



California Employment Law: The Year in Review and Planning for 2007

December 14, 2006

Presented by:

Jackson Lewis LLP

Joseph Breen, Esq.
BreenJ@jacksonlewis.com

Svetlana Vaksberg, Esq.
VaksbergS@jacksonlewis.com

199 Fremont Street, 10th Floor | San Francisco, CA 94105 (415) 394-9400
www.jacksonlewis.com

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Preventive Strategies and
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OVERVIEW

- Case Update
- Pending Cases
- Legislative Developments

SEXUAL HARASSMENT



HARDAGE V. CBS BROAD., INC.

427 F. 3D 1177 (9TH CIR. 2005)

- 1998 Hugh Hardage began working as an advertising account executive for a Seattle TV station
- February 2000 he was promoted to Local Sales Manager
- Supervised by Patty Dean and individual defendant Kathy Sparks
- Hardage claims he was sexually harassed by Sparks on several occasions and subjected to retaliation after he rejected her advances

HARDAGE V. CBS BROAD., INC.
427 F. 3D 1177 (9TH CIR. 2005)

- Hardage claims Sparks flirted with him and made inappropriate comments on her visits to the office
- Hardage admitted his responses could have been perceived as mutually flirtatious
- Hardage alleges more serious harassment on five occasions outside the office, including unwanted touching and temperamental reactions by Sparks when he rejects her reactions

HARDAGE V. CBS BROAD., INC.
427 F. 3D 1177 (9TH CIR. 2005)

- Following the fifth incident, Hardage complained to his supervisor (Dean)
- Dean responded, “Why don’t you just do it and get it over with. It might put her in a better mood.”
- Dean reported Hardage’s complaint
- Human resources met with Hardage

HARDAGE V. CBS BROAD., INC.

427 F. 3D 1177 (9TH CIR. 2005)

- Hardage rejected HR's offer to talk to Sparks and treat the complaint as "anonymous"
- Human resources followed up, but Hardage reiterated that he did not want HR to intervene
- In August 2001, Hardage and his female co-manager received written warnings regarding their performance
- Shortly thereafter, Hardage submitted his resignation claiming constructive discharge, sexual harassment, and retaliation

HARDAGE V. CBS BROAD., INC. 427 F. 3D 1177 (9TH CIR. 2005)

- Does Ellerth/Faragher defense apply?
 - Under Title VII, an employer may avoid liability for harassment that does not involve an adverse employment action if it can demonstrate:
 - (1) it took reasonable steps to prevent and promptly correct sexual harassment in the workplace, and
 - (2) the aggrieved employee unreasonably failed to take advantage of the employer's preventive or corrective measures

HARDAGE V. CBS BROAD., INC.

427 F. 3D 1177 (9TH CIR. 2005)

- CBS was entitled to assert Ellerth/Faragher defense
 - Hardage was not constructively discharged
 - CBS adopted and disseminated its anti-harassment policy
 - CBS' response was prompt and reasonable in light of Hardage's vague complaints and insistence he wanted to handle the situation himself
- BUT - a more thorough investigation and disciplinary measures for the harasser could in some circumstances be essential in spite of a harassed employee's request to handle the situation

HARDAGE V. CBS BROAD., INC.

427 F. 3D 1177 (9TH CIR. 2005)

- California employers should recognize the limited applicability of the ruling
 - In Department of Health Services v. McGinnis, the California Supreme Court rejected the applicability of the Ellerth/Faragher affirmative defense to claims under the FEHA
 - Instead, the "avoidable consequences," doctrine may be applied to FEHA harassment claims, precluding recovery of damages that could have been avoided by reasonably utilizing the employer's internal complaint procedures

PRACTICAL LESSONS FOR EMPLOYERS

- Adopt effective anti-harassment policies and make reasonable efforts to disseminate them
- Conduct training for all employees regarding internal complaint process (such training is now required for supervisors and managers in California)
- Investigate all complaints – even if the employee asks you not to

LYLE V. W.B. TELEVISION PROD.
38 CAL. 4TH 264 (2006)

