception to be covered by prescription drug plans. The law was passed to eliminate sex discrimination in health care benefits by improving access to prescription contraceptive coverage. The California Supreme Court's decision will stand. *Catholic Charities of Sacramento, Inc. v. Cal., 2004 Cal.* LEXIS 1982 (Cal. March 1, 2004), *cert. denied*, 2004 U.S. LEXIS 5609 (U.S. Oct. 4, 2004).

Supreme Court Has Denied Review in 67 Labor And Employment Cases So Far This Term. Currently, there are only four employment cases on the Supreme Court's docket, and all of them were accepted last term. So far this term, the Court has denied review in all 67 labor and employment petitions for *certiorari* it has reviewed.

Federal Courts

Computer Fraud

Jury Verdict And Sanctions Upheld In Computer Fraud And Abuse Case. Truck drivers and trucking companies try to avoid "deadheading," which is driving a truck without a revenue-producing return load. Creative Computing (Creative) developed an internet site called "truckstop.com" to facilitate the matching of loads with trucks. Another company, Getloaded, decided to compete with Creative and set up a load-matching site. In response, Creative prohibited access to its site by competing load-matching services. To circumvent this, Getloaded tried login names and passwords from its customers and used them to gain access to Creative's truckstop.com. Getloaded's officers also hacked into Creative's website and examined the source code for the "tremendously valuable radius-search feature." Further, Getloaded obtained Creative's customer list, through a Creative employee it hired away.

Creative sued for copyright infringement, violation of the Lanham Act, misappropriation of trade secrets and violation of the Computer Fraud and Abuse Act. Creative obtained an injunction barring Getloaded from accessing its site and using its customer list. Getloaded intentionally violated the injunction by among other things, lying under oath. Following a trial, the jury found Getloaded had violated the state Trade Secrets Act and the federal Computer Fraud and Abuse Act. Getloaded argued that the Computer Fraud and Abuse Act required $5,000 in damages from a single unauthorized access to be actionable. The court rejected this argument, finding that the Act requires $5,000 damages or loss over a one-year period, which Creative easily met. The courts further found that loss of business and goodwill were components of "economic damages" and were recoverable by Creative. In addition, the appellate court affirmed the trial court's imposition of a $300,000 sanction and $42,787 in attorney fees and expenses for experts Creative had to hire due to Getloaded's dishonesty during discovery. Finally, the court affirmed the permanent injunction against Getloaded that prohibited Getloaded from accessing Creative's truckstop.com. Though this is a far-reaching prohibition, the court determined that it was warranted by Getloaded's past abuses. *Creative Computing v. Getloaded.com LLC*, 2004 U.S. App. LEXIS 21469 (9th Cir. Oct. 15, 2004).

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State Courts

Arbitration

Settlement Agreement Signed Following Mediation Intended To Be Binding On Parties Was Admissible In Deciding Whether To Compel Arbitration. Generally, a mediator's report and findings are confidential and are neither admissible in court nor discoverable. In this case, after two days of mediation, the parties signed a one-page document entitled "Settlement Terms." The final provision of the document indicated that disputes were subject to the Judicial Arbitration and Mediation Services' (JAMS) arbitration rules. When the parties were unable to reach agreement on the scope and subject matter of the proposed settlement, plaintiff asked that the case be arbitrated. The trial court refused to compel arbitration and, because of the confidentiality rules for mediators' reports and findings, it would not allow plaintiff to submit the one-page settlement document. The appellate court reversed, finding an exception to the confidentiality rules because the parties' express intention that disputes be subject to the JAMS' arbitration rules demonstrated the parties' intent to be bound by the document. Thus, the trial court erred in finding that the one-page settlement document was not admissible. *Fair v. Bakhtiari*, 2004 Cal. App. LEXIS 1702 (1st Dist. Oct. 12, 2004).

