CALIFORNIA
LABOR & EMPLOYMENT LAW
UPDATE

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Supreme Court

Decisions

Because Constructive Discharge is not a Tangible Employment Action, The *Ellerth/Faragher* Affirmative Defense is Available to Employers in Constructive Discharge Cases. Plaintiff, a police communications operator, quit her job claiming her male supervisors had barraged her with vulgar sexual commentary and obscene sexual gestures over a period of five months. Though she spoke with the company's EEO officer, plaintiff never officially reported the alleged harassment through the available channels. Plaintiff sued her former employer under Title VII for hostile-environment sexual harassment and constructive discharge. The trial court granted summary judgment based on the *Ellerth/Faragher* affirmative defense because plaintiff unreasonably failed to use available anti-harassment measures. The court did not reach the constructive discharge claim. The Third Circuit reversed, holding that the *Ellerth/Faragher* defense was never available in constructive discharge cases because constructive discharge constitutes a tangible employment action.

The Supreme Court accepted the case to resolve whether constructive discharge constitutes a tangible employment action that would preclude an employer's use of the *Ellerth/Faragher* affirmative defense. Reversing the Third Circuit, the Supreme Court held that the *Ellerth/Faragher* affirmative defense is available in constructive discharge cases, unless an official company act — such as a humiliating demotion, extreme pay cut or job transfer — precipitated the constructive discharge. In constructive discharge claims resulting from alleged coworker harassment or unofficial supervisory harassment, the employer can avoid or reduce liability by establishing the *Ellerth/Faragher* affirmative defense. *Pennsylvania State Police v. Suders*, 2004 U.S. LEXIS 4176 (U.S. June 14, 2004).

Note: *Suders*, which is the latest in a series of Supreme Court decisions to address issues of employer liability in cases of workplace harassment, reinforces how critical it is for employers to create and distribute anti-harassment policies, while maintaining effective complaint procedures that encourage harassed employees to come forward without fear of retaliation or futility.

Amending a Definition of Disqualifying Employment Which Results in Suspension of Accrued Early Retirement Benefits Violates ERISA'S Anti-Cutback Rule. Participants in a multiemployer pension plan (administered by the Central Laborers' Pension Fund) elected early retirement. The Plan prohibited beneficiaries of service-only pensions from engaging in certain "disqualifying employment." After retiring, one of the Plan participants took a job as a construction supervisor, which was not originally termed "disqualifying employment" under the Plan. However the Plan subsequently expanded the categories of postretirement disqualifying employment to include the supervisory position and therefore suspended the participant's payments under the Plan. The participant sued, claiming that the amended definition violated ERISA's anti-cutback rule. The Seventh Circuit reversed the trial court's judgment for the Plan, holding that by imposing new conditions on rights to benefits already accrued, the Plan violated the anti-cutback rule.

The Supreme Court agreed and affirmed the judgment of the Seventh Circuit, holding that the Plan could not be amended as described. The Court explained that pursuant to the anti-cutback rule, "the accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." Under the Retirement Equity Act, "a plan amendment which has the effect of … eliminating or reducing an early retirement benefit … with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits." *Central Laborers' Pension Fund v. Heinz*, 2004 U.S. LEXIS 4028 (U.S. June 7, 2004).

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Denial of Certiorari

Supreme Court Declines Review of Ruling That Compensatory and Punitive Damages are not Available for ADA Retaliation Claims. The Seventh Circuit ruled that compensatory and punitive damages are not available for retaliation claims under the ADA, and therefore, a plaintiff bringing such a claim is not entitled to a jury trial. The plaintiff argued that the 1991 amendments to Title VII made compensatory and punitive damages available in ADA retaliation claims. The Seventh Circuit found that the 1991 Civil Rights Act authorized compensatory and punitive damages only for the specifically-listed claims and did not expand the remedies available to plaintiffs in ADA retaliation actions. The Supreme Court declined to hear the case. *Kramer v. Banc of Am. Sec. LLC*, 355 F.3d 961 (7th Cir.), cert. denied, 2004 U.S. LEXIS 4557 (U.S. June 21, 2004).

