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Court Extends Unruh Act Protections To Domestic Partners

The California Supreme Court in *Koebke v. Bernardo Heights Country Club* extended the Unruh Act, which prohibits arbitrary discrimination in public accommodations, to protect registered domestic partners. The Court read the Unruh Act in conjunction with the new Domestic Partner Act (Family Code §297) as prohibiting discrimination against registered domestic partners in

public accommodations by treating them differently than married persons.

The Domestic Partner Act, which became effective January 1, 2005, permits same-sex couples and some opposite-sex couples, in which one or both individuals are over the age of 62 and who share a common residence, to file a Declaration of Domestic Partnership with the Secretary of State. Once registered these domestic partners are to be extended the same rights and responsibilities as spouses in most areas of the law.

In the *Koebke* case, the country club refused to extend the club's spousal privileges, which allowed spouses of members to use the club's facilities, to registered domestic partners of members. The Court held that such discrimination could violate the Unruh Act's prohibition on arbitrary discrimination in public accommodations based on marital status. The Court noted that the Domestic Partner Act grants registered domestic partners the same rights, protections and benefits, and imposes upon them the same responsibilities, obligations and duties under law as are granted to and imposed upon spouses. The Court emphasized that this is true whether the rights and duties derive from statutes, administrative regulations, court rules, government policies, common law or any other source of law.

Although this case was not an employment case, its holding applies to employers and workplace situations dealing with spouses. The California Fair Employment and Housing Act specifically prohibits marital status discrimination. The rationale of the *Koebke* case would prohibit employers from administering their rules and policies to treat registered domestic partners of employees differently than spouses of employees. Except for certain employee benefits that are regulated by federal law under ERISA (i.e., medical benefits, pensions and 401K plans), California employ-

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ers now will be required to treat registered domestic partners of employees in the same manner as they treat spouses of employees. Family and medical leave policies, bereavement leave policies and other policies and certain non-ERISA benefits implicating spouses of employees should be reviewed and possibly revised and will have to be administered in accordance with the new Domestic Partners Act.

U.S. Supreme Court Expands Age Discrimination Claims Under ADEA

In the recent case of *Smith v. City of Jackson, Mississippi*, the United States Supreme Court held that employers may be held liable under the Age Discrimination in Employment Act (ADEA) based upon the so called “disparate impact” theory of recovery. Employees suing under the disparate impact theory are not required to prove that the employer had any intent to discriminate. Rather, the theory permits employees to challenge a facially neutral policy or set of rules if they have a disproportionate impact on members of a protected class.

In *Smith*, a group of police officers claimed that the City of Jackson discriminated against them by giving officers over the age of 40 lower salary increases than those increases granted to employees under the age of 40. Under the City’s salary rules, employees with five or less years of experience received proportionately larger raises than those with five or more years of experience. The plaintiffs argued that this plan had the effect of tying wage increases to age.

While the Supreme Court held that disparate impact claims are legally cognizable under the ADEA, it also ruled that the plaintiffs in *Smith* had failed to present a valid disparate impact claim. Specifically, the Court noted that the plaintiffs had failed to isolate a specific employment practice responsible for the disparate impact. The Court stated that, “it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.”

Also, in a significant step for employers, the Court recognized a new defense in ADEA disparate impact cases. Unlike discrimination cases arising under Title VII, where a so-called “business necessity” defense exists to justify a disparate impact on the basis of race or sex, the Court in *Smith* held that an employer may argue that its decisions were based on a “reasonable factor other than age.” In rejecting the plaintiffs’ claims in *Smith*, the Court held that the City’s decision to give raises based on seniority and rank were “reasonable” given the “City’s goal of raising employees’ salaries to match those in surrounding communities.”

For California employers, the effect of *Smith* will be fairly limited, primarily because disparate impact-based age discrimination claims are already expressly permitted under the California Fair Employment and Housing Act. Nonetheless, the *Smith* decision now makes clear that both state and federal law will support a claim alleging that a facially neutral employment policy and practice have disproportionate im-

pacts on workers who are 40 years of age or older.

Supreme Court Opens Door To Hostile Environment Claims Based On Treatment Of Paramour

Adopting a view similar to the EEOC, the California Supreme Court ruled in *Miller v. Department of Corrections* that widespread favoritism of paramours in the workplace may amount to harassment under the California Fair Employment and Housing Act (“FEHA”). Though this ruling does not apply to isolated instances of preferential treatment that do not rise to the level of harassment under California law, it does open the door for employees who have never been personally subjected to sexual advances to bring claims of harassment if the favoritism creates a hostile work environment. The Court indicated that when sexual favoritism is “sufficiently widespread,” it may spread a message that female employees are “viewed by management as ‘sexual playthings’ or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or management.”