Breach of Contract

Vendor Properly Denied Contract Where It Refused To Comply With County Ordinance That Required It To Pay Employees For 5 Days Of Jury Duty. Plaintiff, a provider of security services in California, sued to prevent the County of Los Angeles from enforcing County Code Chapter 2.203, which precludes the County from contracting with companies that do not pay for at least five days of jury duty. Plaintiff was awarded two contracts to provide security at department of public works (DPW) facilities. When the contracts expired, the plaintiff submitted a new proposal, but the County would not consider it because the plaintiff had not complied with Chapter 2.203. Plaintiff had certified in its proposal that it would provide jury duty pay only for full-time employees assigned to a DPW facility. The County asserted that the Code requires payment for any full-time employee who resides in California. Plaintiff estimated that it would cost $1 million dollars to provide paid jury duty leave to all of its employees who reside in California. It argued the ordinance was invalid because: (1) it was preempted by state law, and (2) it has extra-territorial effect because it required plaintiff to pay its employees throughout the state and not just in L.A. County. The trial court declared that the ordinance was valid. The appellate court agreed and affirmed the dismissal of plaintiff's complaint. The court found that the ordinance was an exercise of the County's contracting power and not its regulatory power. The County was simply specifying the type of employer with which it wished to do business. As an exercise of the County's contracting power, Chapter 2.203 was not preempted by other state laws regulating jury leave. *Burns Int'l Sec. Servs. Corp. v. County of L.A.*, 2004 Cal. App. LEXIS 1740 (2d Dist. Oct. 19, 2004).

One-Day Hair Model Is Not "Discharged" And Not Entitled To Immediate Pay At The End Of The Day. Plaintiff agreed to be a one-day model for L'Oreal USA in a hair show for which she was to be paid $500. It took L'Oreal two months to pay plaintiff because it treated her as an independent contractor and the pay was sent from the main accounting office in New York. Plaintiff filed a class action complaint alleging, among other things, conversion, fraud and breach of contract. L'Oreal argued to be entitled to the protections of the Labor Code, one must be an employee who was "discharged." Under the Labor Code, "discharged" employees are entitled to immediate pay and the employer must pay up to a 30 day wage penalty if the payment is delayed. L'Oreal argued plaintiff was not terminated, rather she finished the employment according to the agreed-upon terms. The trial court agreed and entered summary adjudication for L'Oreal. Plaintiff filed a petition for a writ of mandate in the appellate court. In denying the petition, the court found that an individual hired for one day at a flat fee to model in a hair show is not "discharged" within the meaning of the Labor Code. The court stated "discharge" requires the affirmative dismissal of an employee from ongoing employment and not the completion of a set period of employment or a specific task. The model was neither entitled to immediate pay nor a penalty *Smith v. Sup. Ct. of L.A. County*, 2004 Cal. App. LEXIS 1738 (2d Dist. Oct. 19, 2004).

Discrimination

Verdict Finding National Origin Discrimination Against East Indian Workers Upheld On Appeal. Defendant prepared and distributed direct mail advertising for corporate clients and used regular hourly workers and part-time temporary workers provided by a staffing agency. Because the staffing agency regularly provided East Indian workers, about 85 to 90% of the staff at defendant's Newark, California plant was East Indian. Plaintiffs, who were all East Indian, began working for defendant between 1987 and 1990 and prepared single pieces of advertising mail with two machines. In June 2000, the Newark facility had the worst production numbers for all of the defendant's 19 facilities. In response, on July 8, 2000, Supervisor Bill Wright watched plaintiffs work, and according to plaintiffs, upset them by standing so close that he was almost touching them. Following a confrontation with one of the plaintiffs, Wright told them they needed to produce 80,000 pieces per day with two of them on the machines or 120,000 pieces with three employees. Plaintiffs told him it was not possible. Wright allegedly said as long as they worked for the defendant they were "slaves" and if they could not do the work they

should leave. Plaintiffs left two hours before the end of their shift. On the next workday, plaintiffs complained to human resources and the head of HR decided to terminate plaintiffs for "job abandonment." None of the replacement employees were East Indian and defendant changed staffing agencies to an agency that sent half as many East Indian candidates. Over the next several months, the percentage of East Indian employees decreased from 85% to 66%. Plaintiffs sued for national origin discrimination. A jury awarded $650,000 in emotional distress damages.

Affirming the verdict on appeal, the court found there was substantial evidence to support the jury's decision that defendant intentionally discriminated against plaintiffs. There was evidence that the head of HR voiced her concern about the number of East Indian employees. These statements, combined with the decline in East Indian employees and the fact that the head of HR was the decision-maker for terminating plaintiffs, were sufficient for a jury to conclude that defendant discriminated against plaintiffs. *Chopra v. ADVO, Inc.*, 2004 Cal. App. Unpub. LEXIS 9270 (2004).