- Lyle, female, was a writer's assistant on the television show "Friends"
- Lyle was warned she would be required to listen to and transcribe sexual jokes and dialogue during writer's meetings
- Lyle was terminated after four months because of problems with her typing and transcribing skills

LYLE V. W.B. TELEVISION PROD.
38 CAL. 4TH 264 (2006)

- Lyle claims she heard writers discuss:
 - Their preferences in women and sex in general
 - What they would like to do sexually to different female cast members
 - Demeaning statements about an actress on the show
- The writers testified:
 - Portions of Lyle's allegations were true
 - Before and after Lyle was hired, sexually coarse, vulgar language was used in the writers' room and both sexes discussed their own sexual experiences to generate material for the show

LYLE V. W.B. TELEVISION PROD.
38 CAL. 4TH 264 (2006)

- In affirming summary judgment for employer, the California Supreme Court found:
 - None of the offensive comments were directed at Lyle or any other female employee
 - The sexual speech did not contribute to an environment in which women were treated differently from men
 - The comments were a necessary adjunct of the job

LYLE V. W.B. TELEVISION PROD.
38 CAL. 4TH 264 (2006)

- The FEHA is “not a civility code” and is not designed to rid the workplace of vulgarity
 - The statute’s goal is to eliminate disparate treatment on the basis of sex, not the mere discussion of sex or use of vulgar language in workplace

LYLE V. W.B. TELEVISION PROD.
38 CAL. 4TH 264 (2006)

- To prove disparate treatment, a plaintiff must demonstrate:
 - (1) that the defendants engaged in harassment “because of sex,” and
 - (2) the harassment was severe or pervasive enough to alter the conditions of employment
- In the context of the “Friends” writers’ room, Lyle did not present evidence satisfying either requirement

PRACTICAL LESSONS FOR EMPLOYERS

- FEHA is not a civility code
- The decision is consistent with the standard governing harassment claims under Title VII:
 - Sexual language is actionable as harassment only if it is discriminatorily targeted at an employee or group of employees because of their sex
- Context will be an important consideration in future cases -- most employers will not be able to assert that workplace sexual banter is important and necessary to their business

SPOILIATION OF EVIDENCE BY EMPLOYEES



LEON v. IDX
464 F.3d 951 (9th Cir. 2006)

- Leon worked as the director of medical informatics at IDX
- After he was placed on unpaid leave, Leon sued IDX, alleging violations of the anti-retaliation provision of the False Claims Act, Title VII, the Americans with Disabilities Act, and Washington state law
- He also filed a complaint with the U.S. Department of Labor, claiming IDX violated the whistleblower-protection provision of the Sarbanes-Oxley Act

LEON v. IDX
464 F.3d 951 (9th Cir. 2006)

- The district court dismissed all of Leon's claims with prejudice after determining that Leon destroyed data (2,200 files) on his IDX issued laptop computer
- The court also imposed a \$65,000 monetary sanction
- The Ninth Circuit Court of Appeals affirmed the district court's spoliation sanction

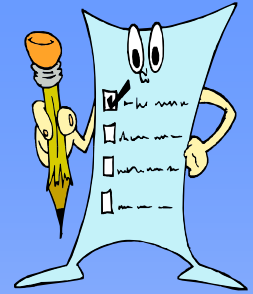
TERMS OF EMPLOYMENT



DORE V. ARNOLD
39 CAL. 4TH 384 (2006)

- Dore requested transfer to employer's Los Angeles office
- Letter confirming transfer stated:
“your employment is at will. . . This simply means [the employer] has the right to terminate your employment at any time just as you have the right to terminate your employment at any time.”
- Dore admitted he read, signed, understood and did not disagree with the terms of the letter

DORE V. ARNOLD
39 CAL. 4TH 384 (2006)



