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EMPLOYMENT LAW UPDATE

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LEGISLATIVE

California

Californians Vote to Legalize Recreational Marijuana Use

On November 8, 2016, California voters passed Proposition 64, also known as the "Adult Use of Marijuana Act." As of November 9, 2016, it became legal for adults over 21 years old to possess and use marijuana for recreational purposes. Additional licensing and taxing provisions become effective January 1, 2018. Despite the legalization of recreational marijuana use, the law does not impact an employer's right to maintain a drug and alcohol free workplace, require an employer to permit or accommodate the use of marijuana in the workplace, or affect an employer's ability to have policies that prohibit the use of marijuana by employees and prospective employees.

Additionally, marijuana remains a Schedule I drug under the federal Controlled Substances Act. Thus, in addition to the provisions of the new law, employers may rely on existing case law that upholds their right to refuse to hire an applicant who has tested positive for marijuana.

Employers should review their existing substance abuse and drug-testing policies to ensure that the policies are clear with respect to the employer's expectations regarding employee marijuana use.

JUDICIAL

California

Court of Appeal Affirms Summary Judgment for Employer on Retaliation Claim Where No "Protected Activity" Occurred

David Dinslage ("Dinslage") was employed for nearly four decades in the recreation division of the Recreation and Parks Department ("the Department") of the City and County of San Francisco ("the City"). As a result of large scale restructuring, the City eliminated Dinslage's recreation director position and Dinslage was one of a large number of employees laid off. While Dinslage applied for other positions with the Department following his discharge, he ultimately elected to retire in August 2010.

Areas of Practice

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Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

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Transportation

Dinslage sued the Department, the City, and a number of his former managers (collectively, "Defendants"), alleging that he had been harassed, discriminated against, and retaliated against on the basis of his age. He also claimed that he had been subjected to retaliation as a result of his opposition to conduct that was allegedly discriminatory to members of the general public with disabilities.

Defendants filed a motion for summary judgment, claiming that their employment actions were taken for legitimate, nondiscriminatory reasons. Specifically, Defendants noted that Dinslage was strongly and outspokenly opposed to the Department's new policies which shifted away from activities created specifically for persons with disabilities and towards activities aimed at general inclusion of all (disabled and able-bodied) individuals.

The trial court granted Defendants' motion for summary and the California Court of Appeal reviewed the lower court's decision. While the unpublished portion of the appellate decision affirmed the trial court's rulings on Dinslage's discrimination and harassment claims, the published portion focuses solely on Dinslage's retaliation claim. In its review, the appellate court affirmed the trial court's grant of summary judgment, based Dinslage's failure to establish a "prima facie" case of retaliation.

To succeed on a claim for retaliation, a plaintiff is required to demonstrate, as a threshold matter, that he engaged in a "protected activity." Dinslage argued that his opposition to the Department's policy shifts, particularly to the extent that those shifts affected persons with disabilities, was sufficient to meet this burden. The Court of Appeal affirmed the trial court's decision that it was not. In doing so, the appellate court held that Dinslage could not reasonably have believed that his general complaints about policy decisions, and the potential impact of those policies on members of the general public, amounted to "protected activity" under the Fair Employment and Housing Act.

Dinslage is an important victory for employers, as the appellate court's decision confirms that not all alleged complaints by employees fall under the umbrella of "protected activities" sufficient to form the basis of a retaliation claim.

Court of Appeal Clarifies Rules Surrounding "On Duty" Meal Breaks

In *Lubin v. Wackenhut*, a California Court of Appeal ruled that the trial court erred in granting a motion for class decertification.

Plaintiffs were former security officers employed by Wackenhut—a provider of private security services. Plaintiffs alleged that Wackenhut violated the California Labor Code by failing to provide off-duty meal periods and failing to authorize and permit off-duty rest breaks.

Under California law, an "on duty" meal period is permitted only when the nature of the work prevents an employee from being relieved of all duty, and when the parties agree in writing that the employee will take an "on duty," paid meal period.

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Although it is not an exhaustive list, the Division of Labor Standards and Enforcement has provided the following factors to aid employers in evaluating whether the nature of the work prevents an employee from being relieved of all duty: (1) the type of work; (2) the availability of other employees to provide relief to an employee during a meal period; (3) potential consequences to the employer if the employee is relieved of all duty during the meal period; (4) the ability of the employer to anticipate and mitigate the consequences; and (5) whether work product or process will be destroyed or damaged by relieving the employee of all duty.

In this case, Wackenhut was allowing its clients to determine the desirability of "on duty" meal breaks for their security officers. Most clients preferred and provided such "on duty" breaks, without analyzing the factors set forth above. Wackenhut likewise performed no analysis to determine the legality of the "on duty" breaks. The court found that Wackenhut could not discharge its duty by arguing that its clients determined that the nature of the work that allegedly prevented officers from being relieved of all duty. That is, Wackenhut, as the employer, had an affirmative duty to ensure that lawful meal breaks were provided.

As for the "on-duty" rest breaks, those too were improper, as there is no "on duty" rest break option under California law.

This case serves as a reminder that those employers looking to utilize "on duty" meal breaks must be cautious that the nature of the work permits such breaks. It further reminds employers that rest breaks must be just that: breaks. Work cannot occur during a rest break under any circumstances; if work is in fact performed, then a rest break penalty must be paid.

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, Ryan Nell, Lauren Bates, Jennifer Suberlak, Shannon Finley, or Cameron Flynn at (858) 755-8500; or Jennifer Weidinger, or Tristan Mullis at (310) 649-5772.