Fenwick Employment Brief

August 15, 2013
Michael A. Sands 650.335.7279
Sheeva J. Ghassemi-Vanni 650.335.7191

Fenwick
FENWICK & WEST LLP

Alert

NEW CALIFORNIA SEXUAL HARASSMENT LEGISLATION

As this FEB went to publication, Governor Brown signed Senate Bill 292, which clarifies that sexual harassment claims under California's Fair Employment and Housing Act do not require a showing of sexual desire. The legislation, effective January 1, 2014, is in direct response to—and effectively overrules—*Kelley v. Conco Companies*, a 2011 California appellate case where the court dismissed an employee's same-sex sexual harassment claim because, among other issues, there was no evidence that the harassment was "motivated by sexual desire." This could greatly expand employers' liability for sexual harassment. More to come on this legislation in our September issue.

Feature Articles

CALIFORNIA: EDD DETERMINATION HAS BINDING EFFECT ON DLSE

In *Happy Nails & Spa of Fashion Valley, L.P. v. Su*, a California appellate court held that a determination by one state agency was binding on another state agency and precluded the second agency's contrary finding.

In 2003, Happy Nails (and its related salons) reorganized its business to make its cosmetologists independent contractors instead of employees. In 2004, the California Employment Development Department ("EDD") issued assessments against Happy Nails for unpaid unemployment contributions, alleging that the cosmetologists were employees and not contractors. Happy Nails opposed the assessments and, following a two-day hearing on the issue, the administrative law judge held that the cosmetologists were in fact independent contractors because they were not terminable at will, they provided their own equipment and most of their materials, and Happy Nails exercised no control over them.

In 2008, the Labor Commissioner at the California Division of Labor Standards Enforcement ("DLSE") cited Happy Nails and assessed penalties for failure to provide the cosmetologists with itemized wage statements. Happy Nails opposed, arguing that the EDD's prior determination that the cosmetologists were independent contractors barred the DLSE's citation under a theory of collateral estoppel (*i.e.*, once an issue has been litigated and decided, it should have a binding, dispositive effect). The company stated that it had already spent hundreds of thousands of dollars and "borne the burden of years of administrative proceedings" in the EDD matter. After a full day hearing, during which the evidence presented was substantially similar to that at the earlier EDD hearing, the hearing officer affirmed the citation and penalties, finding that the cosmetologists were employees.

Happy Nails then engaged in a long and tortured appellate process, finally resulting in an appellate court ruling that accepted Happy Nails' collateral estoppel argument and set aside the DLSE's findings. The court noted that the issue before both agencies—whether the cosmetologists were employees or contractors—was identical; the issue was actually litigated and decided in the EDD proceeding; the EDD's determination was final and on the merits; and the EDD and DLSE had substantially similar purposes and objectives (*i.e.*, to enforce laws designed to benefit and protect employees) such that a decision by one on the same issue should bind the other. The court recognized that giving the EDD's decision preclusive effect "fosters the integrity of both administrative and judicial proceedings" and avoids a "manifestly unfair" situation in which two similar state agencies reach different conclusions on the same issue.

Employers are justifiably celebrating this favorable—and logical—outcome; if one state agency determines that workers are independent contractors, a similar state agency should not reach a contradictory conclusion. It is important to recognize, however, that the effects of this ruling could just as easily be negative for employers: If the EDD had determined that the workers were employees, then the DLSE could have argued that this decision was controlling in its case. In all events, this ruling underscores the importance of legal advice and representation in administrative hearings since their rulings could have a binding effect on related agency investigations and assessments.

MARRIOTT POTENTIALLY LIABLE FOR INJURY FOLLOWING HOLIDAY PARTY

Although it's still summer, it's never too early to start thinking about the annual company holiday party — the food, the conversation, the alcohol — and the liability that can flow from it. In *Purton v. Marriott International, Inc.*, a California appellate court recently held that Marriott could be liable for a drunk driving accident following its annual holiday party.

The Marriott Del Mar Hotel held its annual holiday party in December 2009 as a thank you to employees and to foster camaraderie among its workforce. It planned on serving only beer and wine and providing employees with two drink tickets. However, hotel managers served hard alcohol at the party to certain employees, including employee and off duty bartender Michael Landri. Before arriving at the party, Landri drank one beer and a shot of liquor. He also brought a flask of liquor to the party, which was refilled by hotel managers who shared shots with him and other employees.

