

Feature Articles

NEW CALIFORNIA LAW CLARIFIES THAT “SEXUAL DESIRE” NOT REQUIRED FOR SEXUAL HARASSMENT CLAIMS

As mentioned in last month’s [FEB](#), California recently enacted a new law clarifying that a plaintiff alleging sexual harassment is not required to show that the alleged harassment was motivated by sexual desire. Governor Jerry Brown signed the bill on August 12, which becomes effective on January 1, 2014.

The new law overrules the 2011 decision by a California Court of Appeal in *Kelley v. The Conco Companies* to the extent that case has been construed to require a plaintiff in a same-sex sexual harassment dispute to show that the harassment was motivated by sexual desire. While the *Kelley* decision was nuanced and determined that the plaintiff did not suffer sexual harassment because he could not show that he was treated adversely as compared to members of the female gender, the decision has been interpreted as requiring a showing of sexual desire or intent to prevail on a FEHA same-sex harassment claim.

The recent amendment to the definition of sexual harassment resolves any ambiguity created by the *Kelley* decision, and makes clear that a showing of sexual desire is not an essential element of a claim of sexual harassment. To establish an inference that an alleged harasser’s conduct is sexual in nature, a plaintiff can also produce evidence that the alleged harasser is motivated by general hostility towards the particular gender of which plaintiff is a member or through comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. While the new amendment doesn’t necessarily change existing law, it does re-emphasize the importance of eradicating completely all forms of inappropriate behavior, conduct and comments in the workplace.

FINDINGS THAT EMPLOYEE VIOLATED COMPANY POLICIES WERE NOT AN ADMISSION OF LEGAL VIOLATIONS

In *Oliver v. Microsoft Corp.*, a federal district court in California ruled that Microsoft’s internal determination that the plaintiff’s supervisor violated the company’s discrimination and retaliation policies was not an admission that Microsoft violated the law.

Oliver was a long time employee of Microsoft who alleged that her supervisor discriminated and retaliated against her on account of her gender and medical condition (breast cancer). After Oliver and four other female employees filed an internal complaint of gender discrimination against the supervisor, Microsoft investigated the matter and determined that, among other things, the supervisor made inappropriate, gender-related remarks, engaged in adverse treatment of Oliver due to her medical condition and lowered her performance rating for non-business reasons in favor of a male employee. Microsoft concluded that the supervisor’s actions violated the company’s anti-discrimination and retaliation policies, and terminated the supervisor as a result.

In her lawsuit, Oliver argued that because Microsoft had admitted to violations of its own internal discrimination and retaliation policies, it effectively conceded that Oliver was subjected to unlawful conduct. However, the court found that because Microsoft’s policies set higher standards than the law, a violation of those higher standards did not necessarily mean that a legal violation occurred. Ultimately, the court determined that summary judgment in favor of Microsoft was appropriate because, notwithstanding the results of the company’s internal investigation, there was insufficient evidence to create jury issues regarding the claims of discrimination and retaliation.

Despite the positive result for the employer in *Oliver*, the case serves as an important reminder that internal investigative findings may impact related lawsuits

or arbitrations. At the outset of any employee investigation, employers should carefully consider the scope and extent to which it may wish to protect the investigation from disclosure (for example, through the attorney-client privilege). Investigators should also be aware of how they make, and if needed, publish, their findings and conclusions.

Internal discrimination and retaliation policies should also be examined to ensure that the policies do not restrict the ability of employers to discipline employees. Policies should provide employers the discretion to discipline employees for improper conduct that does not necessarily rise to the level of a legal violation. Moreover, policies should be drafted to avoid giving the impression that a policy violation is the equivalent of a violation of law.

News Bites

EEOC Sued for Unauthorized Mass Solicitation E-mail to Company Employees

After sending 1,330 e-mails to employees of Case New Holland, Inc. and its affiliates in an alleged effort to solicit plaintiffs to commence a class action lawsuit, the federal EEOC found itself on the receiving end of a lawsuit alleging that the agency acted without authority and violated the employer's statutory and constitutional rights.

In *Case New Holland, Inc. v. Equal Employment Opportunity Commission*, the plaintiff alleges that, in connection with an EEOC investigation of the company and its affiliates under the Age Discrimination in Employment Act and after the company had cooperated with the EEOC's investigation and requests for information, the EEOC sent a mass e-mail and survey to the work e-mail addresses of 1,330 employees of the company throughout the United States and Canada without notice to or the consent of the company. The e-mails requested that employees provide information concerning possible job discrimination, including, for example, whether employees were aware of any "age-related comments."

The lawsuit, which has been filed in a federal district court in the District of Columbia, alleges that the EEOC's actions are in violation of the Administrative Procedure Act and the United States Constitution and

seeks declaratory and injunctive relief and attorneys' fees and costs.