In *Miller*, the Court found sufficient evidence of paramour favoritism stemming from a supervisor’s relationships with three employees who were advanced despite inferior qualifications and received special work privileges as a result of their intimate dealings with the supervisor. Plaintiffs complained about the impropriety of the romances and the special treatment of the paramours, which subjected them to

the harassment and retaliation by their supervisors and the love interests, and caused plaintiffs to feel powerless and fear losing their jobs. The supervisor's acts were viewed as unethical by the staff and led to feelings that women would not advance without a physical relationship with the supervisor.

In accord with EEOC Guidelines, the Court determined that if an employee perceives widespread advancement and employment opportunities for those who engage in sexual relationships with supervisors so as to alter his or her working conditions, the employee may advance a hostile environment claim if he or she finds the actions offensive, demeaning or unwelcome. Additionally, a woman with the perception that the only way to advance is to engage in such conduct may also advance a claim of harassment.

As applied to the plaintiffs in *Miller*, the Court concluded that a hostile work environment claim could be asserted based on the supervisor's actions of promoting his paramours who were less qualified than others, verbally abusing the plaintiffs and reducing their responsibilities when they refused to engage in affairs with him, and assaulting one of the plaintiffs. Because the Court did not draw a line between what constitutes "isolated instances" and what constitutes "widespread favoritism," employers should err on the side of caution when dealing with office romances and gauge the perception of the staff as to any actions taken to the benefit of paramours.

The Firm wishes to thank law clerk Amy Messigian for contribution to this article.

Court Expands Reach Of Anti-Retaliation Law

In *Yanowitz v. L'Oreal, Inc.*, the Supreme Court also expanded the reach of the anti-retaliation provisions of FEHA by holding that an employee need not even make a formal complaint in order to be protected by that law. The Court specifically held that a sales manager could proceed with a retaliation claim based on her refusal to terminate a female salesperson who her employer did not consider attractive, when she requested "adequate justification" for that action. When the sales manager refused to fire the employee, she was given negative reviews and subjected to allegedly unwarranted criticism, causing her to resign. The Court ruled that the sales manager could proceed with her retaliation claim even if the employer's conduct was not unlawful under FEHA, as long as she reasonably and in good faith believed it was.

Ninth Circuit Issues Harassment Rulings Favorable To Plaintiffs

The Ninth Circuit Court of Appeals in San Francisco has issued two recent rulings that are favorable to employees in national origin harassment cases. In the case of *Galdamez v. Potter*, the Court held that a Honduran postmaster from a small town in Oregon could proceed with a claim for racial and national origin discrimination against the Postal Service based on harassment by third parties. In that case, postal customers made hostile comments about the employee's race and accent and criticized her ac-

cented English, made threats to her life and safety, and vandalized her car after she had tried to strictly enforce postal regulations. The court faulted the Postal Service with failing to sufficiently investigate and remedy the harassment, which could be found to have resulted in a hostile work environment to the employee.

In another case, the Ninth Circuit held that an Arabic employee could proceed with a race and national origin discrimination claim when his manager repeatedly referred to him by the non-Arabic name of "Manny" rather than his given name of "Mamdouh." Stating that "names are often a proxy for race and ethnicity," the Court stated that the manager's frequent and repeated use of the nickname, over the employee's constant objections, could support a claim that his work environment was made hostile in violation of federal anti-discrimination laws.

Arbitration Policy Announced By E-Mail Held Invalid

In the recent case of *Campbell v. General Dynamics Government Systems Corp.*, the U.S. First Circuit Court of Appeals ruled that an employer's announcement of a new dispute resolution policy by electronic mail was inadequate notice to bind employees to mandatory arbitration of employment-related disputes. The Court reasoned that the employer failed to provide "some minimum level of notice" that continued employment would amount to a waiver of an employee's right to pursue discrimination claims in Court, based on the fact that: (1) the company had no history of communicating significant personnel matters to employees via e-mail, (2) the e-mail required no

affirmative response by employees, or acknowledgment that they had received it, and (3) the message did not explicitly state that the new policy contained an arbitration agreement or indicate that the new dispute resolution policy was mandatory. The Court noted, however, that in its view an e-mail, properly couched, could be an appropriate medium for informing of an arbitration agreement, if the foregoing deficiencies were overcome.