- Two years later, Dore's employment was terminated
- Dore claims breach of contract and breach of the implied covenant of good faith and fair dealing, contending various oral representations, conduct, and documents led him to understand that he would not be discharged except for cause
- Trial court granted employer's motion for summary judgment on the ground that Dore could not establish the existence of either an express or an implied-in-fact agreement that his employment was terminable only for cause

DORE V. ARNOLD
39 CAL. 4TH 384 (2006)



- Court of Appeal reversed, concluding that:
 - Employer's offer letter was not clear and unambiguous with respect to cause for termination
 - Notwithstanding the letter's language that Dore's employment was "at-will," by going on to define "at will" to mean that his employer had the right to terminate Dore's employment "at any time," his employer impliedly relinquished the right to terminate Dore without cause

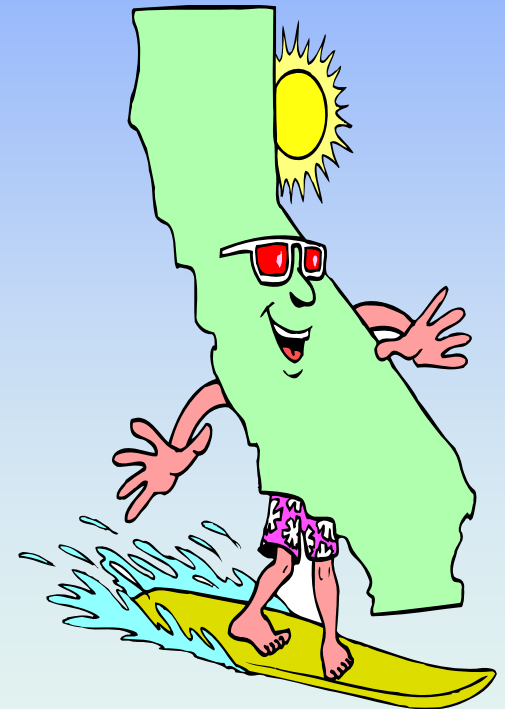
DORE V. ARNOLD
39 CAL. 4TH 384 (2006)

- Supreme Court of California reversed, finding that the letter contained no patent or latent ambiguity
 - The language was similar to that used by California Legislature in codifying the general at will rule
 - The specific language used would have no meaning if the intent was that employment could be terminated only for cause
 - Even though “at will” was defined as meaning “at any time” it also meant “without cause” or “for any” or “no reason,” the letter’s meaning was clear
- The decision resolves the conflict among California appellate courts

AT-WILL EMPLOYMENT: Recommended Language

You are free to leave the Company at any time with or without a reason and with or without notice. The Company also has the right to end your employment at any time, with or without cause and with or without notice. The Company's policy is that employment is "at will."

No one other than the President of the Company may enter into an agreement for employment for a specific period of time or make any agreement contrary to the policy of at will employment. In addition, any such agreement must be in writing signed by the President of the Company.



PAYMENT OF WAGES



SMITH V. SUP. COURT

39 CAL. 4TH 77 (2006)

- Smith was hired to be a hair model for one day for \$500 in a show featuring hair products
- Employer paid Smith more than two months after the show

SMITH V. SUP. COURT

39 CAL. 4TH 77 (2006)

- Smith filed a class action lawsuit claiming that wages were due "immediately" upon discharge, as required by CA Labor Code § 201 which stated:
 - "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."
 - Smith also sought waiting time penalties under § 203 in the amount of \$15,000, representing 30 days of the applicable daily wage rate (\$500)

SMITH V. SUP. COURT
39 CAL. 4TH 77 (2006)

- Trial court and Court of Appeal found that the job termination after Smith's one day assignment did not constitute a "discharge"
- The California Supreme Court reversed the decision holding that releasing an employee upon completion of a particular job assignment is the same as a "discharge"

SMITH V. SUP. COURT
39 CAL. 4TH 77 (2006)

- Holding otherwise would mean that employees who fulfill their employment obligations would be exposed to economic vulnerability from delayed wage payment, while employees fired for good cause would be entitled to immediate payment of their earned wages

PRACTICAL LESSONS FOR EMPLOYERS

- Employers that hire employees for a specific job assignment or duration of time are required to pay wages "immediately" upon completion of assignment or time period
- Delay can result in the employer having to pay waiting time penalties under Labor Code § 203
- Review payment practices in connection with the cessation of an employee's employment to ensure compliance with this decision

BEARDEN V. U.S. BORAX, INC.