Court Reverses Jury Award For Sex And Age Discrimination Finding Insufficient Evidence Of Disparate Impact Following Company-Wide Reorganization. Plaintiff worked for defendant for over 30 years from an entry-level word processor to an administrative manager. In 1997, the brokerage services division hired a new president who — after study and input from employees — decided to reorganize the company from a two-region structure to a nine-region formation. Plaintiff was advised that due to the reorganization she would lose her title, many of her duties and her ability to receive a bonus. Her base salary remained unchanged. Fifteen of the 57 administrative managers were promoted to a new regional position. All of these employees were women over the age of 40. The plaintiff applied for two new positions but other women filled the jobs. Plaintiff was offered a position as senior office services administrator but declined the offer and resigned from the company in 1999. She sued for age and sex discrimination and violation of an implied contract not to demote without good cause. A jury found for the plaintiff, determining that the company-wide reorganization had caused a disparate impact on women over the age of 40. The jury further found that the defendant violated an oral or implied contract not to demote without good cause. The jury awarded the plaintiff over $1 million dollars. The trial court granted the defendant a new trial on the contract claim. Both parties appealed.

The appellate court found that the evidence was insufficient to establish a *prima facie case* of disparate impact sex discrimination, age discrimination, or breach of contract. The reorganization only affected administrative managers as a group. To show disparate impact, plaintiff would have had to present evidence about *all* employees, not just the administrative managers. The appellate court also agreed there was no implied or oral contract that the plaintiff would only be demoted for good cause. The court found that words of encouragement when she was hired and statements that she would get merit increases and promotions so long as she did a good job did not create an implied or oral contract. *Carter v. C.B. Richard Ellis, Inc.*, 122 Cal. App. 4th (2004).

Denial Of Request For Two-Day Leave To Attend Religious Convention Constituted Religious Discrimination. Plaintiff worked for defendant for 15 months without incident and had perfect attendance. Plaintiff requested a two-day leave to attend a religious convention. He asked his supervisor for permission and the supervisor in turn sought permission from the management committee. The committee initially denied the request because the supervisor failed to include a reason in the written request to the committee. The supervisor then submitted a second request and indicated that plaintiff needed the time off to attend a religious convention. The committee again denied the request, without providing a reason. Plaintiff went to the convention without permission and missed two days of work. Defendant suspended plaintiff for ten days. Plaintiff objected to the length of the suspension, stating that others had received a lesser penalty for missing more work. A few days later, plaintiff asked his supervisor to provide him with the written request he gave the committee so he could go to the "labor board." When the supervisor reported the conversation to the committee, plaintiff was fired.

Plaintiff filed a complaint with the Department of Fair Employment and Housing. The DFEH found that the employer: (1) discriminated against plaintiff by failing to accommodate his religious beliefs, (2) failed to prevent discrimination, and (3) retaliated against plaintiff for protesting the discrimination. On appeal to the superior court, the court reversed the DFEH's finding. Plaintiff appealed.

The court of appeals reversed and reinstated the DFEH's finding of discrimination and retaliation. The court concluded that plaintiff possessed a sincerely-held religious belief as a Jehovah Witness, and his attendance at a religious convention was a FEHA religious observance because he considered the convention to be a form of worship and religious study. The court stated if the dates caused the employer hardship, it should have rescheduled the leave rather than denying it outright. Concerning retaliation, the court concluded the DFEH met its burden of proving the employer was aware of the protected activity and an adverse employment action followed shortly thereafter. The court explained an employer "cannot justify terminating an employee for perceived disobedience triggered by its own violation of the FEHA." Cal. *Fair Employment and Hous. Comm. v. Gemini Aluminum Corp.*, 122 Cal. App. 4th 1004 (2004).

Police Sergeant's Sexual Orientation Harassment And Retaliation Complaint Reinstated For Trial. Plaintiff joined the police department in 1994, following five years of exemplary service at the Sheriff's department. Due to his excellent performance, he was promoted to detective after two years and sergeant after four years. In 1999, he was promoted to a premium pay position as head of the department's Human Resources Division. He continued to receive positive performance reviews. Plaintiff kept the fact that he was gay a secret for the first seven years of his employment.

According to plaintiff, the department was anti-gay He regularly heard derogatory anti-gay and lesbian remarks and slurs from the chief, captains, lieutenants, and patrol officers. Plaintiff also presented evidence that a captain may have discriminated against a potential applicant because he was gay. Starting in August 2001, plaintiff encountered some difficulty with two officers — Sellan and Eccles — who spread rumors about plaintiff's sexual orientation. After plaintiff submitted a formal internal memo to the captain in August 2001, the captain's attitude toward him changed drastically. Plaintiff felt that the captain began piling on assignments in an effort to overload him. Also, the department failed to investigate a series of incidents despite plaintiff's requests, and he received dozens of crank calls in the middle of the night.

