CALIFORNIA
LABOR & EMPLOYMENT LAW
UPDATE

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Federal Laws and Individual Rights

ADA

For Severe Diabetic, Eating Was Major Life Activity. A senior account specialist who suffered from life-threatening diabetes was terminated for eating at her desk in violation of company policy. The employee filed suit under the ADA claiming that she had to eat at her desk. Otherwise, her blood sugar would drop so severely that she could become disoriented and eventually pass out. The federal district court granted the employer's summary judgment motion because it concluded that eating was not a major life activity under the ADA. The Ninth Circuit reversed and held that a case-by-case inquiry is necessary to determine whether eating is a major life activity. Under these unique facts, the Ninth Circuit found that eating was a major life activity because the employee's condition required her to measure her blood sugar daily, monitor what she ate, and give herself insulin injections. *Fraser v. Goodale*, 2003 U.S. App. LEXIS 18494 (9th Cir. Sept. 12, 2003).

California Law, Which Is Designed To Afford Greater Protection To Employees Than The ADA, Does Not Require That An Employee Be Presently Disabled To Maintain A Disability Rights Action. The plaintiff applied for disability insurance. She had been previously diagnosed as having an "adjustment disorder with mixed anxiety and depressed mood," and was participating in weekly therapy sessions with a clinical social worker. Because the insurance company's policy was to deny coverage for applicants with adjustment disorders until at least one year after treatment stopped, it declined the plaintiff's application for benefits.

The plaintiff filed a lawsuit under the ADA and California's Unruh Civil Rights Act to contest the denial of benefits. Entering summary judgment for the insurance company, the federal district court found that the plaintiff could not qualify as disabled under the ADA because the insurance company did not regard her as *presently* substantially limited by her disorder but as one who *may be* substantially limited in the future. The Ninth Circuit reversed and concluded for the plaintiff's claim to proceed, she had to show that in 1997, when her application was denied, she had a disability within the meaning of the Unruh Act. The Ninth Circuit held that an individual must be *presently* — not potentially or hypothetically — substantially limited to demonstrate a disability within the meaning of the ADA, but that the Unruh Act did not require a *presently* limiting disability. *Goldman v. Standard Ins. Co.*, 2003 U.S. App. LEXIS 18023 (9th Cir. Aug. 29, 2003).

FMLA

Ninth Circuit Tackles "Joint Employer" Issue Under the FMLA. Air France flies an abbreviated schedule (one flight per day) in and out of the San Francisco International Airport. It contracts with outside entities for ramp and towing service, cargo and baggage handling, and food preparation. The plaintiff, an Air France employee, sought 12 weeks of leave to care for his ill father in France. The airline denied the leave request because it had fewer than 50 employees in a 75-mile radius and so not covered by the FMLA. The plaintiff argued that the airline and the outside entities were "joint employers" under the FMLA. If Air France was considered the "joint employer" of the contract workers performing services for the airline through the outside entities, then it would be subject to FMLA requirements because it would employ more than 50 individuals at SFO. Analyzing, for the first time, the issue of what a "joint employer" is under the FMLA, the Ninth Circuit rejected the plaintiff's argument that Air France's relationship with its ground service handling companies made it a joint employer of the contract workers and held that the plaintiff was not eligible for protected leave. *Moreau v. Air France*, 2003 U.S. App. LEXIS 18999 (9th Cir. Sept. 16, 2003).

Title VII

Ninth Circuit Restores Full Punitive Damages Award. A federal jury awarded the first African-American deputy sheriff in Clackamas County, Oregon $1.4 million in com-

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pensatory and punitive damages in a racial discrimination suit. The federal district court judge upheld the verdict, but reversed the punitive damages award. The plaintiff appealed. The Ninth Circuit affirmed the jury's finding race discrimination and restored the punitive damages award. In affirming the jury's verdict, the Ninth Circuit rejected the county's contention that the deputy sheriff was terminated for poor performance and for an inability to respond to training. The Ninth Circuit concluded that, because the deputy sheriff presented specific and substantial circumstantial evidence that he was terminated because he complained about racial profiling and comments, punitive damages against the county were appropriate. *Bell v. Clackamas County*, 2003 U.S. App. LEXIS 17041 (9th Cir. Aug. 25, 2003).

