

Employment Law Update

JULY, 2006

LEGISLATIVE/REGULATORY UPDATE

Status of Various Legislative Bills

As the 2005-2006 legislative session nears an end, it is worth mentioning the status of several bills affecting the workplace. The Legislature has until August 31 to pass any of these measures. The Governor would have to sign or veto the measures by September 30.

AB 2095 – This bill proposes to limit the AB 1825 sexual harassment training requirement to supervisors in California. The bill cleared the Assembly Committee, but was slightly amended in the Senate. It seems likely that the bill will be passed.

AB 2217 – This bill would provide for alternative work weeks on an individual basis. However, the bill was rejected at the committee level. It will receive reconsideration, but many observers believe that it will go nowhere at this time.

AB 2209 – This bill proposes to invalidate any agreements between an employer and employee that would prohibit the employee from filing a claim for unemployment benefits or appealing a decision regarding unemployment benefits.

SB 300 – This bill seeks to amend a provision of the Government Code relating to family and medical leave. Among other things, it would (1) permit an employee to take family medical leave to care for an adult child with a serious health condition, even if that child is independent; (2) allow an employee to take family medical leave to care for a seriously ill sibling, grandparent or domestic partner; and (3) provide that “care for,” as used in the act, includes both physical and psychological care, and also provide that an employee need not be involved or participating in providing *direct* medical care of the family member.

Fair Employment and Housing Commission Issues Modified Proposed Regulations on Harassment Training and Education

On June 20, 2006, the Fair Employment and Housing Commission (“FEHC”) issued proposed regulations relating to AB 1825, requiring harassment prevention training for managers in California. These proposed regulations follow public comments on the original regulations issued in December 2005. The new proposed regulations are available for viewing at:

www.fehc.ca.gov/pub/harassment_training.asp

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The regulations clarify the statutorily required training in several ways, including:

- The term “employee” includes full-time, part-time and temporary workers.
- The term “employer” includes any company that is engaged in business in California with 50 or more employees or contractors for each working day in any 20 consecutive weeks in the current calendar year or preceding calendar year. The law does not require that the 50 employees or contractors work at the same location or all work or reside in California.
- “Supervisors” are those persons defined under Government Code section 12926(r). Such supervisory employees do not have to be located in California, but must be trained if they directly supervise California employees.
- The term “effective training” can mean classroom training provided to a supervisor by a qualified trainer in a setting removed from the supervisor’s daily duties; E-learning, which is an individualized computer-based training, whose content is written, reviewed and approved by an instructional designer; or a webinar based program, which is an internet-based seminar created and taught by a qualified trainer and transmitted over the internet in real time.
- An employer must provide training once every two years, and must track the training of each supervisor by measuring that two-year period from the date of completion of the last training of the supervisor.

In August, the FEHC will decide whether to adopt the modified regulations or make additional changes.

JUDICIAL UPDATE

U.S. Supreme Court Has Broadened the Scope of Retaliation Claims under Title VII

The United States Supreme Court has recently issued a decision that is likely to have a substantial impact on retaliation claims under Title VII, the federal law prohibiting discrimination, harassment and retaliation in the workplace. Though its impact in California will be less because most retaliation claims in this state are made under the Fair Employment & Housing Act, it is still worth knowing about this recent case. The decision makes it easier for employees to prevail on retaliation claims under federal law. All employers should understand the new scope of Title VII retaliation claims.

Facts

Sheila White (“Employee”) was the only woman who worked in the maintenance de-

partment at the Tennessee location of Burlington Northern & Santa Fe Railway Company (“Employer”). Employee came to the company with significant experience in operating forklifts. She was hired as a “track laborer,” which involved removing and replacing track components, transporting track material, cutting brush and clearing litter and cargo spillage from the tracks and surrounding areas. When a worker who had been operating a forklift chose to do another job, Employee was assigned to operate the forklift, and this became her primary responsibility.

In September 1997, Employee complained to Employer that her immediate supervisor had repeatedly told her that women should not be working in the maintenance department. Allegedly, the supervisor also made inappropriate remarks to her in front of her male co-workers. After Employer’s investigation, the supervisor was suspended for 10 days and ordered to attend sexual harassment training.

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Sexual Harassment
Prevention Training
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Coming to
Los Angeles**

**September 26, 2006
11am to 1pm
Lunch Provided**

**Watch next month's
ELU for details, or
visit us online at
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On September 26, 1997, the senior manager who had hired Employee informed her about the discipline against the supervisor. At the same time, the manager told Employee that he was removing her from forklift duty and assigning her to perform only standard track laborer work. He did this because of the complaints of co-workers that a more senior person should have the “less arduous and cleaner job” of forklift operator.

Two weeks later, Employee filed a complaint with the EEOC to claim that the reassignment of her duties constituted unlawful gender discrimination, as well as retaliation for her earlier complaint about her supervisor. Two months later, Employee filed a second retaliation charge with the EEOC to claim that the manager had placed her under surveillance and was monitoring her daily activities.