This case is important because it was decided under the Federal Arbitration Act (FAA), the statute most commonly used to compel arbitration of workplace disputes. It is particularly significant because it highlights the need to prove the existence of a valid agreement to arbitrate, by both providing notice to employees of a mandatory arbitration policy and some evidence that they have received such a policy and acknowledge its existence.

FMLA Claim Of Traveling Father Rejected

The Family and Medical Leave Act provides for unpaid time off for an employee to “care for” his or her spouse who has a serious health condition. Can a father’s cross-country trip to retrieve a family vehicle during his wife’s late-stage pregnancy difficulties satisfy this test? In the recent case of *Tellis v. Alaska Airlines, Inc.*, the U.S. Ninth Circuit Court of Appeal held that it did not.

The employee in that case took time during his family and medical leave to fly from Seattle to Atlanta to retrieve a family vehicle, while his sister-in-law stayed with his pregnant wife. The employee argued that the trip provided psychological reassurance

to his wife that she would soon have reliable transportation, and that his phone calls to her while he drove back to Seattle provided her with “moral support” and “psychological comfort.” The Court ruled, however, that providing *care* to a family member under the FMLA “requires some actual care which did not occur here,” involving “some level of participation and ongoing treatment” of the spouse’s serious health condition. Relying on past cases, the Court noted that at least some presence with the employee’s wife was required to meet this test. The Court accordingly rejected the employee’s claim for violation of his rights under the FMLA, and upheld his employer’s termination of his employment for breaching the terms of his leave by taking unexcused absences.

Vet Properly Denied Reinstatement As Bar Manager

In a recent case, a U.S. Army Reserve Veteran was properly denied reinstatement to his position as manager of a bar for destroying its website after the bar refused to immediately reinstate him to his position. The manager, Jeffrey Haight, was discharged for an injury only five days after being called up for duty for deployment to Iraq, and informed the bar that he wished to return to his position as manager nine days later. When the bar refused to immediately reinstate him on the ground that it needed to first seek advice about its legal obligations to do so, Haight picketed in his uniform outside of the bar, known as “Luckies Lounge” in Lincoln, Nebraska, and dismantled the links on its website to its menu, specials and events. Luckies then

fired him for misconduct related to his dismantling of its website.

The U.S. District Court in Nebraska ruled that Haight was clearly entitled to reinstatement upon his return from military leave under the provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), because the cumulative length of his absence from the position did not exceed five years. Under that law, the employer was required to reemploy Haight “as soon as practicable under the circumstances,” which could have required the bar to reinstate him on the day he returned. However, under another provision of the law, Haight committed a “terminable offense that precluded his reemployment” by violating a work rule that prohibited the destruction of company property.

Court Holds That Airline Failed To Make “Real Job Offer” Under ADA

In the recent case of *Leonel v. American Airlines*, the U.S. Ninth Circuit Court of Appeals held that American Airlines failed to make a valid conditional job offer under the Americans With Disabilities Act (ADA), by conditioning the employment of applicants on passing both a medical examination and background check. In that case, two flight attendants completed medical history forms that did not disclose their HIV-positive status and medications, which were later discovered in the medical examination. The airline then rescinded their conditional offers of employment based on their failure to provide full and correct information in the medical screening process.

The Court held that the employer had failed to make a “real” job offer to the applicants, because the medical examination and inquiries were made before all of the non-medical job prerequisites had been satisfied. The Court explained the purpose of this rule as allowing applicants to more easily challenge denials of employment if medical considerations are isolated and the reasons for the denial are thereby made clear. By requiring the applicants to undergo medical examinations before their background checks were completed, the airline prematurely required medical examinations and could not penalize the applicants for failing to disclose their HIV-positive status in that process. The Court noted that the problem could have been avoided if American had completed the background checks before requiring the medical exam, or could show that it could not reasonably have completed the background checks before initiating the medical examination process.

The Court also faulted American for failing to obtain the applicants’ consent to any and all medical tests that it wished to run on their blood samples. The airline merely informed the applicants that they would have blood tests, without informing them what the tests would entail. As a result, the applicants had “little reason to expect that comprehensive scans would be run on their blood.” The Court’s analysis of this issue raises some troubling concerns regarding what employers must actually tell applicants before subjecting them to medical examinations that are given following conditional job offers, if the tests are not disclosed to the applicants in advance or are not part of the normal battery of tests an applicant could reasonably expect to be administered in the medical screening process.