138 CAL. APP. 4TH 429 (2006)

- Mining employees of U. S. Borax subject to a CBA alleged that they worked 12.5 hours per shift, yet they only received a single 30-minute meal period
- Plaintiffs claimed they should have received a second 30-minute meal period for each shift
- The CBA authorized one meal period for each 12.5 hour shift

BEARDEN V. U.S. BORAX, INC.

138 CAL. APP. 4TH 429 (2006)

- IWC Wage Order 16 (construction, drilling, logging, and mining industries) expressly exempts compliance with the meal period rules where a CBA exists that covers meal periods
- Based on the CBA and the Wage Order 16 exemption, the trial court sustained U.S. Borax's demurrer to the complaint

BEARDEN V. U.S. BORAX, INC.

138 CAL. APP. 4TH 429 (2006)

- Court of Appeal held the IWC's attempt to add the CBA exception was both beyond the authority given to the IWC by the Legislature and in conflict with the Labor Code
- The safe harbor for employees covered by CBAs was invalid and unenforceable
- The court declined to rule on the issue of liability for missed meal periods under Labor Code § 512, which, unlike Labor Code § 226.7, does not premise liability on a violation of a Wage Order

PRACTICAL LESSONS FOR EMPLOYERS

- Blind reliance on agency rules and regulations will not insulate an employer from potential liability where the rules or regulations are in conflict with the underlying statute
- Employers should review both the statute and its regulations when implementing and enforcing work place rules

PRIVACY



KEARNEY V. SALOMON SMITH, INC.

39 CAL. 4TH 95 (2006)

- Georgia brokerage firm regularly recorded conversations with customers located in California without disclosing to them the calls were being recorded
- Practice complied with Georgia law which, like most state and federal law, permits a conversation to be recorded where one party to the conversation consents

KEARNEY V. SALOMON SMITH, INC.

39 CAL. 4TH 95 (2006)

- California Penal Code Section 632 requires that all parties to a confidential conversation consent to its recording
 - Civil penalties of \$5,000 or three times actual damages, whichever is greater, to anyone who is injured by a violation of Section 632
- Two California customers challenged the firm's recording practices in California state court
- Both the trial and appeals court agreed that Georgia law applied and dismissed the case

KEARNEY V. SALOMON SMITH, INC.

39 CAL. 4TH 95 (2006)

- California Supreme Court held California law applied because:
 - California's privacy rights are a fundamental public policy
 - Protections against recording of confidential communications are one of the principal purposes of California's Invasion of Privacy Act
 - California businesses would be placed at a disadvantage if out-of-state competitors were free to record calls without consent, but California businesses were not permitted to do so

KEARNEY V. SALOMON SMITH, INC.

39 CAL. 4TH 95 (2006)

- California Supreme Court held California law applied because:
 - Application of the California statute would not adversely impact privacy interests under Georgia law
 - California statute applies only to calls made to or received from California and only to secret recordings of conversations

KEARNEY V. SALOMON SMITH, INC.

39 CAL. 4TH 95 (2006)

- The court limited its ruling to plaintiffs' request for an injunction
- The court expressly cautioned businesses that the full range of civil sanctions could be imposed for future violations of California law prohibiting the recording of confidential communications without all parties' consent

PRACTICAL LESSONS FOR EMPLOYERS

- Businesses that record telephone calls with customers or employees in California should review their policies
- Companies must notify the customer or employee that the conversation is being recorded
- California participant has the choice to continue the conversation or communicate in some other fashion
- Whether or not the substance of the conversation could be considered confidential is probably irrelevant