Several days later, Employee and her new immediate supervisor disagreed about how employees should be transported from one location to another. The supervisor told the senior manager that Employee had been insubordinate. Employee was immediately suspended without pay. Employee made an internal grievance, and the result of the grievance was that Employee had not been insubordinate. Employer reinstated Employee to her position and awarded her back pay for the 37 days that she was suspended. Employee filed another retaliation charge based on the suspension.

The Decision

Employee prevailed in her federal court lawsuit, receiving compensatory damages from the jury. On appeal, the Sixth Circuit Court of Appeals affirmed the decision, holding that a retaliation plaintiff must prove that she suffered an “adverse employment action,” which is a materially adverse change in the terms and conditions of employment. Because the various circuit courts of appeals around the country have applied varying standards for retaliation claims under Title VII, the United States Supreme Court used this

case as an opportunity to resolve the conflict and announce the standard to be applied in all Title VII retaliation cases. The Court observed that the anti-retaliation provision of Title VII, unlike the anti-discrimination provision, does not confine the actions that it forbids to those that are related to employment or occur at the workplace. Accordingly, the conduct prohibited by the anti-retaliation provision is not limited to actions that affect employment terms and conditions. The Court held that the anti-retaliation provision extends to any employer actions that would have been “materially adverse” to a reasonable employee or applicant.

In the Court’s view, a retaliation plaintiff must show that the challenged action might have dissuaded a reasonable worker from making or supporting a charge of discrimination. The standard is an objective one, and its application must be made on a case-by-case basis in the context of the particular circumstances of the claim at issue.

Comparison with California Law

This standard for Title VII retaliation claims is very much pro-employee, even more favorable to employees than the standard utilized under California law. In 2005, the California Supreme Court clarified that, under the Fair Employment & Housing Act, a claim for retaliation requires an employee to establish that she engaged in “protected activity” and that she was subjected to an “adverse employment action” because of that activity. An adverse employment action must materially affect the terms and conditions of employment. Courts can consider the cumulative effect of a number of separate actions in determining whether this “materiality” standard has been satisfied.

Under any law, claims of retaliation have become easier to prove. Employers must be especially careful in how they, through their supervisors, treat employees who have made claims of discrimination, harassment or other unlawful conduct, even if those claims are believed to have no merit, or have been proven to have no merit.

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Employee Can Pursue Same-Sex Harassment Claim Because the Unwelcome Conduct by Male Co-Workers Challenged His Identity as a Heterosexual Male

The California Court of Appeal determined in *Singleton v. United States Gypsum Company* that a male employee had presented enough evidence of harassment based on sex to be able to proceed to a trial to have a jury determine the merits of his claims. John Singleton (“Employee”), a maintenance mechanic employed by United States Gypsum Company (“Employer”), filed an action alleging sex discrimination and harassment in violation of the Fair Employment & Housing Act. Employee contended that two of his co-workers would say things that challenged him as a man, such as pointing out that he was wearing tight jeans, and accusing him of giving his male supervisor oral sex or engaging in other homosexual activity. The trial court granted Employer’s motion for summary judgment by holding that, as a matter of law, none of the harassing conduct was sex discrimination or sexual harassment. Specifically, the court found that there was no triable issue of fact that the hostility or abuse was related to Employee’s gender or sexual orientation.

The appellate court reversed the trial court’s judgment. First, the appellate court held that Employee presented more than adequate evidence that his co-workers’ comments were unwelcome, and that the conduct was sufficiently severe or pervasive to alter Employee’s conditions of employment and create an abusive work environment. The crux of the case was whether the harassment was “because of sex.” As the Califor-

nia Supreme Court recently explained in another case, the disparate treatment of an employee on the basis of sex – not the mere discussion of sex or use of vulgar language – is the essence of a sexual harassment claim. The harassment was “because of sex” because it attacked Employee’s identity as a heterosexual male. Sexual harassment occurs when sex is used as a weapon to create a hostile work environment.

Healthcare Employees That Work a 3/12 Alternative Work Week Schedule May Receive Overtime Premium Pay Only After Working Over 40 Hours in a Week

In *Singh v. Superior Court*, the Court of Appeal addressed an issue of first impression in California: when are healthcare employees (under Wage Order 5) who work an alternative work week schedule of three 12-hour days entitled to receive overtime pay? The employee argued that the general overtime provision in Section 3(B)(1) of the wage order entitled him to receive time-and-a-half pay for every hour worked past the regularly scheduled alternative work week schedule (the employee worked as a nurse for a hospital). However, after reviewing the language of the wage order and the pertinent regulatory and legislative history, the appellate court agreed with the hospital that the issue was governed by Section 3(B)(8) of the wage order. That section, which was passed in accordance with Labor Code section 517 following the enactment of AB 60, provides that healthcare workers who work a 3/12 alternative schedule may receive overtime at one-and-a-half times the regular rate of pay only for hours over 40 in the work week.

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