Psychological Test Ruled A Medical Exam Under ADA

May an employer use a psychological test that is widely used to measure personality traits in the process of screening applicants for promotions? No, held the U.S. Seventh Circuit Court of Appeals in *Karraker v. Rent-A-Car Center, Inc.*, when that test is designed at least in part to reveal mental illness, and the employer fails to prove that the test is a permissible medical examination under the ADA that is “job-related and inconsistent with business necessity.”

This case involved the administration of the widely-used Minnesota Multi-Phasic Personality Inventory (MMPI), which measures such traits as depression, hysteria and paranoia, to employees who applied for promotions in a rental car company. Because the MMPI was not shown to have been used for a valid job-related purpose as the ADA requires, the Court held that it was an impermissible medical examination because it was designed to reveal mental impairment and could accordingly be used to screen out people with disabilities.

Court Refuses To Issue Injunction Against Union’s Bannering

In another recent decision of the Ninth Circuit Court of Appeals, the Court held that the National Labor Relations Board did not have a “just and proper” basis for enjoining the Carpenters Union from standing in front of various retailers with large banners reading “Shame on [Retailer], Labor

Dispute.” The basis of the court’s ruling was that the Board could not establish that the bannering activity constituted “picketing,” as opposed to free speech activity.

In *Overstreet v. Carpenters Local 1506*, the Court rejected the Board’s arguments that the bannering activity constituted a form of “signal picketing” as opposed to pure speech, and refused to enforce the secondary boycott laws to the Carpenters Union’s activities against the retailers – who were neutrals in the union’s primary labor dispute with the construction contractors who worked on their facilities. Because the bannering activity was not akin to “picketing,” it was not sufficiently “coercive” activity that violated the secondary boycott prohibitions, and could not be enjoined.

DLSE Issues Further Revisions To Proposed Meal And Rest Period Regulations

On July 7, 2005, the state Division of Labor Standards Enforcement issued its third revision to its proposed meal and rest period regulations, which would primarily enable employees working eight-hour shifts to take a meal period after six hours of work instead of five. The newly-revised regulations state that an employer cannot waive its obligation to provide the meal period, but that an employee may initiate a request for approval from his or her employer to either not take the meal period for a given day or to take a portion of it for that day. The employer then has the discretion to approve or deny the request, and either such action

would not be a violation of its duty to provide a meal period.

The proposed regulations also provide that the one-hour-per-day premium an employee can recover for the employer's failure to provide a meal or rest period is a "penalty" and not a wage. This will mean that only a one-year limitation period applies to claims to recover such penalties, and that attorneys' fees and waiting time penalties cannot be recovered for failure to pay the penalty. The DLSE has actually issued a precedent decision directing its offices to construe the law in accordance with the proposed regulations, so that administrative claims processed through the Labor Commissioner are treated consistently at this time. The proposed regulations can be accessed on the DLSE's website at www.dir.ca.gov/dlse.

Exempt Employees May Be Charged With Partial Day Use Of Vacation Or PTO

In another Memorandum issued by the DLSE on May 31, 2005, the Division concluded that the partial day use of vacation or paid time off by exempt employees does not violate the "salary basis" test and render such employees non-exempt, if they are paid their full salary for the work week in which the deductions from their accrued PTO or vacation time are made. This ruling is consistent with a recent Department of Labor Opinion Letter dated January 7, 2005 and with the California appellate court case of *Conley v. Pacific Gas & Electric*. The *Conley* court specifically held that charging exempt employees accrued vacation leave for partial day absences from work did not render those employees non-

exempt as a matter of law, and did not destroy the salary basis upon which they were paid.

DOL Issues Ruling On Motor Carriers Act Exemption

In a recent Opinion Letter dated April 27, 2005, the U.S. Department of Labor clarified the issue of whether truck drivers who transport goods coming from interstate commerce only within the state can be exempt from overtime under the federal Motor Carriers Act. The DOL ruled that when goods brought in through interstate commerce are not earmarked for a particular retail store, but are stored in a warehouse from which they are shipped to retailers based on individual store orders, the final leg of the trip is covered by the statute and the drivers making those trips are exempt under the federal Motor Carriers Act exemption. The Department defined the ultimate test as whether the shipper has a fixed and persisting transportation intent beyond the terminal storage point at the time of the shipment; and, if it does, the drivers delivering the goods from that storage point are deemed to have been part of the chain of interstate commerce that renders the work exempt.

If you have any questions about these issues or any other labor matters, please contact any member of the Labor & Employment Department at Hill, Farrer & Burrill LLP -- we're here to help.

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