Federal Courts

Age Discrimination

72-Year-Old Taxi Driver's ADEA Claim Reinstated. A 72-year-old taxicab driver was fired after Yellow Cab purchased new insurance that only covered employees between 23 and 70 years old. Facing suspension of its business license if it did not provide proof of insurance for each cab driver in its employ by June 25, 1999, Yellow Cab terminated plaintiff on June 24, 1999. The parties disputed whether the termination was intended to be permanent or temporary. Yellow Cab presented evidence that it made telephone calls and secured work for the plaintiff while it resolved the age issue, and also negotiated with the insurance company, who agreed to cover the plaintiff so long as he passed a physical exam. The plaintiff refused to submit to a physical.

Plaintiff filed suit against Yellow Cab alleging that it violated the ADEA when it terminated him because he was over 70 years old. The trial court granted Yellow Cab's motion for summary judgment. On appeal, the Ninth Circuit reinstated plaintiff's cause of action for trial, concluding plaintiff had provided direct evidence of discrimination, and the trial court should not have applied the *McDonnell Douglas* burden shifting analysis. The court explained that when a plaintiff presents direct evidence of disparate treatment, the *McDonnell Douglas* presumption does not apply and a factual question will almost always exist to be resolved at trial. *Enlow v. Salem-Keizer Yellow Cab Co., Inc.*, 2004 U.S. App. LEXIS 11428 (9th Cir. June 10, 2004).

ERISA

Where Evidence of Disability is Slight, Treating Physician's Conclusory Statement is Insufficient to Reverse Administrator's Denial of Benefits. In 1995, a 42-year-old employee, who had worked for Northrop for 11 years, sought disability benefits for pain that allegedly interfered with her ability to perform her job as a senior administrative secretary. Under Northrop's disability plan, monthly benefits were available to those who became "Totally Disabled." It was undisputed that plaintiff suffered from fibromyalgia, a condition with no objective symptoms. It was disputed, however, whether her condition was so severe as to disable her from working a sedentary secretarial position. MetLife (the plan administrator) denied benefits. Plaintiff filed several appeals, all of which were denied.

Plaintiff then filed suit and the trial court found for MetLife (affirming the denial of benefits). Plaintiff appealed and the Ninth Circuit affirmed, finding that the administrator's decision was not "clearly erroneous" (which is the standard for reversal). Plaintiff's claim was denied because she did not prove her condition disabled her from working. Her physician made only the conclusory statement that plaintiff was disabled, but did not elaborate. MetLife's physicians evaluated plaintiff and stated she was not totally disabled. The court applied the reasoning in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003), which held that a plan need not accord special deference to the opinions of the treating physician. Here, there was conflicting evidence regarding the degree to which her condition disabled her. The court concluded there was a reasonable basis for the administrator's determination that plaintiff was not totally disabled. *Jordan v. Northrop Grumman Corp. Welfare Benefit Plan*, 2004 U.S. App. LEXIS 10626 (9th Cir. June 1, 2004).

FLSA

Time Spent Changing into Protective Gear to Enter "Cleanrooms" in Wafer Manufacturing Plant is Compensable Work Time. Employer, who manufactured computer wafers, required all employees who worked in "cleanrooms" (environments with very few air-borne impurities) to don protective gowns called "bunny suits" before entering those cleanrooms. Some workers also were required to wear plant uniforms in addition to their bunny suits. These clothing requirements added anywhere from 20 to 50 minutes to the employees' already-scheduled 40-hour work week. In addition, employees also were required to arrive at their stations (fully-gowned) 5 to 10 minutes before their shifts began for a "pass down" of information about any problems that occurred during the prior shift. The employees were not paid for the time spent gowning or for the "pass down."

Plaintiff, a former employee, sued on behalf of himself and others for unpaid overtime wages. The trial court concluded that time spent "gowning" was not compensable work time. The court also found that the employer could lawfully credit a paid lunch period against any overtime compensation due to the employees.