PRACTICAL LESSONS FOR EMPLOYERS

- There are 11 other “two-consent” states which could face similar rulings: Florida; Illinois; Michigan; Pennsylvania; Connecticut; Maryland; Massachusetts; Montana; Nevada; New Hampshire; Washington
- Employers who monitor/record telephone conversations should provide separate notice to their California employees informing them of non-monitored telephone lines that are available for personal calls

TIEN V. SUPERIOR COURT
139 CAL. APP. 4TH 528 (2006)

- Plaintiffs in a wage and hour class action sought from employer the names, addresses and telephone numbers of all 50,000 putative class members
- Parties agreed to send a neutral letter to random sample informing them of the lawsuit and contact information for plaintiffs' lawyers if they "would like more information"
- Employer then served a set of special interrogatories on plaintiffs seeking names of all putative class members who had contacted plaintiffs' counsel

TIEN V. SUPERIOR COURT
139 CAL. APP. 4TH 528 (2006)

- Some putative class members expressly consented to having their identities disclosed to the employer, but others either failed to respond to the request for consent or expressly refused
- Court of Appeal held disclosure would violate the individuals' rights to privacy

TIEN V. SUPERIOR COURT

139 CAL. APP. 4TH 528 (2006)

- California trial courts remain divided as to whether a defendant in a wage and hour class action is required to produce the names and addresses of putative class members in discovery prior to class certification
 - Some order defendants to produce such information for all class members
 - Some courts order such information only be produced after affirmative consent by class members
 - Some courts order such production after putative class members are given the opportunity to object

DISABILITY CLAIMS



GELFO V. LOCKHEED MARTIN

140 CAL. APP. 4TH 34 (2006)

- Gelfo began working for Lockheed as a metal fitter in 1980
- He was laid off in 1984, rehired in 1997, and later promoted to senior metal fitter
- In September 2000, Gelfo injured his lower back at work
- Although he continued to work, he filed a workers' compensation claim
- October 2000: Laid-off again/placed on a recall list

GELFO V. LOCKHEED MARTIN

140 CAL. APP. 4TH 34 (2006)

- November 2000: Declared “permanent and stationary” - restricted from heavy lifting, bending
- May 2001: Released to return to work with restrictions, but Lockheed had no metal fitter positions at that time
- June 2001: Underwent a QME and was declared “permanent and stationary,” “permanently disabled,” a Qualified Injured Worker, and precluded from “heavy work”

GELFO V. LOCKHEED MARTIN

140 CAL. APP. 4TH 34 (2006)

- September 2001: Gelfo reported periodically wearing a back brace, continued difficulty sitting/standing at length, bending over and lifting; his doctor declared him unable to return to his position
- October 2001-January 2002: Gelfo participated in a vocational rehabilitation program
- During this same period, Gelfo participated in a number of strenuous physical activities that left him “feeling fine”

GELFO V. LOCKHEED MARTIN

140 CAL. APP. 4TH 34 (2006)

- January 2002: Workers' compensation action settled
- September 2001: Gelfo participated in a composite training class, but did not tell anyone he was involved in an active workers' compensation action, had any physical limitations, or was under any workplace restrictions

GELFO V. LOCKHEED MARTIN

140 CAL. APP. 4TH 34 (2006)

- February 2002: On graduation, Lockheed offered Gelfo a position but later rescinded the offer because Gelfo's medical file stated he had medical restrictions inconsistent with the position
- Gelfo said he felt great; he didn't believe he had any limitations; his doctor said work restrictions were no longer necessary

GELFO V. LOCKHEED MARTIN

140 CAL. APP. 4TH 34 (2006)

- July 2002: Lockheed determined it could not accommodate all of Gelfo's restrictions and no reasonable accommodation or modification was possible
- Gelfo reported Lockheed was misinformed about his restrictions, he successfully completed the program, his doctor agreed he could perform the job, and he recently accepted a position with the same functions for another company

