CALIFORNIA
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UPDATE

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Supreme Court

First Roberts Court Decision Affirms 'Continuous Workday' Rule Under FLSA, But Rejects Employee Claim For Waiting Time Pay. At issue was whether the time spent by employees with regard to "donning and doffing" (putting on and taking off) protective clothing was excluded from compensation under the Portal-to-Portal Act of 1947. In the first decision issued by the Roberts Court, the Supreme Court ruled that, since time spent donning and doffing protective gear is itself integral and indispensable to the employees' principal activity, so too is the time spent walking to and from the changing areas. Such activities are therefore compensable under the Fair Labor Standards Act (FLSA). However, in the absence of any showing that the employees were required to report at a specific time and wait to don the gear, the time spent waiting to don the gear was preliminary to the first principal activity of the workday. Such time was thus not compensable except by agreement of the parties or the custom and practice in the particular industry. The genesis of the IBP decision is in the Portal-to-Portal Act of 1947, passed as an amendment to the FLSA. The Portal-to-Portal Act excepted from FLSA coverage walking to and from the place of the employee's "principal activity or activities" and work which is "preliminary or postliminary" to such principal activities. Later, however, the Supreme Court interpreted "principal activity or activities" to embrace all job duties that are "an integral and indispensable part of the principal activities." *IBP Inc. v. Alvarez*, 2005 U.S. LEXIS 8373 (U.S. Nov. 9, 2005).

Supreme Court Rules On Burden Of Persuasion In Education Cases. The Individuals with Disabilities Education Act (IDEA) is a Spending Clause statute designed to ensure that "all children with disabilities have available to them a free appropriate public education." Under the IDEA, school districts must create an "individualized education program" (IEP) for each disabled child. If parents believe their child's IEP is inadequate, they may request an "impartial due process hearing." However, because the Act is silent as to which party bears the burden of persuasion at such a hearing, the Court was asked to decide the question. The Supreme Court held that the party seeking relief, which in this case was the parents challenging the appropriateness of the IEP, bears the burden of persuasion during administrative hearings on the matter. The Court saw no reason to adopt a due process balancing test or to depart from the typical standard which is to place the burden on the party seeking relief. Thus, in a case such as this one where the evidence is closely balanced, the party with the burden of persuasion - here the parents - loses. *Schaffer v. Weast*, 2005 U.S. LEXIS 8554 (U.S. Nov. 14, 2005).

Federal Courts

Title VII

Ninth Circuit Affirms Summary Judgment For Employer On Sexual Harassment Claim Because Employee Failed To Take Advantage Of Corrective Opportunities. A male advertising account executive for a Seattle television station sued the company claiming sexual harassment and retaliation under federal and state law. In his complaint, the plaintiff alleged that his supervisor, a female general manager, repeatedly groped and propositioned him, creating a hostile work environment that ultimately forced him to resign. Although the plaintiff complained to his general manager and a human resources representative about the unwanted sexual advances, he did not reveal any of the details and insisted on handling the situation himself. The district court entered summary judgment for the employer, dismissing the plaintiff's claims, based on the employer's defense under Supreme Court cases *Ellerth* and *Farragher*.

The Ninth Circuit affirmed on appeal that the employer could invoke an affirmative defense to liability. To establish the defense the employer must show: (1) that it exercised reasonable care to prevent and correct

promptly any sexually harassing behavior; and (2) that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm. The court held that the employer met both requirements. First, the employer took reasonable steps to prevent harassment by adopting and disseminating an anti-harassment policy. Second, the plaintiff failed to take advantage of preventative and corrective opportunities because he waited six months to make a complaint to his managers, and demanded that company not investigate because he insisted on handling the matter himself. The court rejected the plaintiff's argument that the affirmative defense could not be invoked because he was constructively discharged, and therefore, suffered a tangible employment action. The court ruled that because the plaintiff waited close to five months before he resigned, he could not establish that he was constructively discharged. Lastly, the court rejected the plaintiff's argument that he was retaliated against for complaining of the harassment by receiving an unwarranted unsatisfactory performance evaluation. The court held that the employer offered legitimate, non-discriminatory reasons for the critical evaluations. *Hardage v. CBS Broad., Inc.* 2005 U.S. App. LEXIS 23551 (9th Cir. Nov. 11, 2005).