Female Car Cleaners' Allegations of Hostile Work Environment and Retaliation Reinstated. Plaintiffs were some of the first women hired to work as car cleaners for the San Francisco Municipal Railway. They filed a lawsuit alleging that they were subjected to a hostile work environment and were retaliated against for complaining about the unlawful harassment. The plaintiffs alleged that: one of them was harassed by a supervisor for an extended period of time; that same supervisor failed to prevent another employee from harassing the other plaintiff; they were either discouraged from complaining or their complaints were not taken seriously by the employer; one plaintiff was verbally and physically abused; they were not afforded overtime opportunities; and the employer's EEO office failed to adequately investigate the complaints. The federal district court granted the employer's motion for summary judgment finding that the employer took prompt remedial action to remedy the hostile working environment. On appeal, the Ninth Circuit reinstated the employees' hostile work environment and retaliatory discharge claims, concluding that genuine issues of material fact existed as to whether the employees were subject to hostile working environments and whether the employer took prompt remedial action after the plaintiffs complained about the harassment. *Taybron v. City and County of San Francisco*, 2003 U.S. App. LEXIS 17981 (9th Cir. Aug. 28, 2003).

Wrongful Termination

Employee Fired Because of False Drug Test Results Receives $400,000 Award. The plaintiff, a flight attendant, was subjected to a random drug test after a transcontinental flight. After the laboratory informed the employer that it believed that the plaintiff's urine sample had been tampered with because it was inconsistent with human urine, the employer treated the plaintiff's test result as a refusal to cooperate and terminated her. Because the plaintiff claimed that she had consumed several tea beverages before the test (during the nine-hour flight) which diluted her sample, and because she argued that the drug testing machinery was not properly calibrated, the employer rehired her. The plaintiff then filed a negligence lawsuit against the laboratory. A federal jury found that the laboratory negligently analyzed and reported the employee's test results and awarded her $332,000 in mental distress damages and $68,000 in economic damages. The laboratory appealed to the Ninth Circuit. Ruling that the Omnibus Transportation Employee Testing Act of 1991 does not preempt state common law negligence claims, the Ninth Circuit affirmed the jury verdict. The Ninth Circuit concluded that, as a matter of law, there was no preemption because the state law standards were not inconsistent with the federal law. *Ishikawa v. Delta Airlines Inc.*, 2003 U.S. App. LEXIS 18939 (9th Cir. Sept. 17, 2003).

Plaintiff's Wrongful Termination Claim, Arising From His Complaint That Another Employee Was Sexually Harassed, Reinstated. The plaintiff, a Hispanic male, worked his way up through the ranks before being terminated for violation of company procedures. The plaintiff filed a lawsuit alleging that he was fired in retaliation for making a sexual harassment complaint about his supervisor on behalf of a co-worker. The plaintiff also alleged that he was denied several promotions because he was Hispanic. The federal district court granted the employer's motion for summary judgment because the plaintiff could not prove that his supervisor knew that the plaintiff was the individual who made the complaint to management. The district court also held that the plaintiff's "failure to promote" claim was time barred. The plaintiff appealed. The Ninth Circuit reversed the district court's ruling and concluded that genuine issues of material fact existed for the plaintiff's retaliatory discharge claim. The federal court held that the plaintiff established a prima facie case of retaliation because there was sufficient evidence for the jury to conclude that the supervisor knew that the plaintiff complained about him. (It did not reinstate the plaintiff's "failure to promote" claim). The federal court also held that there was sufficient evidence for the jury to conclude that the employer's reasons for terminating the plaintiff were a pretext for discrimination. Specifically, the Ninth Circuit concluded that the plaintiff's evidence demonstrated that the timing of his termination was suspicious and that the plaintiff had not committed the mistakes attributed to him by the employer. *Hernandez v. Spacelabs Medical Inc.*, 2003 U.S. App. LEXIS 18869 (9th Cir. Sept. 11, 2003).

State Laws and Individual Rights

Age Discrimination

No Age Discrimination Where Plaintiff Could Not Perform New Owner's Requirements For The Position. The plaintiff was hired as a driver in 1985. He was promoted to operations supervisor in 1992. When his old employer was acquired by another company in 1999, the plaintiff retained his position notwithstanding a management restructuring. Prior to the acquisition, the plaintiff was told by management "maybe you're getting too old" to work. Following the acquisition, the plaintiff was required to create and maintain routes using a computer system and routing software — something that he was unable to do. He also was observed as having an unprofessional demeanor, for being overbearing, aggressive and offensive toward other employees. The employer then terminated the plaintiff.

