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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *February 2013*

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I.

LEGISLATIVE/ADMINISTRATIVE

Federal

Department of Fair Employment and Housing ("DFEH")
Begins Enforcing New Disability Regulations

The DFEH recently began enforcing newly revised regulations addressing discrimination based on disability. The final regulations, which took effect on December 30, 2012, primarily update the old regulations. Among other things, the new regulations:

- include several updates to the definition of "disability" to conform to the federal Americans with Disabilities Act Amendments Act of 2008 and the broad definition contained in Government Code section 12926.1;
- provide examples of disabilities including chronic and episodic conditions, and temporary disabilities. The new regulations note a few exclusions from the term "disability," such as the common cold, mild cuts or abrasions, and the flu;
- clarify that the term "medical condition" may include a "genetic characteristic" (in order to conform to the federal Genetic Information Non-Discrimination Act);
- add guidance regarding the phrase "essential job functions," and specify that the elements of a discrimination claim now require the employee to establish that he or she can perform the job's essential functions, with or without accommodation;
- provide more detail regarding the "interactive process" obligations for both employers and employees. Notably, an employee's exhaustion of California Family Rights Act or Family and Medical Leave Act leave is now considered notice to the employer that the employee may need an accommodation; and
- recognize medical leave as a form of accommodation, but expressly state that employers need not provide "indefinite" leave.

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II.

JUDICIAL

Federal

Ninth Circuit Affirms Summary Judgment in Disability Discrimination Case

In *Lawler v. Montblanc North America,* the Ninth Circuit Court of Appeals affirmed the trial court's order granting summary judgment in favor of an employer where the evidence was insufficient, as a matter of law, to substantiate claims for disability discrimination, retaliation, and harassment.

Montblanc North America, LLC ("Montblanc") makes jewelry, timepieces, and other luxury products that it sells wholesale and in boutique stores. Montblanc employed Plaintiff Cynthia Lawler ("Plaintiff") as a manager at a store maintaining a staff of six employees. Plaintiff's duties included hiring, training, and supervising sales staff; administrating stocking and inventory; cleaning; creating store displays; and preparing sales reports, all of which could only be performed in the store. The store earned one-third of its annual revenue between the Friday after Thanksgiving and January 2nd. Plaintiff worked between sixty and seventy hours per week during the holiday season.

On June 30, 2009, Plaintiff was diagnosed with arthritis for which her doctor recommended that she limit her work to twenty hours per week. On July 23, 2009, Plaintiff requested a twenty-hour work week. On July 29, 2009, Montblanc requested that Plaintiff provide information regarding the nature, severity, and duration of her impairment, and what accommodations could be provided for her to perform the essential functions of her job. A few days later, Plaintiff fractured her foot in connection with her arthritis. Plaintiff's doctor recommended that she not return to work until September 2, 2009.

When Plaintiff returned to the store to fax the necessary paperwork to Montblanc's disability carrier, the company's President, Jan-Patrick Schmitz ("Schmitz"), arrived for a routine inspection during which he criticized Plaintiff's non-work attire, disapproved of the merchandise displays, became angry when she tried to explain the displays, and made her walk around the store (during which time another employee stepped on her injured foot). Thereafter, Schmitz requested a detailed report and Plaintiff explained that she could not meet his request because she was on leave, to which he responded "you will do it or else."

On August 11, 2009, Plaintiff sent a letter to Montblanc's human resources representative in which she expressed her concerns about Schmitz's "abrupt," "gruff" and "intimidating" behavior toward her during his store visit. The human resources representative did not investigate the allegations.

On September 2, 2009, Plaintiff's doctor recommended an extended leave of absence until January 5, 2010. Montblanc requested from Plaintiff's doctor a reasonable accommodation that would permit Plaintiff to resume her regular duties, and for a date on which Plaintiff could return to work. Plaintiff's doctor replied

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that Plaintiff's status had not changed and that she had to be on leave until January. On October 31, 2009, Montblanc terminated Plaintiff's employment, explaining that it was essential for a manager to be in regular attendance at the store, and that since Plaintiff was unable to return to work until January, she needed to be replaced.

Plaintiff sued for disability discrimination, retaliation, harassment, and intentional infliction of emotional distress. The trial court granted summary judgment for Montblanc, and the Ninth Circuit affirmed.

In affirming summary judgment on the discrimination claim, the Ninth Circuit held that Plaintiff was not able to do her job "with or without reasonable accommodation," as she admitted that her disability made it impossible for her to fulfill the duties of a store manager, regardless of an accommodation. As such, she could not meet her burden to prove that she was "qualified for the position," an essential element of her claim.

The court also affirmed summary judgment on the retaliation claim, holding that Montblanc had a legitimate reason for terminating Plaintiff's employment: she could no longer perform her duties as a store manager during the most critical time of the year.

The court similarly affirmed summary judgment on Plaintiff's harassment claim, concluding that Schmitz's conduct (criticizing Plaintiff's work attire and the displays, and requesting the report) did not constitute "harassment" as a matter of law because his actions were exclusively related to store operations and personnel management.

