CALIFORNIA
LABOR & EMPLOYMENT LAW
UPDATE

March 2003

Federal and State Discrimination Laws

Disability Discrimination

California Disability Discrimination Law Expanded Beyond ADA. Francisco Colmenares, a general laborer at the Braemar Country Club Inc., had been given light duties at the country club since injuring his back at work. In 1997, however, a new supervisor reassigned him to a job involving heavy duties, then fired him two months later for poor performance. Colmenares sued under the Fair Employment and Housing Act ("FEHA") alleging disability discrimination.

The country club responded that FEHA follows the ADA and so Colmenares had to prove that his disability "substantially limits" a major life activity, such as work generally.

The California Supreme Court did not agree. The Court explained that, to be disabled under FEHA, a person must only prove that they are "limited," rather than "substantially limited," in performing major life activities. The court also held that the California legislature had always intended the FEHA test to be "limited," rather than "substantially limited." Accordingly, the court ruled that its decision could be applied retroactively to previously decided cases. *Colmenares v. Braemar Country Club Inc*., 2003 Cal. LEXIS 1131 (Feb. 20, 2003).

Sex Discrimination

Favoritism Towards Supervisor's Paramours Does Not Equal Bias Based On Sex. Edna Miller and Frances Mackey were employed by the California Department of Corrections ("CDC"). They claimed that their warden was having affairs with at least three subordinates and, in exchange, those women allegedly received preferential treatment. In 1999, Miller and Mackey sued the CDC claiming sex discrimination and illegal retaliation. The women claimed that they "were forced to work in a hostile environment where women got ahead and were promoted if they performed sexual favors for employees of [CDC]." They also claimed that they were subjected to illegal retaliation for complaining about what they believed was a hostile work environment.

The trial court dismissed their suit because there was no discrimination based on sex and therefore no retaliation for engaging in protected activities. The California Court of Appeals agreed, in part relying a notice by the EEOC stating that "[n]ot all types of sexual favoritism violate Title VII. Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. An isolated instance of favoritism toward a 'paramour' may be unfair, but it does not discriminate against women or men in violation of Title VII since both are disadvantaged for reasons other than their genders." *Mackey v. Department of Corrections*, 2003 Cal. App. LEXIS 120 (Jan. 28, 2003).

Equal Employment Opportunity Commission

EEOC Encourages "Teleworking." The Equal Employment Opportunity Commission released a fact sheet for employers on the use of "telework," typically referred to as "telecommuting," as a reasonable accommodation under the Americans with Disabilities Act ("ADA"). The fact sheet notes that employers can use existing telecommuting policies to meet reasonable accommodation obligations under the ADA, although the employer may have to waive certain eligibility requirements or otherwise modify the program for someone with a disability. Employers that do not currently have a telecommuting policy may still need to allow an individual employee with a disability to telecommute as a reasonable accommodation, unless doing so would create an undue hardship for the employer. The full text of the fact sheet is available at the EEOC's website, www.eeoc.gov.

SEYFARTH SHAW ATTORNEYS

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.

State Laws and Individual Rights

California Family Rights Act

Request to Accompany Ill Family Member to Father's Funeral Not Covered Under Family Leave Law. Arnulfo Gradilla worked as a sheet metal assembler at Ruskin Manufacturing. This company had a typical no-call no-show policy by which, if a worker does not call in or show up for work three days in a row, he would be terminated.

The employer knew that Gradilla's wife had a serious heart condition that required her husband to administer correct doses of medication and to calm her when she became excited. According to the court, Gradilla was the only one who knew how to do this.

When Gradilla's father-in-law died in Mexico, his wife told Gradilla that she needed him to accompany her to the funeral and care for her during the trip, because she feared it would aggravate her heart condition. The employer told Gradilla that he did not qualify for bereavement leave, because his father-in-law was not an immediate family member, but nonetheless gave him permission to leave. Gradilla stated that he would be back at work as usual on Monday. That weekend, however, the Company scheduled a mandatory overtime workday on Saturday, causing Gradilla to miss three days. He was fired. Gradilla sued, claiming that his discharge was prohibited by the California Family Rights Act ("CFRA").

The Ninth Circuit upheld the discharge and said that the leave was not appropriate under CFRA. According to the Court, the scope of the CFRA does not require that an employer must accommodate an employee whose spouse decides, in spite of her serious medical condition, to travel away from her home for reasons unrelated to her medical treatment. *Gradilla v. Ruskin Mfg.*, 2003 U.S. App. LEXIS 2733 (9th Cir. Feb. 14, 2003).

Respondeat Superior Liability

Employer May Be Liable For Car Accident Caused By Sick Employee Driving Home From Work.
Irma Hernandez was employed by Minimed, Inc., as a clerical worker. The company hired a pest control service to spray pesticide overnight to eliminate flees at its facility. When Hernandez arrived at work the next morning, she noticed a funny smell she described as similar to "Raid." A few hours later, she suffered from a headache, nausea, and tightness in her chest. Hernandez told two supervisors that she didn't feel well and wanted to go home. One offered to send her to the company doctor, but she refused. Another supervisor asked whether she felt well enough to drive herself home, and she said yes. While driving home, however, she rear ended Barbara Bussard, who was stopped at a red light.