The Ninth Circuit reversed, finding that the time spent changing into and out of plant uniforms, walking between various cleanrooms and locker rooms before and after changing out of plant uniforms, and engaging in cleanroom "gowning" activities was compensable work time. Furthermore, the court rejected the employer's argument that because it paid for a half-hour lunch period, it was not required to pay for the half-hour of overtime. Such "creative booking," violated both the express provisions of the FLSA, as well as the FLSA's goals and purposes. *Ballaris v. Wacker Siltronic Corp*., 2004 U.S. App. LEXIS 10797 (9th Cir. June 3, 2004).

County Not Required to Grant Compensatory Time Off on Demand. Sacramento County Sheriff Deputies may accept compensatory time off ("CTO") in lieu of overtime. Under the CTO policy, the County must grant CTO within one year of an employee's request or pay the overtime compensation. A leave book is maintained that lists a predetermined number of available leave slots. If a deputy requests CTO on a day when the leave slots are filled, the county will deny the request. The plaintiff sought 12 hours of leave for March 11, 2001. The leave book was full for that day so the request was denied. Plaintiff sued, claiming that the policy violated the FLSA because it did not require the county to show the request would "unduly disrupt" its operations.

The Ninth Circuit affirmed. It rejected plaintiff's argument that the county was required to grant him CTO on the day he specifically requested, unless it showed granting the request would "unduly disrupt" operations. The court concluded that the FLSA gave the employer a "reasonable period of time" to accommodate the employee. The employee could not force the county to pay another employee overtime so that he could use CTO on demand. The court further concluded that the county would not violate the FLSA unless it failed to follow its leave book policy or failed to grant CTO within one year of a request. *Mortensen v. Sacramento County*, 2004 U.S. App. LEXIS 10163 (9th Cir. May 24, 2004).

State Courts

Arbitration

Arbitration Award Vacated Because Arbitrator Failed to Disclose His Recent Service as a Neutral Arbitrator in a Non-Collective Bargaining Matter Involving one of the Law Firms. Plaintiff sued Local 16 for sex discrimination and the parties settled. The settlement agreement stated that any future dispute about the terms of settlement would be submitted to binding arbitration before one of four listed arbitrators. Thereafter, a dispute arose, and the plaintiff agreed to submit the dispute to one of the four listed arbitrators. The arbitration resulted in a finding in favor of the union and plaintiff appealed. The court concluded that the arbitrator was required to disclose that he had recently acted as a neutral arbitrator in a non-collective bargaining matter involving the union's law firm and vacated the award based on his failure to do so. *Internat'l Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local No. 16 v. Laughon*, 2004 Cal. App. LEXIS 813 (May 27, 2004).

"Gateway" Issue Regarding Enforceability of Arbitration Agreement to be Decided by the Trial Court; Waiver of Right to Compel Arbitration to be Decided by Arbitrator. A Ralphs Grocery manager was fired for allegedly making offensive comments to another employee. He filed a complaint against Ralphs for, among other things, wrongful termination. Ralphs filed a motion for summary judgment or, in the alternative, a request to compel arbitration. The trial court denied both motions, finding the issues should be resolved at trial.

On appeal, the court looked first to who had authority to decide issues regarding whether the plaintiff's claims were arbitral. According to the appellate court, the trial court (not the arbitrator) was the proper authority to determine the "gateway" issues of whether there was an enforceable arbitration agreement between the parties, and if so, whether the claims were covered by the agreement. The court further ruled that if the trial court found a valid arbitration agreement covered the parties' disputes, the issue of whether Ralphs waived its right to compel arbitration was to be decided by the arbitrator. *Omar v. Ralphs Grocery Co.*, 2004 Cal. App. LEXIS 770 (May 6, 2004).

