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Fenwick Employment Brief

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CALIFORNIA'S SEXUAL HARASSMENT LAW IS NOT A "CIVILITY CODE" ACCORDING TO CAL. SUPREMES

The California Supreme Court recently issued a unanimous decision holding that three writers for the sitcom "Friends" did not sexually harass their former assistant, even though the assistant was exposed to coarse sexual humor during brainstorming sessions in which potential (and often provocative) story lines were explored. *Lyle v. Warner Brothers Television Productions,* 06 C.D.O.S. 3258. Though the holding is based on the specific facts arising in the entertainment arena, the court adopted language from federal harassment cases that is helpful to any employer facing harassment claims based on lewd comments and conduct. Specifically, the court recognized that, "like Title VII, the [Fair Employment and Housing Act] is not a 'civility code' and [is] not designed to rid the workplace of vulgarity." In reaching its decision, the court focused on the fact that the at-issue sexual comments were not directed at the plaintiff. The court noted that "there was nothing to suggest the defendants engaged in this particular behavior to make plaintiff uncomfortable or self-conscious, or to intimidate, ridicule or insult her" and that "most of the sexually coarse and vulgar language at issue did not involve and was not aimed at plaintiff or other women in the workplace." The court also noted that the plaintiff was warned about the show's "lowbrow" sexual humor prior to accepting the job. Still, the court cautioned that such dialogue and behavior might be illegal elsewhere: "Language similar to that at issue here might well establish actionable harassment depending on the circumstances."

NINTH CIRCUIT UPHOLDS MAKE-UP REQUIREMENT—BUT CAUTIONS EMPLOYERS

In January 2005, we reported on a ruling by a panel of the Ninth Circuit Court of Appeal in *Jespersen v. Harrah's Operating Company, Ltd.*, where the court held that a former employee failed to present sufficient evidence that a casino's grooming standards unequally burdened women. On April 15, 2006, the Ninth Circuit, ruling en banc, affirmed that decision, but expressly recognized that dress and grooming standards may in different circumstances constitute sex discrimination.

Darlene Jespersen had been a bartender at Harrah's Casino for almost 20 years with stellar performance reviews, until Harrah's implemented a "Personal Best" image program. Harrah's implemented the program to ensure employees conveyed a professional image to the public. While certain neatness and dress standards applied regardless of gender, other requirements and limitations were gender specific. Men had to keep their hair short and their fingernails neatly trimmed without polish, and they could not wear make-up. Women had to tease, curl or style their hair, use certain colors of nail polish, and wear make-up consisting of foundation, blush, mascara, and lip color. Jespersen refused to comply with the make-up requirement, and Harrah's fired her. Jespersen sued Harrah's for sex discrimination.

The Ninth Circuit recognized that employers may not impose unequal burdens on male and female employees, including through grooming and dress standards. Still, the court affirmed summary judgment

for Harrah's because Jespersen failed to present evidence that the policy was more burdensome for women than men. For example, she did not present evidence that the requirements for women were significantly more time-consuming than those for men. Jespersen's subjective, negative reaction to the make-up policy was insufficient to establish her sex-stereotyping claim. Notwithstanding Harrah's victory, companies are cautioned that gender-specific policies are inherently risky. Companies should carefully consider the ramifications of implementing such a policy, lest the next litigant present the required evidence to demonstrate an unequal burden.

NEWS BITES

A complaint recently filed by a former employee of musician Carlos Santana raises interesting employment issues. Bruce Kuhlman, who had worked for Carlos and Deborah Santana since 1988, claims he was fired when he missed a chiropractic appointment scheduled at the behest of the Santanas. According to the complaint, the Santanas required all of their employees to receive "enlightenment" treatments conducted by their chiropractor, which treatments were designed to help the employee become closer to God. After missing a February 2004 appointment, the Santanas terminated Mr. Kuhlman. Mr. Kuhlman sued the Santanas for wrongful termination in violation of public policy, citing the public policy of freedom of religion. The case also could implicate California's protection of employees' privacy interests (sometimes framed as the right to be free from "lifestyle discrimination").

A state court in Pennsylvania recently concluded that a release by a recently terminated employee (who was over age 40) was valid despite failure to comply with the Older Workers Benefit Protection Act (OWBPA), which requires (among other provisions) that the employer allow the employee at least 21 days to consider the release and a seven day post-signature revocation period. *Griest v. Pennsylvania State University,* No. 1104 MDA 2005. The release purported to be a general release of all claims, but it did not provide the 21/7 day periods. The court concluded that the release was valid as to all claims except a claim under the Age Discrimination in Employment Act (ADEA). This decision supports an employer's ability to enter into a release with an "over 40" employee that resolves all claims except for ADEA claims. Employers may wish to enter into such a release when the risk of an ADEA claim is remote and there are compelling reasons to avoid the 21/7 day waiting periods.