PETTITKOHN
PETTIT KOHN INGRASSIA & LUTZ

EMPLOYMENT LAW UPDATE

Relationship-Driven Results *March 2014*

Congratulations to our Pettit Kohn Employment Team

Jennifer Lutz
selected for inclusion in
San Diego Super Lawyers (2011-2014)

Tom Ingrassia
selected for inclusion in
San Diego Super Lawyers (2008-2014)

Jenna Leyton-Jones
recently promoted to
Shareholder

I.

Legislative Update

California

Pending California Legislation

The California Legislature is considering a number of bills which, if enacted, would impact California's employers and employees. These bills include:

AB 1522 (Gonzalez): AB 1522 (the Healthy Workplaces, Healthy Families Act of 2014) would provide that an employee who works in California for seven or more days in a calendar year is entitled to paid sick days to be accrued at a rate of no less than one hour for every thirty hours worked. An employee would be entitled to use accrued sick days beginning on the ninetieth calendar day of employment. The bill would authorize an employer to limit an employee's use of paid sick days to twenty-four hours or three days in each calendar year. In addition, AB 1522 would require an employer to provide sick days, upon the request of the employee, for diagnosis, care, or treatment of health conditions of the employee or an employee's family member, or for leave related to domestic violence, assault, or stalking. AB 1522 would prohibit an employer from discriminating or retaliating against an employee who requests paid sick days. The bill would also require employers to satisfy specified posting, notice, and recordkeeping requirements. The bill has been referred to the Assembly Labor and Employment Committee.

AB 2095 (Wagner): This bill seeks to amend Labor Code section 226 by limiting frivolous litigation regarding itemized wage statements for alleged technical violations. If signed into law, AB 2095 would permit an employer to recover attorneys' fees in actions where the employee was not injured and the litigation was brought in bad faith. AB 2095 has been referred to the Assembly Labor and Employment Committee as well as the Judiciary Committee.

AB 2688 (Brown): AB 2688 would allow employers to rely on and follow advice received from the Division of Labor Standards Enforcement about various wage and hour laws. The bill has been referred to the Assembly Labor and Employment Committee and Judiciary Committee.

Proposed Amendments to the California Family Rights Act ("CFRA") Regulations

California's Department of Fair Employment and Housing Council recently published proposed amendments to the CFRA. These regulations are intended to

clarify some aspects of the existing regulations and also to adopt many of the recent amendments to the federal Family and Medical Leave Act ("FMLA") regulations. The proposed amended regulations address, among other topics: (1) length of service/eligibility issues; (2) the certification process and timeframes for responding to employee requests for CFRA leave; (3) computation of amount of leave entitlements; (4) key employee issues; (5) clarification of reinstatement rights; (6) maintenance of health and other benefits during leave; (7) retroactive designation of leave; and (8) the interplay between CFRA leave and California's Pregnancy Disability Leave.

Importantly, there remain some areas where CFRA administration will continue to differ from FMLA administration. Among other things, pregnancy disability is not covered under CFRA and, therefore, a California employee who is otherwise eligible for leave under CFRA/FMLA will be eligible for up to four months of leave for pregnancy disability under the Pregnancy Disability Leave Law, and up to twelve additional weeks of leave for baby bonding under CFRA. The proposed regulations state that a California employer is required to maintain the employee's group health benefits for this whole period (and not just up to twelve weeks). Some other notable differences between the CFRA and FMLA are that the medical certification and scope of permissible medical inquiry are much more refined under California law than under FMLA, and the circumstances under which an employer can seek re-certification are narrower under California law. There is a public comment period through June 2, 2014. Comments can be submitted via email to FEHCouncil@dfeh.ca.gov.

II.

JUDICIAL

California

Appellate Court Affirms Award of Unemployment Insurance Benefits After Rejecting Employer's Argument that the Employee "Constructively Quit"

In *Kelley v. California Unemployment Insurance Appeals Board*, the Court of Appeal affirmed a judgment overturning the California Unemployment Insurance Appeals Board's decision denying unemployment benefits to Stephanie Kelley ("Kelley"). The appellate court affirmed the judgment on the ground that there was substantial evidence that Kelley did not constructively quit her position with Merle Norman Cosmetics, Inc. ("Merle Norman"), and instead was fired.

In May 2010, one month after reporting alleged ongoing sexual harassment and filing a complaint with the Department of Fair Employment and Housing, Kelley took a stress-related leave of absence from her position as marketing director of Merle Norman. Kelley's physician cleared her to return to work on November 15, 2010.