On October 10, 2001, plaintiff took a medical leave of absence. In early November 2001, he received a letter stating if he did not return to work soon he could face charges of abandonment of duties. When he returned to work, he was transferred to a patrol position. In December 2001, plaintiff renewed his complaint that no action had been taken on his August memo and took another medical leave of absence. Sometime after plaintiff made his August complaint, two internal investigations were initiated against him. One for misusing a department credit card and the other for allegedly harassing Officers Sellan and Eccles. Before the complaints were resolved, the chief wanted to terminate or demote plaintiff due to the investigations. An internal affairs interview of plaintiff's August memo did not occur until January 31, 2003. Following an extended leave of over one year, plaintiff decided to retire from the force instead of returning to a modified light duty position.

Five days after plaintiff filed an administrative complaint with the Department of Fair Employment and Housing, he appeared on a radio show and indicated he had "no problems with the anti-gay slurs and the jokes." He understood it was a "cop thing." However, at his deposition, he stated the anti-gay slurs had "offended him deeply inside."

The trial court granted the department's summary judgment motion. The court of appeals reversed, reinstating plaintiff's complaint for trial. The court rejected the department's argument that the plaintiff did not subjectively perceive his work environment as hostile or abusive because there was sufficient evidence of an anti-gay atmosphere for a jury to find harassment. The court also found that the department had not offered any evidence of a legitimate, non-retaliatory reason for the alleged adverse employment actions (the internal affairs investigation to demote or dismiss the plaintiff). Finally, the court found the city did not promptly investigate the plaintiff's complaint nor did it try to stop the harassing anti-gay comments. *Shelton v. City of Manhattan Beach***,** 2004 Cal. App. Unpub. LEXIS 8841 (2004).

Wage and Hour

Declaratory Complaint Regarding Whether Uninterrupted 30-Minute Meal Break Applies To Ready-Mix Cement Drivers Is Reinstated On Appeal. Wage Orders provide that certain non-exempt employees are entitled to a 30-minute work-free meal break. Employers who fail to comply with the Wage Orders must pay employees one hour's pay for each day an employee does not receive a meal period. Plaintiff was in the pre-mixed (ready-mix) concrete delivery business and claimed that its drivers should be exempt from the meal break requirement because they cannot leave their trucks unattended for an uninterrupted 30-minute meal break. In a letter issued in April 2001, the Division of Labor Standards Enforcement (DLSE) opined that Wage Order 1 covered "ready-mix drivers" but stated in a footnote that an employer would not be liable for the penalty if the nature of the work prevented a meal break. Because the April 2001 letter caused confusion, the DLSE issued a follow-up letter in December 2001 in which it indicated that the "nature of the work" exception applies only in cases where a product will be lost or destroyed if the employee takes an off-duty meal period. The DLSE stated the determination would have to be made on a case-by-case, day-by-day basis. Plaintiff stated that in June 2002, the DLSE informed him that *in most instances*, a ready-mix driver can take an off duty meal period.

Plaintiff filed an action seeking a declaratory judgment that the DLSE's interpretation of the meal period provision as applied to plaintiff and the industry was invalid because of the nature of the work. Plaintiff maintained the DLSE adopted an "underground regulation" in violation of the Administrative Procedure Act (APA). The trial court found the two DLSE letters were advice letters to a private party and not administrative regulations subject to the APA. Plaintiff contended, and the court agreed, there was a factual dispute as to whether the DLSE's 2001 opinion letters were intended to be of general application to the entire industry. Concerning the argument that the IWC acted in excess of its regulatory authority, the court deemed the issue moot because meal periods are regulated by the Labor Code and employers who do not comply with Wage Order 1 do so at their financial peril. *Westside Concrete Co. v. Div. of Labor Standards Enforcement*, 2004 Cal. App. Unpub. LEXIS 9310 (2004).

Legislative Updates

Federal Development

EEOC Issues Guidance Regarding Hiring Workers With Intellectual Disabilities. The EEOC has issued a new fact sheet regarding people with intellectual disabilities. It addresses the challenges employers face in hiring, accommodating, and preventing harassment of employees with intellectual disabilities. The term "intellectual disability" has replaced the term "mental retardation" and covers individuals with an IQ below 70-75 who have significant limitations in "adaptive skill areas." Approximately 1% of the population, 2.5 million people, has an intellectual disability. It is estimated that only 31% of those with intellectual disabilities are employed, although many more want to work. The EEOC hopes that the fact sheet can break down myths, fears and misconceptions that prevent more of individuals with the disability to become employed.