GELFO V. LOCKHEED MARTIN

140 CAL. APP. 4TH 34 (2006)

- September 2002: Based on doctor's reports and testimony, Lockheed confirmed there was no reasonable accommodation available
- By directed verdict, the trial court concluded that:
 - Gelfo was not "actually" disabled;
 - Lockheed owed no legal duty to provide a reasonable accommodation to an applicant not "actually" disabled;
 - Lockheed owed no legal duty to engage in an informal interactive dialogue with an applicant or employee who was not "actually" disabled

GELFO V. LOCKHEED MARTIN

140 CAL. APP. 4TH 34 (2006)

- The only claim submitted to the jury was whether Lockheed violated the FEHA by refusing to hire Gelfo based on its perception he was physically disabled
- The jury returned a verdict in favor of Lockheed

GELFO V. LOCKHEED MARTIN
140 CAL. APP. 4TH 34 (2006)

QUESTION PRESENTED

- Under the FEHA, is an employer obligated to provide a reasonable accommodation to an applicant or employee who is not "actually" disabled, but is "regarded as" having a disability?

GELFO V. LOCKHEED MARTIN

140 CAL. APP. 4TH 34 (2006)

- California Court of Appeal held that the lower court erred in failing to determine, as a matter of law, that Lockheed regarded Gelfo as physically disabled
- The court concluded an employer must engage in an informal interactive process and provide reasonable accommodation to an applicant or an employee whom it regards as physically disabled, even though the employee may not be actually disabled

PRACTICAL LESSONS FOR EMPLOYERS

- Train employees who communicate with and make decisions about injured workers in order to avoid any implication that such employees are "regarded as" disabled
- Consider obtaining a second medical opinion regarding the employee's condition

RAINE V. CITY OF BURBANK

135 CAL. APP. 4TH 1215 (2006)

- Raine, City of Burbank police officer, injured his knee at work which interfered with his ability to run, jump, kneel and lift
- City assigned Raine to light-duty position at front desk during his recovery
- Front-desk position was traditionally reserved for injured police officers recovering from temporary ailments or civilians receiving less pay and benefits than officers

RAINE V. CITY OF BURBANK
135 CAL. APP. 4TH 1215 (2006)

- After working six years in the light-duty position, Raine's physician concluded he would never return to patrol position
- City engaged in interactive process and concluded Raine could not perform essential duties of patrol position
- City advised Raine he could no longer continue in the front desk position unless he agreed to change his status to civilian technician
- Raine refused because disability retirement meant forfeiture of police officer retirement benefits

RAINE V. CITY OF BURBANK
135 CAL. APP. 4TH 1215 (2006)

- Raine sued for failure to accommodate
- Claimed he should have been permanently assigned to front desk as a police officer

RAINE V. CITY OF BURBANK
135 CAL. APP. 4TH 1215 (2006)

- Court of Appeal concluded City not obligated to make light-duty position permanent
 - Employers would be dissuaded from creating light-duty positions if required to maintain those positions indefinitely
 - FEHA does not require employers to create new jobs
 - Undue hardship did not factor into the analysis because converting temporary position into permanent position is not a reasonable accommodation

PRACTICAL LESSONS FOR EMPLOYERS

- Maintain clear communication with employees regarding temporary light-duty assignments
- Inform employees on light duty in writing that assignment is temporary and specify a defined time when light duty will end
- If handled appropriately, light duty may provide benefits to both employers and employees

CIVIL RIGHTS



STAMPS V. SUPERIOR COURT

136 CAL. APP. 4TH 1441 (2006)

- Stamps, an African-American tunnel miner, sued his former employer and supervisor for violating Cal. Civ. Code Sections 51.7 and 52.1 (granting all persons the right to be free from violence and intimidation by threat of violence based on race, religion, ancestry, national origin, etc.)
- Stamps claimed he was subjected to retaliation, violence, and intimidation by threat of violence based on his race

STAMPS V. SUPERIOR COURT
136 CAL. APP. 4TH 1441 (2006)

- Stamps contended his supervisor verbally harassed, intimidated and threatened him with physical violence, and placed him in unsafe work situations because of his race
- Stamps contended his supervisor's lack of concern for his safety resulted in several of Stamps' toes being amputated
- Stamps' employment was terminated as a result of this injury