Before returning to work, Kelley made several requests of Merle Norman that would aid in her transition back to work: (1) a written job description; (2) a written statement of goals and objectives; (3) written confirmation of her job title, duties, pay, and benefits; (4) the status of her earlier request for vacation during the Christmas holiday period; and (5) written confirmation that Kelley would not be subjected to retaliation for her earlier complaints of sexual harassment. Merle Norman responded by saying that Kelley's demands were unreasonable under the circumstances. Merle Norman pointed out that Kelley had been off work for seven months and had exhausted

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all of her vacation time. In addition, rather than agreeing to provide a written job description and list of duties, Merle Norman suggested that Kelley meet with her supervisor upon her return to review her job duties and expectations. It then suggested that Kelley return to work on November 30, 2010 (not November 15, as suggested by her doctor). The only request that Merle Norman granted to assure that it would not retaliate against her.

In response, Kelley asserted that she had almost 100 hours of vacation time left, and that buying her permission to take vacation over the holidays (like other employees) would be retaliatory. Kelley added that she did not think her request for written confirmation of her duties and compensation was unreasonable, and offered November 22, 2010 as a return to work date. On November 18, 2010, Merle Norman reiterated that Kelley was imposing conditions on her return to work that were unnecessary and unacceptable. Merle Norman then informed Kelley that it considered her employment terminated. Thereafter, Kelley filed for unemployment benefits. Merle Norman contested her eligibility citing the "constructive voluntary quit" doctrine.

A "constructive voluntary leaving" occurs when an employee causes his or her unemployment by engaging in a voluntary act or course of conduct that leaves the employer no reasonable alternative but to discharge the employee, and which the employee knew or reasonably should have known would result in his or her unemployment. Merle Norman argued that Kelley's "unreasonable" demands left it with no alternative but to discharge her. In contrast, Kelley argued that she merely made "requests" of the company, and her communications did not constitute "ultimatums," "demands," or "conditions." Moreover, Kelley never said that she would not return to work if Merle Norman did not comply with her requests.

The trial court found that the constructive voluntary quit doctrine did not apply because Kelley's requests were not conditions or ultimatums, and that Merle Norman had a reasonable alternative to firing Kelley – it could have waited to see whether she reported for work after the company declined to provide the requested information. The court further noted that for the doctrine to apply, the employer must provide substantial evidence that the employee took some action that actually prevented the employer from retaining the employee, or made some unequivocal demand as a condition of his or her continued employment that the employer had no obligation to meet and that the employee reasonably knew would result in termination. The doctrine does not apply to those situations, like Kelley's, where the employee simply makes requests or inquiries about employment matters.

California Court of Appeal Denies Summary Judgment for Employer who Discharged Employee for Poor Performance

In *Cheal v. El Camino Hospital*, the California Court of Appeal overturned a trial court's grant of summary judgment, ruling that an employee plaintiff had raised triable issues of material fact regarding both her performance and whether her discharge was based on discrimination against older workers.

Plaintiff Carol Cheal ("Cheal"), age 61, was employed as a Diet Tech at El Camino Hospital. In this role, Cheal was responsible for collaborating with doctors and other hospital staff to prepare dining menus for hospital patients. Throughout her employment, Cheal largely received positive performance reviews.

In August 2007, El Camino hired Kim Bandelier ("Bandelier") to serve as Cheal's new supervisor. Bandelier began to criticize Cheal for perceived performance deficiencies. By September 2008, Bandelier notified Cheal that she was no longer performing at the level required by her position. Cheal was presented with three options: accept a demotion to a different position, accept a severance package, or have her employment terminated. Cheal responded by retaining legal counsel and was discharged shortly thereafter.

Cheal filed suit against El Camino, alleging age discrimination and other claims. El Camino filed a motion for summary judgment, requesting that the lawsuit be dismissed by the court. The trial court granted El Camino's motion, finding that Cheal had not met her burden of proving that she was performing in a satisfactory manner at the time of her discharge. The trial court was also unmoved by Cheal's argument that El Camino's purported nondiscriminatory reasons for discharge were "pretextual."

Cheal appealed, and the Court of Appeal ruled in her favor, overturning the trial court's grant of summary judgment. In its decision, the appellate court relied upon a number of declarations supplied by Cheal in opposition to El Camino's motion. It ruled that, in conjunction with other evidence presented in the case, the declarations established triable issues of fact sufficient to defeat the motion.

The first declaration, from Cheal, suggested that she had only made some minor mistakes, on par with those committed by other El Camino employees. Cheal attributed those mistakes to her transition to working under Bandelier's supervision. Cheal's declaration showed, at the very least, that factual issues existed with regard to whether Cheal had committed the "several errors" of which she was accused, and upon which El Camino based its motion. The second declaration was from a friend of Bandelier which quoted Bandelier as saying that she had a preference for younger workers. While the trial court excluded this evidence on hearsay grounds, the Court of Appeal held that it was subject to an exception to the hearsay rule (for statements against a party's own interests) and permitted the declaration to be considered.

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, Heather Stone, Ryan Nell, Lauren Bates or Jennifer Suberlak at (858) 755-8500; or Jennifer Weidinger or Tristan Mullis at (310) 649-5772.

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

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