Finally, the court affirmed summary judgment on Plaintiff's claim for intentional infliction of emotional distress, holding that Schmitz's alleged "gruff," "abrupt," and "intimidating" conduct did not exceed all bounds tolerated in a civilized community, and merely related to business operations and Plaintiff's performance as a manger.

California

California Supreme Court Alters "Mixed Motive" Landscape in Employment Discrimination Cases

In *Harris v. City of Santa Monica*, the California Supreme Court issued a long-awaited decision clarifying the extent to which the "mixed motive" defense applies to employment discrimination claims brought under the Fair Employment and Housing Act ("FEHA"). The Supreme Court ruled that when a plaintiff has shown by a preponderance of the evidence that discrimination was a "substantial factor" motivating his or her discharge, the employer is entitled to demonstrate that legitimate, nondiscriminatory reasons would have led it to make the same decision at the time. If the employer proves that it would have made the same decision for lawful reasons, regardless of any discriminatory conduct, the plaintiff *cannot* be awarded economic damages or reinstatement. However, where appropriate, the plaintiff may be entitled to declaratory or injunctive relief, as well as reasonable attorneys' fees and costs.

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The City of Santa Monica ("the City") hired Wynona Harris ("Harris") as a bus driver during October 2004. During the first few months of her employment, Harris was involved in two minor "preventable" accidents and missed one shift. A few months later, she was late for another shift and was placed on probation. Then, in May 2005, Harris revealed to her supervisor that she was pregnant. The supervisor requested a doctor's note authorizing Harris' continued work. On the same day Harris submitted the note, her supervisor received a management directive indicating that Harris had not been meeting appropriate work standards given her probationary status. Harris was fired on May 18, 2005.

In October 2005, Harris sued the City, alleging sex discrimination based on her pregnancy. The City denied the allegations and asserted that it had legitimate, nondiscriminatory reasons for firing Harris. At trial, the City requested that the trial court instruct the jury that the City could not be liable for discrimination if it could prove that, even in the face of discriminatory *and* non-discriminatory reasons for firing Harris, its legitimate reasons, standing alone, would have induced it to make the same discharge decision. The trial court denied the City's request, instead giving a "motivating factor" instruction, which would impose liability on the City if Harris was able to prove that her pregnancy was a "motivating factor" in the discharge decision. Harris met this burden at trial and was awarded $177,905 in damages, and $401,187 in attorneys' fees.

The Court of Appeal reversed the trial court's decision, holding that the City's request for a "mixed motive" instruction should have been granted. Harris then appealed to the California Supreme Court, which held that in FEHA-based "mixed motive" discrimination cases, the initial burden is on the plaintiff to demonstrate, by a preponderance of the evidence, that discrimination was a "substantial factor" (not simply a "motivating factor") in the termination decision. The burden then shifts to the employer to demonstrate, again by preponderance of the evidence, that it would have made the same decision based on legitimate, nondiscriminatory reasons. If the employer is successful in doing so, the plaintiff may not recover damages for back pay, front pay, or emotional distress, or be awarded reinstatement.

As the Supreme Court explained, forcing an employer to retain someone when it has sufficient and legitimate reasons not to do so would cause "inefficiency" and would tend to "deprive the state of the fullest utilization of its capacities for development and advancement, contrary to FEHA's purposes." Moreover, permitting a plaintiff to recover for economic losses when he or she would have been discharged regardless of any discriminatory motive would amount to an "unjustified windfall."

While the Supreme Court's decision may be seen as a boon for employers, its scope is not unlimited. The Court acknowledged that the FEHA still operates to prevent discrimination in the workplace. Thus, even if an employer meets its burden, a plaintiff may still be provided declaratory or injunctive relief (and attorneys' fees and costs) as a means of eradicating discriminatory practices from the workplace.

California employers should attempt to avail themselves of the additional protections afforded them *Harris* by ensuring (and documenting) that employee

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decisions are based upon legitimate, understandable performance and business concerns.

California Court Clarifies Scope of Anti-SLAPP Legislation

In *Aber v. Comstock*, a California Court of Appeal issued a ruling which serves to further broaden the scope of statements protected by anti-Strategic Lawsuit Against Public Policy ("anti-SLAPP")[1] legislation. Plaintiff Lisa Aber ("Aber") sued her employer and two of its employees for sexual harassment. In response to Aber's claim, one of the individual defendants, Michael Comstock ("Comstock"), filed a cross-complaint, alleging defamation and intentional infliction of emotional distress. In its review of the matter, the appellate court determined that Aber's statements to police, healthcare practitioners, and human resources representatives should all receive the protections afforded by anti-SLAPP legislation, as they were statements made in, or in connection with, matters under review by an official proceeding or body.

In her complaint, Aber alleged that following a work-related function, Comstock and another male employee sexually harassed her. Among other allegations, Aber claimed that the men informed her that spurning their advances would jeopardize Aber's employment with the company. In response to these allegations, Comstock offered his own narrative of the events of that evening and alleged that Aber's statements to others regarding her accusations amounted to defamation and intentional infliction of emotional distress. In response, Aber filed an anti-SLAPP motion, arguing that Comstock's cross-complaint was merely an attempt to censor her valid exercise of speech.