Marital Status Discrimination

Court Affirms Firing of Worker for Lack of Character. Plaintiff was assistant general sales manager for Courtesy Oldsmobile-Cadillac ("Courtesy"). After plaintiff began experiencing marital problems, he developed a close personal relationship with the office coordinator, who was also weathering marital difficulties. Plaintiff was told on several occasions to stay out of her office, as his relationship with her was affecting both his and her performance at work. The plaintiff also was counseled twice for inappropriate behavior, and another employee filed a sexual harassment claim against him. However, he never received any written warnings. Plaintiff eventually was fired for "lack of character."

Plaintiff filed suit against Courtesy for marital status discrimination, tortious termination in violation of public policy, and related claims. The trial court granted Courtesy's motion to dismiss the claim for tortious termination in violation of public policy and a jury found in Courtesy's favor on the marital status discrimination claim.

On appeal, the court (in an unpublished opinion) affirmed the finding for the employer on the tortious termination claim. The court ruled the plaintiff was on notice that his relationship with the office manager was disruptive and presented a potential conflict of interest. The court found the plaintiff did not have a reasonable expectation of privacy in pursuing a personal relationship and he had waived his argument regarding freedom of association. The court concluded that the plaintiff failed to articulate a fundamental public policy to support his wrongful termination claim. *Merino v. Courtesy Oldsmobile-Cadillac, Inc.*, 2004 Cal. App. Unpub. LEXIS 5591 (5th Dist. June 10, 2004).

Automatic Rule Barring Married Coworkers from Working Together may be Unconstitutional. Hope International is a religious institution, affiliated with the Church of Christ. Its handbook instructs faculty to be exemplary Christians. Two professors in the Marriage and Family Therapy department were believed to be involved in an extramarital affair. The two eventually married and were fired while on their honeymoon, because Hope claimed that two individuals married to one another could not make up an entire department.

The couple filed suit for marital status discrimination, wrongful termination and other related matters. Hope's motion for summary judgment was denied. On appeal, two issues were raised: (1) the application of the ministerial exception; and (2) the degree to which California's marital status antidiscrimination laws preclude employers from *automatically* assuming that coworkers cannot be married.

The ministerial exception is a "nonstatutory constitutionally compelled" exception to federal civil rights legislation. The exception covers ministers, and those whose duties "go to the heart of the church's function." In the education setting some, such as a theology teacher at a Catholic school, fall within the exception, while others, such as lay teachers of secular subjects at religious schools, do not. The role of the employee and the subject matter taught is determinative. In this case, the court was unable to determine whether the two professors fell within the ministerial exception. Therefore, the court concluded that the trial court properly denied summary judgment. As for the second issue, the court determined that the school's policy that a married couple could not make up a department (essentially an anti-nepotism rule) may violate California state civil rights law that impliedly provides that an automatic rule against married coworkers is unconstitutional. In addition, in response to the employees' argument that they were terminated based on Hope's perception that they were having an affair, the court held that even if true, this did not amount to marital discrimination. *Hope Internat'l Univ. v. The Sup. Ct. of Orange County*, 2004 Cal. App. LEXIS 945 (4th Dist. June 18, 2004).

NLRB

Employees in Nonunion Setting are no Longer Entitled to Representation During an Investigatory Interview. The National Labor Relations Board reversed its 2000 ruling in *Epilepsy Foundation of Northeast Ohio*, holding that the so-called *Weingarten* right to have a representative present during an investigatory meeting does not extend to employees in a nonunionized setting.

An Administrative Law Judge, applying *Epilepsy Foundation*, concluded that the employer violated the Act by denying the requests of nonunionized employees to have a coworker present during investigatory interviews concerning harassment allegations made by a former employee. A divided Board ruled in favor of the employer and concluded that policy considerations warranted a reversal of *Epilepsy Foundation*. The Board stated that "[t]he years since the issuance of *Weingarten* have seen a rise in the need for investigatory interviews, both in response to new statutes governing the workplace and as a response to new security concerns raised by terrorist attacks on our country." The Board observed that in today's workplace, employers are often called upon to interview employees on a wide array of charges and issues, including workplace violence, discrimination, sexual harassment, corporate abuse, fiduciary lapses and "real and threatened" terrorist attacks. The Board concluded an employer "must be allowed to conduct its required investigations in a thorough, sensitive and confidential manner" and that this is best accomplished by permitting an employer to investigate an employee without the presence of a coworker. This decision does not affect unionized employees' *Weingarten* rights. *IBM Corp.*, 341 NLRB No. 148 (2004).