A & F's Appearance Policy Violates Employee's Religious Rights

In *EEOC v. Abercrombie & Fitch Stores, Inc. dba Hollister Co California, LLC*, a federal district court in California recently held that Abercrombie & Fitch's "Look Policy" violated a part-time associate's religious rights when it prohibited her from wearing a hijab at work. The clothing retailer – which promotes "Authentic American" clothing and often hires models for marketing campaigns from their retail stores – argued that its "Look Policy" is key to its success and its brand, and it could not accommodate the associate without undue hardship.

The court held that Abercrombie failed to raise a jury issue that allowing the associate to wear her hijab at work to accommodate her religious beliefs would have posed an undue burden to Abercrombie, and granted summary judgment to the associate on her religious accommodation claim. The court also allowed the associate's claim for punitive damages to be decided by a jury, as it found that offering an employee only one option – to remove her hijab despite her religious beliefs – reasonably could support an award of punitive damages.

Wrongful Termination Claims Fail Where Employer Thoroughly Investigated Work Altercation

In *Kodwavi v. Intercontinental Hotels Group Resources, Inc.*, a federal district court in California determined that a hotel employee was not entitled to have his claims of national origin discrimination and retaliation go to a jury, because the employee could not show that he was performing his job adequately or that others outside his protected class were treated more favorably, and further could not show that the employer's stated reason for termination – violation of the workplace violence policy – was pretextual.

The hotel employee, who was born in Pakistan, allegedly used profanity towards his supervisor, grabbed the supervisor's waist and threatened him. After a thorough investigation of the altercation, which included interviews of more than 20 employees by the hotel's human resources department and obtaining written statements from several witnesses, the employer concluded the employee acted aggressively

and made unwelcome physical contact in violation of the hotel's "zero tolerance" workplace violence policy and terminated the employee. Key to the court's decision was that the employer's investigation of the incident was thorough and the employer made a good faith determination based on the findings of the investigation.

\$4.6M Jury Verdict in Retaliation Lawsuit Confirmed

Finding that the damages were supported by the facts and the law, a federal district court in California affirmed a jury award for \$4,650,000 (\$300,000 in economic damages, \$850,000 in non-economic damage and \$3.5M in punitive damages) in favor of a supervisory employee who was fired after she raised concerns to management about possible California rest period violations. The employer, Regus Group, PLC, challenged the jury award as excessive, against the weight of the evidence and based on improper jury instructions, among other things. The court dismissed all of the employer's challenges, finding that while the verdict may have been "a surprise to Regus" and was "probably tough to swallow," Regus simply lost and needed to accept that loss.

Wrongful Discharge Plaintiff Required to Disclose Cell Phone Records

The plaintiff in *Kamalu v. Walmart Stores, Inc.* filed a wrongful termination lawsuit against her former employer, claiming that Walmart's proffered rationale for her termination – that Kamalu misrepresented her work hours – was false. During the litigation, Walmart subpoenaed Kamalu's cell phone records, and Kamalu moved to quash the subpoena. Finding that records regarding incoming and outgoing cell phone calls, messages and data usages were directly relevant to Walmart's defense that Kamalu was terminated for misrepresenting work hours, and that Kamalu had no federal or state privacy right in the number, dates, times and durations of calls and texts (as opposed to the content), a federal district court in California ordered that the requested information be turned over to Walmart.

New Law Makes Recovery of Attorneys' Fees and Costs Against Employees in Wage Nonpayment Lawsuits Difficult

On August 26, Governor Jerry Brown signed into law an amendment to Section 218.5 of the California Labor Code, which requires courts in lawsuits for the nonpayment of wages, fringe benefits, health and welfare contributions or pension fund contributions to award reasonable attorneys' fees and costs to the prevailing party. Under the new law, if the prevailing party is not an employee, recovery of attorneys' fees and costs will only be permitted if the court determines that the employee brought the lawsuit in "bad faith." However, if the prevailing party in the lawsuit is an employee, an award of reasonable attorneys' fees and costs is mandatory.

World Series Champion Giants Pay \$544,715 in Back Wages

Following an investigation by the federal Department of Labor concerning minimum wage, overtime and recordkeeping violations for 74 employees – including clubhouse assistants, video operators and managers – of the San Francisco Giants baseball team over a three year period, the Giants agreed to pay \$544,715 in backpay and liquidated damages to the underpaid workers. Some of the alleged violations included failures to pay minimum wage, failure to pay overtime, and improper classification of employees as exempt. Presumably starting pitchers Tim Lincecum (\$22,250,000 salary for 2013) and Barry Zito (\$20,000,000 salary for 2013) were not among the underpaid workers.

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