California Courts

FEHA

Supervisor Can Be Held Personally Liable For Retaliation Under The FEHA. Plaintiff sued her employer and individual supervisors at the Los Angeles Department of Water and Power for discrimination, harassment and retaliation. According to the plaintiff, her workplace was "permeated with discriminatory animus" against African-Americans and women. Defendant demurred on the ground that individual defendants could not be liable for retaliation. The trial court sustained defendant's demurrer without leave to amend, and ruled that supervisors could not be held liable for retaliation. The Court of Appeals disagreed and reversed, finding that supervisors could be held liable for retaliation under the FEHA. The court further found that the plaintiff met the requirement of an adverse employment action because she alleged that her supervisor's retaliatory actions affected her ability to be promoted. Finally, the court held that the supervisor was not immune from liability under section 820.3 of the Tort Claims Act. *Barr v. Lakatos*, 2005 Cal. App. Unpub. LEXIS 10455 (Cal. App. 2d Dist. Nov. 15, 2005)

The Interactive Process Required Under The FEHA Can, In Certain Circumstances, Be Between The Employer And The Employee's Attorney. The plaintiff worked in the school of veterinary medicine until he contracted leptospirosis, a disease that left him disabled because he could not work in any area where he might become infected by animals. Plaintiff took medical leave and moved to Florida. An employment specialist from the university began to communicate with the plaintiff about the possibility of finding him another job that did not require him to be around animals. However, because the plaintiff had been told on four separate occasions that he was fired, he told the employment specialist to communicate with his attorney. When the employment specialist learned that the law firm specialized in workers' compensation, and because this was not a workers' compensation case, she decided that she did not need to further confer with the plaintiff's attorney. Instead, she checked the plaintiff's resume against open positions and concluded that nothing was available, after which she processed the plaintiff's final termination from employment. The plaintiff sued, alleging that his employer violated the FEHA by failing to engage in the interactive process. The court entered summary judgment for the employer.

The Court of Appeals reversed and reinstated the employee's disability action under the FEHA because, under the unusual circumstances the employer created (by telling the plaintiff four times that he had been fired), it was not unreasonable for the employer to communicate with the plaintiff's attorney. In addition, the court concluded that the employment specialist did not act reasonably in unilaterally determining not to communicate with the plaintiff's attorney simply because the firm representing him specialized in workers' compensation. *Claudio v. Regents Of The Univ. Of California*, 2005 Cal. App. LEXIS 1815 (Cal. App. 3rd Dist. Nov. 22, 2005).

Wage & Hour

Labor Code Does Not Prevent Employer From Indemnifying Employees For Automobile Expenses By Paying Increased Salary And Commissions. Outside sales representatives (OSRs) from a marketing company sued their employer seeking indemnification under Labor Code §2802 for expenses incurred in using their personal automobiles to fulfill their job duties. To compensate the OSRs for the expenses, they were paid higher commission rates than the inside sales representatives who sold the products via phone and did not incur automobile expenses. The trial court determined that the employer could satisfy its obligations under §2802 by paying its employees an increased salary and commission instead of paying for actual automobile expenses. However, the court did not express any opinion about whether the additional compensation was

sufficient to actually indemnify the OSRs, only that §2802 did not prevent the employer from indemnifying its employees in that manner. In addition, because a resolution of the liability issues entailed individual inquiry for each OSR, the court ruled that the trial court did not abuse its discretion in denying the plaintiffs' request to certify the case as a class action. *Gattuso v. Harte-Hanks Shoppers, Inc.*, 133 Cal. App. 4th 985 (Cal. App. 2d Dist. 2005).