Wage & Hour Laws

Berkeley's Living Wage Ordinance is Constitutional. The City of Berkeley passed a "living wage" ordinance requiring some businesses to pay their employees wages approximating the real cost of living in the locality, an amount higher than the state and federal minimum wages. Soon thereafter, Berkeley amended the ordinance by adding the "Marina Amendment," requiring certain employers in the Berkeley marina district to comply with the living wage ordinance. RUI Corp., which operates a restaurant and lounge in the marina area, filed a lawsuit seeking a declaration that the Berkeley living wage ordinance and Marina Amendment violated the Contract Clause, Equal Protection Clause and Due Process Clause of the U.S. and California constitutions. The trial court declared the statute constitutional.

The Ninth Circuit agreed and affirmed the judgment for the City. The court rejected RUI's Contract Clause argument, finding that the ordinance did not impair any *specific* terms, *implied* terms or "expected benefits" of the lease between RUI and the City. The court also

concluded that there was a rational basis for the legislature to treat large marina businesses differently from their competitors outside the marina and therefore rejected RUI's equal protection argument. In addition, the court concluded that RUI's due process rights were not violated. RUI contended that, by allowing *bona fide* collective bargaining agreements to opt out of the ordinance, the City unconstitutionally delegated its legislative authority to the unions negotiating the contracts. The court explained that the opt-out provision was not a delegation of legislative power at all, because the unions do not have the power to make and alter laws, but rather to negotiate collective bargaining agreements. Thus, that argument too must fail. *RUI One Corp v. City of Berkeley*, 2004 U.S. App. LEXIS 1171 (June 16, 2004).

Class Suitability for Wage and Hour Action Should not be Decided at the Pleadings Stage. A driver brought a wage-and-hour class action on behalf of 500 drivers who are or were employed by CLS Transportation. On demurrer, the trial court found that the action was not suitable as a class action because the plaintiff could not establish a well-defined community of interest among the potential class members. The appellate court reversed and reinstated the action, finding that in non-mass tort actions, including wage and hour actions, class suitability should not be determined by demurrer at the pleading stage. *Prince v. CLS Trans.*, 118 Cal. App. 4th 1320 (2004).

$11 Million for Overtime Violations. Longs Drug Stores Corp. has agreed to pay $11 million to about 1000 employees to resolve two lawsuits filed against it alleging wage-and-hour violations. The complaint alleged that Longs failed to pay proper overtime pay to store managers in some 400 locations across the state. The class consisted of "store managers" and "assistant store managers." Plaintiffs alleged they routinely worked over 10 hours of overtime a week without getting paid and they spent more than half of their time performing non-managerial duties such as stocking shelves and running a cash register. Daily Lab. Rpt. No. 112 (June 11, 2004), A-2 (*Robotnick v. Longs Drug Store Cal.*).

Legislative Updates

Federal Developments

New COBRA Notice Procedures Issued by DOL. The DOL published final regulations implementing updated notice and disclosure requirements under COBRA. The new regulations apply to notice obligations arising on or after the first day of the first plan year beginning on or after November 26, 2004.

Vote on Bill to Increase Federal Minimum Wage Delayed. Senate vote on raising the federal minimum wage to $7 (S. 2370) is delayed.

State Developments

Senate Passes Law to Soften Private Attorney General's Force. The California Senate passed a bill (S.B. 1809) that softens the penalty provision of the new Private Attorney General's Act that allows employees to sue their employers for Labor Code violations.

Increase of Minimum Wage Passes State Assembly. A bill that would increase California's minimum wage from $6.75 to $7.75 an hour by 2006 passed the state assembly.

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