STAMPS V. SUPERIOR COURT
136 CAL. APP. 4TH 1441 (2006)

- The employer filed a demurer, asserting that these provisions do not apply in employment cases
- The lower court ruled that his claims could not be asserted in a wrongful termination and employment discrimination case because the statute regulating such claims, the California Unruh Civil Rights Act, is inapplicable in the employment context

STAMPS V. SUPERIOR COURT
136 CAL. APP. 4TH 1441 (2006)

- The Court of Appeal disagreed, holding that the Ralph Civil Rights Act (Cal. Civ. Code §51.7) and the Tom Bane Civil Rights Act (Cal. Civ. Code §52.1) authorize a private cause of action in employment cases such as this one

CALIFORNIA WARN ACT



MACISSAC V. WASTE MGMT.
134 CAL. APP. 4TH 1076 (2006)

- MacIsaac worked for Empire Waste which contracted with City of Santa Rosa to provide waste services
- In 2002 City accepted a bid from North Bay Disposal to provide services beginning in 2007
- Empire Waste agreed to sell the remaining years of its City contract to North Bay in 2002

MACISSAC V. WASTE MGMT.
134 CAL. APP. 4TH 1076 (2006)

- North Bay agreed to accept transfer of 42 Empire Waste employees to work in their current positions
- 41 employees started work at North Bay the next business day after finishing their work with Empire Waste
- MacIsaac declined to accept the offer of employment with North Bay

MACISSAC V. WASTE MGMT.
134 CAL. APP. 4TH 1076 (2006)

- Empire Waste RIF'd 20 employees
- RIF was separate and distinct from the previous 42 employee transfer
- After the RIF MacIssac filed an action claiming Empire Waste should have given the 20 and 42 employee groups 60 days' notice of a "mass layoff" under the California WARN Act

MACISSAC V. WASTE MGMT.

134 CAL. APP. 4TH 1076 (2006)

- The trial court found California WARN did not apply because the transferred employees "were not separated from their positions for lack of funds or lack of work" within the meaning of the statute
- Court of Appeal agreed notice obligations were not triggered
- Court rejected MacIsaac's claim that dispositive separation was a split from particular employer, rather than particular position

MACISSAC V. WASTE MGMT.
134 CAL. APP. 4TH 1076 (2006)

- Court emphasized holding was limited to situation where all transferred employees retained their former positions with no change in the terms of their employment
- If North Bay had offered to rehire the workers with different terms and conditions, inference of continuity of employment would not apply

**THE YEAR AHEAD
PREVIEW OF THE
CALIFORNIA SUPREME
COURT'S 2006-2007 DOCKET**

EDWARDS V. ARTHUR ANDERSEN
(Review Granted Nov. 2006)

- Should narrowly written non-compete agreements be allowed in California employment contracts?

PENDING CASES

EDWARDS V. ARTHUR ANDERSEN

- Edwards was hired by Arthur Andersen in 1997
- Andersen required Edwards to sign a non-compete agreement prohibiting him from working for, or soliciting business from, certain Andersen clients for 18 months following his separation
- Andersen sold its tax practice to HSBC in 2002
- HSBC hired Edwards and other Andersen alum

PENDING CASES

EDWARDS V. ARTHUR ANDERSEN

- Before he could accept HSBC's offer, Andersen required Edwards sign a "Termination of Non-Compete Agreement," releasing him from the 1997 non-compete
- Edwards refused and his offer from HSBC was withdrawn
- Edwards sued Andersen claiming intentional interference with prospective economic advantage and violation of the Cartwright Act

PENDING CASES

EDWARDS V. ARTHUR ANDERSEN

- Trial court found both the 1997 non-compete and the 2002 termination of non-compete were valid under so-called “narrow restraint” exception to Business & Professions Code § 16600
- Trial court reasoned agreements only prevented him from working on or soliciting accounts he serviced while at Andersen
- Ninth Circuit recognizes a “narrow restraint” exception