The Americans with Disabilities Act (ADA) protects individuals with intellectual disabilities. However, employers should note that some, but not all, individuals with an intellectual disability will be considered a person with a "disability" under the ADA and entitled to its protections. The analysis is similar to determining whether any individual is disabled. In addition, the ADA limits the types of questions employers may ask job applicants. Those who fall within the definition of an individual with a disability under the ADA may be entitled to an accommodation. The accommodation may be necessary during the application process or when the individual has been hired for a new position. The EEOC provides the following accommodations: job restructuring, job training, job coaching, modified work schedule, acquisition or modification of equipment or devices, and work station placement. The new publication is available at www.eeoc.gov/facts/intellectual_disabilities.html

The American Jobs Creation Act Of 2004. Congress has passed legislation that will substantially affect all nonqualified deferred compensation plans and employment agreements that include deferral arrangements. This legislation may also affect other forms of compensation. The American Jobs Creation Act of 2004 amends the Internal Revenue Code and takes effect January 1, 2005. The Act applies to nonqualified deferred compensation arrangements, including elective deferral plans such as wrap 401(k) plans and bonus deferral plans, and supplemental retirement plans (SERPs) and excess benefit plans. A more comprehensive Management Alert is available on the Seyfarth Shaw website, www.seyfarth.com.

The Act also includes the *Civil Rights Tax Relief Act* (CRTRA), which ends "double taxation" of settlement or judgment amounts attributable to attorney fees in employment discrimination cases. Rather than being taxable to both a plaintiff and his or her attorney, the attorney fee portion will be taxable only to the attorney. This should make settlements more attractive to plaintiffs. The CRTRA applies to actions brought under Title VII, the ADEA, the ADA, the NLRA, the FLSA and the FMLA. This issue is also currently before the United States Supreme Court. The Court will hear oral argument on November 1, 2004, on whether settlement on judgment amounts attributed to attorney fees are taxable as income to the plaintiff as well as the plaintiff's attorney. Federal Circuits have been divided on the issue. The Ninth Circuit has generally taken the view that the payments are taxable to both the plaintiff and the attorney. The Supreme Court case is relevant to matters settled before October 22, 2004.

State Developments

Sexual Harassment Training Required. Gov. Schwarzenegger signed into law a bill mandating two-hour "effective and interactive" sexual harassment training. The bill sets January 1, 2006 as the deadline for all employers with 50 or more employees to provide at least two hours of training and education to all supervisory employees who are employed as of July 1, 2005. Those hired after July 1st must be trained within six months of when they assume their duties. The law does not apply to supervisory personnel who have been trained on sexual harassment training since 2003. After January 1, 2006, supervisors must be trained at least once every two years.

The law requires interactive, practical and effective training taught by experienced and qualified trainers. From the point of preventing harassment, the new law is both an improvement and a potential trap for the unwary. The law can be misleading, and harmful to employers, if employers come to believe that meeting its requirements will necessarily discharge an employer's legal obligations with respect to training. In this respect several points bear noting:

- The two hours of sexual harassment training for supervisors is a minimum threshold. Whether two hours of training will be enough to establish a defense to sexual harassment or sexual discrimination claims remains to be seen. In fact, the law specifically states that more elaborate training may be necessary for an employer to take reasonable steps necessary to prevent and correct harassment and discrimination.

- Training to prevent sexual harassment without training to prevent other forms of unlawful workplace harassment is a high-risk proposition. Effective harassment prevention training must be broad-based, touching upon not only issues of sexual harassment, but harassment based on all protected characteristics, including race, national origin, age, sexual orientation, gender identity, religion and disability.

- When implementing a harassment prevention and training program, California employers should make certain its program meets the Interactive, Practical and Effective standards of the new law. Typically, this requires, at minimum, that the training provide realistic exercises wherein participants practice and learn new skills and techniques to combat and eliminate harassment in the workplace. In addition, employers should make certain that its trainers have not only content expertise, but high-level facilitation skills.

- Training supervisors only, without regard to educating the remainder of the workforce, is also an unnecessary risk. Harassment prevention training should be provided to all employees, not just supervisory or managerial staff. Broad-based training of this sort is particularly important in California, which imposes personal liability for workplace harassment on rank-and-file employees as well as on supervisors.

Notice Bill Vetoed. Gov. Schwarzenegger vetoed a bill that would have required employers to give clear, one-time written notice to workers before adopting policies that will monitor workers' telephone, internet, or other electronic devices in the workplace. Daily Lab. Rpt. No. 192 (Oct. 5, 2004), A-10.

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