The plaintiff filed a lawsuit alleging age discrimination, termination in violation of public policy and intentional infliction of emotional distress. Although the plaintiff was over 40 when he was terminated, the court concluded that the plaintiff could not prove that he was fired because of his age. The trial court held that the employer reasonably concluded that the plaintiff's lack of computer skills and overbearing and aggressive personality rendered him unqualified for the operations supervisor position. The trial court also concluded that the pre-acquisition remark that he was "too old" did not factor into the decision that the plaintiff was not qualified to be an operations supervisor. On appeal, the appellate court affirmed the trial court's decision. *Gibbs v. Consolidated Serv.*, 2003 Cal. App. LEXIS 1319 (Aug. 27, 2003).

Race Discrimination

Allegations of Racial Discrimination at Fox Sports Insufficient To Sustain Claim. The plaintiff, an African-American, became the director of music for Fox Sports Productions in 1996. In 1997 and 1998, the plaintiff applied for several promotions. According to the employer, the plaintiff was not promoted because of his poor work performance. Specifically, the plaintiff failed to obtain "clearances" allowing Fox to incorporate music owned by others into the Fox broadcasts, was absent without notice and lied to conceal his poor performance. The employer also found pornography on the plaintiff's computer. As a result, the plaintiff was terminated in 2000. The plaintiff denied that his performance was less than satisfactory, and further alleged that Fox put the pornography on his computer to justify his firing. The plaintiff also said that he came upon pornographic e-mail attachments and internet sites inadvertently and, in any event, no more than 10 times. The plaintiff then filed a lawsuit against Fox alleging racial discrimination.

The plaintiff claimed his termination was discriminatory because: he was the only African-American department head; he was the only department head who was not a vice-president; a less qualified Caucasian woman replaced him and became vice-president in a year; and, Fox planned to fire him even before it found the pornography on his computer. The court held that the plaintiff did not demonstrate that Fox acted with a discriminatory motive when it refused to promote him and when it fired him. The court concluded that even viewed together, the evidence did not reveal a discriminatory motive on behalf of the employer. *Jacquet v. Fox Sports Productions, Inc.*, 2003 Cal. App. LEXIS 8063 (Aug. 25, 2003).

National Labor Relations Board

Wal-Mart Achieves Significant Labor Win. After a union representation petition was filed against a Wal-Mart store, a number of managers visited the store as part of the Company's "Coaching By Walking Around" program. The store's district manager also stepped up his visits to five times a week. The management representatives responded to the employees' complaints about workplace issues. The NLRB held that Wal-Mart did not violate the NLRA by soliciting employee grievances during the organizing campaign because the Company had a past practice of doing so at other locations. *Wal-Mart Inc.*, Daily Lab. Rep. No. 171 (Sept. 4, 2003), A-2.

Nursing Assistant Owed Full Back Pay Despite State Disciplinary Notice. After receiving a written warning for patient abuse, a certified nursing assistant immediately started engaging in union activities. After learning of the nursing assistant's union activities, the employer re-opened its investigation of the patient abuse incident, suspended the employee pending results of investigation, and thereafter discharged her for "gross misconduct." Shortly after her discharge, a state agency found that the nursing assistant had committed patient abuse and fined the employer. The NLRB concluded that the employer terminated the nursing assistant because of her union activity and awarded her over 10 years of back pay. The employer argued that the back pay award should be reduced because it would have terminated the employee for patient abuse notwithstanding her union activity. The NLRB rejected the employer's argument because the evidence showed that the nursing assistant was fired for her union activities and not because of her alleged patient abuse. *Beverly California Corp.*, Daily Lab. Rep. No. 143 (July 25, 2003), A-2.

Wage and Hour

Culinary School's Instructors Were Exempt From Overtime Pay. The California School of Culinary Arts is a private accredited school that offers instruction and post-secondary degrees in the fields of culinary arts and commercial restaurant management. CSCA employs over sixty

instructors. According to Industrial Welfare Commission Wage Order 4-2001, instructors who are within the "profession of teaching" are exempt from overtime pay. Based on this wage order, CSCA classified its instructors as exempt because it believed that they fell within the professional exemption. The Department of Labor Standards Enforcement disagreed and sent CSCA a letter informing it that the instructors were entitled to overtime because the school is a vocational institution rather than "a school of higher learning teaching academic subjects which grants at least the bachelor degree in arts and sciences or both," which the DLSE historically used as the definition for college. CSCA filed a complaint for declaratory relief.

According to the court, CSCA presented sufficient evidence that it possesses all of the indicia of a "college." The court opined that the term "college" must be applied in context and not so narrowly defined as to only include those that grant "academic" rather than "vocational" degrees and held that the instructors were professionals exempt from receiving overtime. *California School of Culinary Arts v. Lujan*, 2003 Cal. App. LEXIS 1445 (Sept. 18, 2003).

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