The court first examined Aber's statements to the police, noting the long-standing protections afforded to such statements. The court next looked at statements made by Aber to the nurse that administered Aber's sexual assault testing. In its analysis, the court notably broadened the scope of anti-SLAPP case law in holding that the nurse, as a healthcare practitioner investigating a potential sexual assault, was required to report statements made to her. Thus, the nurse's status as a mandated reporter afforded Aber's statements the same anti-SLAPP protections as the statements Aber made to the police.

Finally, and of greatest note to California employers, the court agreed that statements Aber made to her employer's human resources representative related to an "official proceeding" in that they were necessary to address an affirmative defense commonly used by employers in sexual harassment cases (that the employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer). As such, the statements should be afforded anti-SLAPP protection.

California employers should be aware of the additional anti-SLAPP protections afforded to their employees this case. While statements made to police were previously protected by anti-SLAPP legislation, statements made to healthcare practitioners in their role as mandatory reporters, and those made to

[1] Governed by California Code of Civil Procedure § 425.16, "anti-SLAPP" motions protect against claims which are merely thinly veiled attempts to censor or intimidate individuals from exercising protected speech. In pertinent part, the statute protects speech made in, or in connection with, matters under review by an official proceeding.

human resources representatives in anticipation of legal action, are now also protected.

California Court Rules for Employer in Discrimination and Defamation Case

In *McGrory v. Applied Signal Technology*, a California Court of Appeal upheld the granting of summary judgment in favor of the defendant employer where there was no evidence that the employee had been discharged in violation of public policy, and where alleged "defamatory" statements made about him were in fact protected by the "common interest" privilege.

Defendant Applied Signal Technology, Inc. ("AST") discharged four-year employee John McGrory ("McGrory") in June 2009 after an outside investigator concluded that, while McGrory had not discriminated against a lesbian subordinate on the basis of her sex or sexual orientation, he had engaged in inappropriate conduct including regularly making inappropriate sexual and racial/ethnic remarks in violation of AST's policies. The investigation also revealed that McGrory was neither truthful nor cooperative in responding to the questions asked during the interview. Based on the investigation report, AST discharged McGrory.

McGrory filed a lawsuit, alleging that AST had wrongfully discharged him in violation of public policy. Specifically, he alleged that an employee cannot be discharged for: (1) being male; (2) participating in AST's internal investigation; or (3) trying to protect the confidentiality and privacy of coworkers. He further alleged that a discharge for misconduct must be preceded by notice, a hearing, and honest findings of misconduct. He further alleged that he was defamed when AST's Vice President of Human Resources told another employee why McGrory was discharged.

AST filed a motion for summary judgment, asserting that there was no evidence that McGrory was discharged for an impermissible reason and that AST could not be liable for privileged statements of opinion on a topic of mutual interest. Over McGrory's opposition, the trial court granted summary judgment, concluding that AST's motion had established "a legitimate, non-discriminatory reason for terminating" McGrory's employment, namely that McGrory had "failed to meet his burden of showing substantial evidence that [AST's] stated reasons for the adverse action were untrue or pretextual, such that a reasonable trier of fact could conclude that [AST] engaged in discrimination," and AST had established "that the allegedly slanderous statements are privileged."

The Court of Appeal affirmed the judgment. As a preliminary matter, the court held that there was no evidence to support McGrory's claim that his discharge was somehow motivated by the fact that he was a man. There was no direct evidence of any gender bias on the part of the decision-makers, and the fact that McGrory disagreed with the conclusions of the investigation report was not sufficient to establish a discriminatory motive. The court reiterated the principle that discrimination cannot be proven simply by establishing that the employer's actions were unwise, unsound, or even incorrect. Rather, there must be evidence that the actions were motivated by discriminatory intent.

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Second, the court rejected McGrory's claim that his participation in the investigation was "protected activity." As the court explained, while it is true that the Fair Employment and Housing Act protects participation in investigatory interviews, it does not protect *dishonesty* during an investigation or failure to fully cooperate in an investigation.

Finally, the court rejected McGrory's defamation claim, explaining that the common interest privilege protects statements made in the employment context by one interested party to another, as long as those statements are not made "maliciously." Malice generally means that the allegedly defamatory statement must have been motivated by hatred or ill will or with no reasonable grounds for believing the statement to be true. McGrory argued that there was no reasonable ground for AST to believe that he failed to cooperate with the investigation. The court held, however, that this argument was not supported by the evidence and that the investigator (and hence, AST, which relied on the investigator's report) had grounds for believing McGrory was less than cooperative. The court explained that it did not matter whether this conclusion was correct or fair.

This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Jenna Leyton-Jones, Christine Mueller, Hazel Ocampo, Heather Stone or Ryan Nell at (858) 755-8500;or Andrew L. Smith or Jennifer Weidinger at (310) 649-5772.