Bussard sued Minimed for personal injury and property damage. The California Court of Appeals determined that Minimed was responsible for Bussard's injuries because Hernandez endangered others with a risk arising from her exposure to fumes in the workplace. *Bussard v. Minimed, Inc.*, 2003 Cal. App. LEXIS 94 (Jan. 23, 2003).

Arbitration

Arbitration Agreement Upheld Despite Invalid Appeal Provision. When Edward Fittante applied for a Service Technician position with Palm Springs Motors ("PSM"), he signed a written employment application which included a provision stating that employment disputes would be resolved through arbitration. Fittante claimed that he was told before accepting the job that there was plenty of work and that he could expect an income at least equal to his earnings at his previous employer. Based on those representations, he quit his job in Beverly Hills and moved his family to Palm Springs. Shortly after he began working at PSM, however, he discovered that the representations were false. Nonetheless, he remained on the job because "[h]e had very little choice financially." Fittante was later fired, allegedly because he had defrauded a customer. Fittante then sued PSM for fraud, defamation, and wrongful termination.

When PSM requested to submit the claims to arbitration, Fittante argued that the arbitration agreement was an unconscionable adhesion contract barred by the California Supreme Court's ruling on arbitration agreements in the case of *Armendarriz v. Foundation Health Psychcare Services, Inc.* The court found that the agreement was valid, with the exception of the requirement that the agreement provide all types of relief available in court. The single invalid term in the PSM agreement provided that "[a]t either party's request, awards exceeding $50,000 shall be subject to reversal, modification, or reduction following review of the record and arguments of the parties by a second arbitrator." The court found that this provision lacked neutrality in that it was far more likely that an employer would use this provision to challenge a large award to an employee, rather than the other way around. The invalidity of that single provision, however, was not found to render the entire arbitration agreement unenforceable. Therefore, the court concluded that the agreement should be upheld with the exception of the unlawful appeal provision. *Fittante v. Palm Springs Motors, Inc*., 2003 Cal. App. LEXIS 90 (Jan. 23, 2003).

California Labor Code

Unionized Employee's Claim For Daily Overtime Not Preempted By The Labor Management Relations Act.
Rodney Gregory is employed in the entertainment industry and is a member of Local 44 of the International Alliance of Theatrical Stage Employees ("IATSE"). The terms of his employment, including overtime pay, are governed by a collective bargaining agreement ("CBA").

Gregory worked on multiple television and motion picture productions for a company called SCIE. During a period of two months, he worked six consecutive days on two productions, one day on one production and five on the other. While working on two other productions, he worked 20½ hours on one day; 8 hours on one show and 12½ hours on the other. Gregory claims that SCIE violated the California Labor Code by failing to pay him overtime for the hours worked in excess of 8 hours in one day and 40 hours in one work week.

SCIE removed the case to federal court claiming preemption under the Labor Management Relations Act ("LMRA"). Section 301 of the LMRA establishes jurisdiction in the federal courts for disputes involving the terms of a CBA. The Ninth Circuit disagreed and allowed Gregory to sue in state court, stating that the issue was not how much he was paid for working overtime, but whether he was paid for *all overtime hours worked*, as required by California law. *Gregory v. RSWL SCIE*, 2003 U.S. App. LEXIS 1233 (9th Cir. Jan. 27, 2003).

Wrongful Discharge

California Appeals Court Reinstates Wrongful Discharge Claim of Worker Who Took Disability Retirement. Lillian Colores worked at California State University from February 1977 to November 1998, starting as a receptionist and working her way up to Director of Procurement. After Colores was diagnosed with fibromyalgia, a disabling medical condition marked by chronic and debilitating pain and fatigue which can be aggravated by stress, she received a medical retirement with the University. During her employment with the University, Colores' job performance was consistently rated commendable to outstanding, she received progressive salary increases and was referred to as a model employee, despite her disability.

In her lawsuit, Colores claimed that shortly after she discovered and reported several instances of unlawful misappropriation of funds by other administration employees, the University intentionally caused her excessive stress, which in turn exacerbated her medical condition to the extent that she was constructively discharged. The Court of Appeals allowed Colores to pursue her suit. First, the court explained that in order to establish a constructive discharge claim, an employee must prove "that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated … that a reasonable person in the employee's position would be compelled to resign." Then, the court pointed out that after establishing a constructive discharge, an employee must then independently prove a breach of contract or tort in connection with employment termination. The court explained that because Colores was forced into a medical disability retirement by the University's wrongful action, the University cannot hide behind the disability retirement in defending the constructive discharge claim. *Colores v. Board of Trustees of the California State University*, 2003 Cal. App. LEXIS 150 (Jan. 31 2003).

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

BOSTON
World Trade Center East
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 3850
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
101 California Street, Suite 2900
San Francisco, California 94111-5858
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