PENDING CASES

EDWARDS V. ARTHUR ANDERSEN

- Court of Appeal rejected “narrow restraint” exception and found both agreements invalid
- California public policy favors protecting employee mobility and enterprise over former employer’s economic security
- Other than 3 narrow restrictions, California courts have long held restrictive covenants enforceable only to extent necessary to protect trade secrets

PENDING CASES

GATTUSO V. HARTE-HANKS

- Can an employer pay increased salaries or commissions instead of reimbursing an employee for actual automobile expenses – assuming that the after-tax compensation fully indemnifies employees for their expenses?

PENDING CASES

GENTRY V. SUPERIOR COURT

- Are class action waivers in pre-employment arbitration agreements enforceable under California law?

PENDING CASES

GREEN V. STATE OF CALIFORNIA

- The court will determine whether a plaintiff bears the burden of proof in demonstrating, as part of his or her prima facie case under the FEHA, that he/she is capable of performing essential duties of the job or whether the burden lies with the employer to demonstrate that the plaintiff was not capable of performing those duties

PENDING CASES

WILLIAMS V. GENENTECH

- The Court of Appeal held plaintiff failed to make out a prima-facie case of disability discrimination because at the time the decision was made to fill her position, she was “totally disabled,” and therefore, was unable to perform the essential functions of her job

PENDING CASES

WILLIAMS V. GENENTECH

- Court also held plaintiff was not entitled to an accommodation that:
 - (1) would have resulted in her being transferred to a different supervisor;
 - (2) would have kept her position open until she returned to work; or
 - (3) would have placed her in a vacant position upon her release to return to work
- Briefing deferred in this case pending decision in Green v. State of California (see above)

PENDING CASES

MURPHY V. KENNETH COLE

- Is a claim under Labor Code Section 226.7 for required payment of “one additional hour of pay at the employee’s regular rate of compensation” for each day that an employer fails to provide mandatory meal or rest periods to an employee governed by the three-year statute of limitations (claim for compensation) or the one-year statute of limitations (claim for payment of a penalty)
- Related cases: Mills v. Superior Court and National Steel & Shipbuilding Co v. Superior Court are stayed

PENDING CASES

LONICKI V. SUTTER HEALTH

- Is an employee entitled to a leave of absence where employee's serious health condition prevents him from working for a specific employer, but employee is able to perform a similar job for a different employer?
- Did defendant's failure to invoke the statutory procedure for contesting a medical certificate preclude it from later contesting the validity of that certificate?

PENDING CASES

ROSS V. RAGINGWIRE, INC.

- Does terminating an employee for off-duty use of marijuana violate the FEHA or public policy when employee is authorized to use marijuana for medical purposes under the California Compassionate Use Act?

PENDING CASES

PRACHASAISORADEJ V. RALPH'S

- Does an employee bonus plan based on a profit figure reduced by the employer's expenses violate state law?
- The lower court decision adopts the reasoning of Ralph's Grocery Store v. Superior Court, in holding that workers' compensation expenses cannot be included in bonus calculations

NEW LEGISLATION FOR 2007

SAN FRANCISCO'S PAID SICK LEAVE ORDINANCE

- San Francisco employers must provide paid sick leave to employees – including part-time employees, temporary workers and participants in Welfare-to-Work Programs – who are employed within the geographical limits of the City and County of San Francisco

ASSEMBLY BILL 1835

- Raises California's minimum wage to \$7.50 in 2007 and to \$8.00 in 2008, giving California the highest minimum wage rate in the nation

ASSEMBLY BILL 2095

- Clarifies that AB 1825, which requires employers having 50 or more employees to provide two hours of sexual harassment prevention training to supervisory employees every two years and within six months of hire, applies only to supervisory employees located in California

AB 1825: PROPOSED REGULATIONS

- FEHC plans to propose legislation in 2007 to extend the required workplace training to include:
 - additional forms of harassment and
 - to require a three-hour training session instead of the current two-hour requirement



Thank You