After about three hours at the party, a co-worker drove Landri home. He arrived home safely, but after about twenty minutes Landri decided to drive a co-worker home who had become intoxicated. (The implication is that Landri drove the co-worker from his house to the individual's home, but it is unclear based on the court's statement of the facts whether he might actually have returned to the party to drive the co-worker home.) While doing so, Landri rear-ended another car at 100 miles per hour, killing the driver. Landri's blood alcohol level was .16 at the time of the accident, twice the legal limit in California. He received a six-year prison sentence for gross vehicular manslaughter while under the influence.

The deceased driver's parents sued both Landri and Marriott for wrongful death of their son. Marriott argued that it was not liable for the accident because it did not occur within the scope of Landri's employment, and the trial court granted summary judgment in its favor. The appellate court reversed, however, holding that Marriott could be liable because the proximate cause of the injury (*i.e.*, Landri's intoxication) occurred within the scope of employment. Vicarious liability of the employer attaches if the activities that caused the employee to become an "instrumentality of danger to others" were (1) done with the employer's permission and benefitted the employer or (2) constituted a "customary incident of employment."

Here, the court found both. First, Marriott served alcohol (including hard liquor) to Landri at a party to thank its employees and encourage relationship building, from which Marriott arguably received the tangential benefit of increased employee morale. Second, drinking alcohol was a customary incident of employment since some of the employees at the party (including Landri) were bartenders and were regularly allowed to drink leftover alcohol from parties, taste new drinks, and have drinks purchased for them while at work. Marriott's argument that its liability ended when Landri arrived safely at home and did not extend to when he later decided to drive a co-worker home was unconvincing, as the court stated: "no legal justification exists for terminating the employer's liability … simply because the employee arrived home safely from the employer hosted party."

This case is a cautionary tale for employers about the hazards of unregulated alcohol consumption at company parties. The court noted that Marriott could have reduced its risk of liability by having a policy against smuggled alcohol (*i.e.*, Landri's flask), enforcing its drink ticket policy, serving drinks for a limited time, or prohibiting alcohol altogether.

News Bites

More Unpaid Intern Lawsuits on the Horizon
A former intern recently filed a putative wage-and-hour class action against Columbia Recordings Corp. and its parent companies, including various Sony entities, on behalf of nearly 500 interns for failure to pay wages. This case is right on the heels of the unpaid intern class action certification decision in June against Fox Searchlight. Columbia joins Gawker, PBS' Charlie Rose Show, W Magazine, and other companies that all have been sued by former interns for unpaid wages. Aside from the cost of unpaid wages, benefits, and penalties, which can add up to thousands of dollars per intern, company officers and directors can be held personally liable for unpaid wages. As summer comes to a close, think twice about the interns in your organization and how they are being compensated, if at all.

New Mandatory Bereavement and Sick Leave Laws in Oregon and New York City
Mandatory benefits legislation is sweeping the nation — including, most recently, both Oregon and New York City.

Effective January 1, 2014, employers with twenty-five or more employees working in Oregon must provide bereavement leave to employees under the Oregon Family Leave Act ("OFLA"), as recently amended and subject to additional eligibility requirements. Employees may take up to two weeks of leave per death of a family member up to a maximum of twelve weeks in a twelve-month period. Although OFLA leave is unpaid, if employers allow employees to use paid sick leave for OFLA-qualifying events, then employees would receive paid bereavement leave. Oregon is the first state to require bereavement leave.

New York City joins San Francisco, Seattle, Portland, and Washington, D.C. in requiring employers to provide paid sick leave. Beginning April 1, 2014, employees working for companies with twenty or more workers in New York City will be eligible to earn up to 40 hours of paid sick time annually. Smaller employers will also be affected by the legislation to varying degrees.

Employers with out-of-state operations should keep these mandatory leave obligations in mind when reviewing their employee handbooks and related policies.

Employee Fired for Comments Made at Mediation
In *Benes v. A.B. Data, Ltd.*, an employer fired its employee for a comment he made during an Equal Employment Opportunity Commission ("EEOC") mediation. Benes filed an EEOC charge for sex discrimination against his employer, A.B. Data, and the parties agreed to mediation. At the EEOC mediation, the parties were in separate rooms. After receiving what he considered to be a low settlement offer, Benes stormed into the employer's room and said: "You can take your proposal and shove it up your ass and fire me and I'll see you in court." One hour later, A.B. Data obliged and terminated Benes. Benes then dropped his discrimination claim and sued for retaliation under Title VII. The Seventh Circuit granted summary judgment in A.B. Data's favor, holding that if the company would have fired an employee who behaved like Benes at work, then it was entitled to do so for the same conduct at mediation.

Follow us on Twitter at:
http://twitter.com/FenwickEmpLaw