



FENWICK & WEST LLP

## Fenwick Employment Brief

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### “AT WILL” MEANS “AT WILL”

The California Supreme Court recently concluded that the “at will” doctrine is alive and well in California. In *Dore v. Arnold Worldwide, Inc.*, the court held that an employee’s offer letter specifying that he was an “at-will” employee who could be terminated “at any time” unambiguously granted the employer the right to terminate the employee with or without cause or reason, despite the absence of such language in the letter.

Dore alleged that, in connection with his recruitment by Arnold Worldwide (“AWI”), AWI told him that the company needed help with a large account on a “long-term basis” and that, if hired, Dore would play a critical role in growing the company. Dore also learned that AWI terminated two previous employees for cause. Further, in the letter confirming Dore’s oral acceptance of AWI’s employment offer, AWI stated that Dore’s employment was “at will” and that AWI had the right to terminate Dore’s employment at “any time.”

Two years later, AWI terminated Dore’s employment. He sued, claiming AWI’s oral representations, past conduct and the ambiguous contract language created an implied contract that he would only be discharged for good cause. The Supreme Court rejected Dore’s argument, holding that the terms “at will” and “at any time” unambiguously meant that AWI could terminate Dore with or without cause or reason, notwithstanding AWI’s alleged representations during the recruitment stage and its apparent past precedent regarding cause with other terminated employees.

While this decision confirms that employers have some freedom regarding how to convey the notion of at will employment, we encourage employers to re-examine their at will provisions so as to avoid the scrutiny AWI experienced in this lengthy court dispute.

### **SAME-SEX HARASSMENT CLAIM SURVIVES DISMISSAL, PROCEEDS TO JURY TRIAL**

In *Singleton v. U.S. Gypsum Company*, the plaintiff, a male, sued for sex discrimination and harassment based on the actions of male co-workers. During his employment, the plaintiff complained that two male co-workers called plaintiff “sing-a-ling” (referring to a homosexual character in a movie) and made other, more sexually explicit statements to him, and that one co-worker challenged plaintiff to a fight. Plaintiff also asserted that he complained to supervisors on several prior occasions about the co-workers’ actions, but management failed to intervene. The employer urged that the “sing-a-ling” nickname and the other alleged conduct was not sexual harassment but merely male-on-male horseplay. A California appellate court rejected this argument, holding that the alleged conduct was more than “horseplay,” and that conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. The court ruled that sexual harassment occurs whenever “sex is used as a weapon to create a hostile work environment” and ordered that the matter proceed to a jury trial to decide whether the alleged harassment in fact occurred.

## **CALIFORNIA REVISES proposed REGULATIONS ON HARASSMENT TRAINING**

The California Fair Employment and Housing Commission issued proposed regulations governing mandatory sexual harassment prevention training for supervisors. The regulations offer several important clarifications and changes to the original law:

- Employees and contractors working at different facilities, whether inside California or out-of-state, must be counted in determining whether the employer has the 50 or more employees or contractors necessary for coverage.
  - “Webinar training” (an internet-based program transmitted over the internet or intranet in real time) or “e-learning program” (an electronic but non-Web based program) must take the supervisor no less than two hours to complete.
  - An e-learning program must provide a link or directions on how to directly contact trainers or educators. The trainer/educator must respond to questions within a reasonable time, but no less than two business days after the question is asked. The program may include a “book-marking” feature that allows the supervisor to pause, and then resume the training later so long as the actual program is two hours in duration.
  - A webinar must ensure that the supervisor attends the entire training and actively participates in interactive content, discussion questions, hypothetical scenarios, quizzes or tests, and other activities. The supervisor must also have opportunity to ask questions, and the trainer must answer them.
  - Training must include questions that assess learning, skill-building activities, hypothetical scenarios, and discussion questions so that the supervisor remains measurably engaged in the training.
- Employers must document the training by including the supervisor’s name, date of training, the type of training, and the name of the trainer, educator or instructional designer. Employers must retain such documentation for a minimum of two years.
  - Employers that expand to 50 employees/contractors must begin training within six months after reaching the threshold.
  - For newly-hired supervisors who received the requisite training with a prior employer within the previous two years, a new employer is not required to re-train the supervisor. It need only give the supervisor a copy of the employer’s anti-harassment policy, and secure the supervisor’s acknowledgement of having received and read the same.
  - In addition to training, the employer must provide each supervisor with a copy of the harassment policy, and require each supervisor to acknowledge receipt of, and to read the policy.

## **NEWS BITES**

In *Smith v. L’Oreal*, the California Supreme Court held that an employer must pay employees hired for temporary and specific job assignments upon conclusion of the assignment. L’Oreal hired plaintiff as a model for a hair-styling show and agreed to pay her \$500 for the one day’s work. However, L’Oreal waited two months to pay her. Plaintiff sued for the unpaid wages and “waiting time” penalties for failure to pay wages due upon termination. L’Oreal argued that the penalty did not apply because plaintiff was not terminated; rather, her employment ended upon completion of the agreed assignment. Rejecting this argument, the court held that the obligation to pay wages (and liability for attendant penalties) are triggered when an employee is released after completing the specific job assignment, or the end of the specific time for which the employee was hired.

In *Dark v. Curry County*, the Ninth Circuit reversed the dismissal of an epileptic, heavy-equipment operator's failure to accommodate him because the employer failed to consider a reassignment or leave of absence while the plaintiff adjusted to new medication. Following a seizure by the plaintiff, the employer requested a medical examination that confirmed the employee should not work around moving equipment. The employer rejected plaintiff's request for either reassignment or a leave of absence, and discharged him on the ground that he could not perform essential job functions without posing a threat to safety. Reversing dismissal in the employer's favor, the court held that a jury must decide whether the employer properly engaged in the interactive process before rejecting plaintiff's suggested accommodations.

The FMLA requires employers to give employees 15 days to provide medical certification of the need for leave after the employer requests such certification. In *Killian v. Yorozu Auto. Tenn Inc.*, the Sixth Circuit held that the employer violated FMLA by terminating plaintiff for failing to provide certification only six days after its request for certification. Plaintiff, a welder, received time off for surgery. During the surgery, the physician discovered that the condition was more serious than originally thought. Plaintiff then verbally contacted the employer and requested a leave extension. The employer asked for certification, which plaintiff did not immediately obtain, believing that she had 15 days to comply. Six days later, the employer terminated plaintiff for failing to immediately obtain a certification. The court held that plaintiff's verbal request for an extension satisfied FMLA, and further held that the employee was entitled to 15 days to furnish a medical certification.

The California Supreme Court extended the state ban on recording conversations without consent to non-California residents. In *Kearney v. Salomon Smith Barney, Inc.*, California customers of a nationwide stock brokerage firm complained that the company recorded their telephone conversations without their knowledge or consent. The company defended by arguing that the California prohibition on such recording did not apply to conduct occurring in Georgia (where such recording is lawful). Rejecting the argument, the court held that California law applied, and that plaintiffs would be allowed to proceed with their action for injunctive relief (*i.e.*, to stop future recording), but would not be allowed to sue for money damages.