Legislative Updates

Federal Developments

EEO-1 Report Gets A Face Lift. Private employers with 100 or more employees, and various federal government contractors with 50 or more employees, are required by the EEOC to annually file the Employer Information Report (EEO-1). This report includes a breakdown of the workforce by job category and by race, ethnicity, and sex. The changes to the reporting form constitute the first major revisions to the EEO-1 in nearly 40 years. Among the major changes are an expansion in the number of race and ethnic categories, and revamping of some of the report's job categories. Employers are now encouraged to ask employees to voluntarily report their ethnicity and race, and the new form divides the reporting category of officials and managers into two subgroups: executive/senior level and first/mid-level. Lastly, the EEO-1 data collection now includes employers in Hawaii, who were previously not required to comply with the reporting requirements. The revisions are scheduled to go into effect starting with the 2007 reporting cycle. The EEOC is accepting public comment on the proposed revisions. The EEOC provides a "Questions and Answers: Revisions to the EEO-1 Report" on its website at: http://www.eeoc.gov/eeo1/qanda.html.

Practice Tip: Although not yet formally approved, employers should begin planning for the changes by:

- Communicating with its human resources information systems (HRIS) management or any other external agency that assists with applicants and/or employee tracking.
- Developing a self-identification questionnaire.
- For those employees who refuse to self-identify, developing a process for identifying race/ethnicity and gender visually or from employment records.
- If possible, coding the employee database to contain the method for identification: self, visual or employee records.
- Re-categorizing officials and managers per the revised form.
- Conducting a self-audit of the officials and managers to evaluate any glass ceiling indicators that may exist between the higher and lower level categories. Conduct yearly reviews of this issue.
- If a federal contractor, including those employees identified as two or more races in the affirmative action program statistics for "total minorities."

The DOL Provides Guidance On Several FLSA Issues. The DOL issued seven opinion letters in November, and twelve letters in October, on a number of different issues. All of the letters can be found on the DOL website at http://www.dol.gov/esa/whd/opinion/flsa.htm.

Labor Department Office Of Labor-Management Standards Offers Incentives To Employers Filing LM-10 Disclosure Forms For The First Time. On November 9, the Office of Labor-Management Standards (OLMS) announced that it will not require employers who file an LM-10 disclosure form for the first time this year to file past-due forms for previous years. According to the OLMS, this announcement was made "in the interest of achieving greater compliance with the reporting requirements." Pursuant to the LMRDA, employers must disclose to the OLMS whether they have provided anything of value to unions, union officials or employees, or to labor relations consultants, if those payments were made specifically because of the recipient's relationship with the union. The DOL's announcement includes new guidance on LM-10 filing requirements. For example, the guidance provides that employers need not report payments totaling $250 or less. This disclosure threshold is ten times higher than the previous threshold, which required disclosure for payments that totaled $25. This disclosure threshold will also be applied to LM-30 disclosure reports. The guidance also provides that trusts and services providers to financial plans that make payments to union employees or officers must file an LM-10, if the payments are not made within the regular course of business. Lastly, the new guidance provides that reports for employer fiscal years that have already begun do not have to be signed by the filer's president and treasurer under penalty of perjury. *See* Daily Lab. Rpt. No. 221 (Nov. 17, 2005), A-10.

IRS Announces Cost-Of-Living Adjustments For Retirement Plans. The Internal Revenue Service has announced cost-of-living adjustments applicable to dollar limitations for retirement plans and inflation-adjusted limits for other benefits for 2006. Many of the limitations have increased from the 2005 limits. Some of the limitations increased due to the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) enacted in 2001.

See www.seyfarth.com for our Management Alert on these limits.

California Developments

Voters Rejected All Eight Measures In November Special Election. Voters rejected Proposition 75, a measure that would have required public employee unions to get written permission before using member dues for political purposes, and Proposition 74, another measure designed to boost requirements for teacher tenure. Unions financed a costly fight against these measures by using dues increases to agency fee payers, which were challenged in court. *See* Daily Lab. Rpt. No. 217 (Nov. 10, 2005), A-9.

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