



FENWICK & WEST LLP

Weekly Employment Brief

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Corporate Restructuring Not A Reasonable Accommodation Under FEHA

A California court recently held that an employee's request for accommodation of her disability, which would have required her employer to either terminate a supervisor or carry out a substantial corporate restructuring, was both unreasonable, and an undue hardship on the employer.

In *Ceazan v. Saint John's Hospital*, plaintiff Barbara Ceazan served as a hospital nursing staff manager/“team leader.” Ceazan found her supervisor, a hospital vice president, to be harsh and belligerent, so much so that Ceazan resigned from her role as team leader, but remained an employee. Thereafter, Ceazan and the hospital argued about the hospital’s reduction of her pay grade after she shed her team leader role. As a result, Ceazan became increasingly depressed and she took a leave of absence. When cleared to return to work, Ceazan demanded that, as an accommodation for her emotional problems, she not report to the vice president, or that the hospital install a new supervisor between Ceazan and the vice president. The hospital rejected these requests, for they would have required the creation of a new position, or an alteration to the chain of command, or the termination of the vice president. As an alternative, the hospital offered Ceazan a non-managerial position.

Ceazan rejected the offer, resigned and sued the hospital for failure to accommodate under the California Fair Employment and Housing Act (“FEHA”). A lower court dismissed Ceazan’s accommodation claims, and a court of appeals affirmed, holding that Ceazan’s requests were not reasonable. Moreover, even if the requests could be deemed reasonable, they would have imposed an undue hardship – an affirmative defense to a failure to accommodate claim – on the hospital.

This decision further clarifies the boundaries regarding employer duties to accommodate disabilities. Employers are not necessarily obliged, under federal or state disability law, to agree to the precise accommodation an employee recommends, or to implement accommodations that will create an undue hardship. Also, where multiple alternative reasonable accommodations exist, the employer (not the employee) gets to choose which accommodation will be provided. However, the reasonableness and undue hardship analysis are very fact-specific in nature, and employers must analyze each matter on a case-by-case basis.

Unequal Pay For Employees With Similar Titles Is Permissible Where Duties And Skill Levels Differ

The Eighth Circuit Court of Appeals (encompassing Minnesota and other Midwestern states) held that a salary disparity between employees with similar titles but different responsibilities was lawful under the federal Equal Pay Act and Title VII.

In *Horn v. University of Minnesota*, plaintiff David Horn applied for and was hired as the “Second Assistant” hockey coach for the University of Minnesota. The University hired Elizabeth Witchger as the “First Assistant.” Despite the different titles, the University posted only one job description when it advertised for the two positions, except that Witchger’s position called for a higher salary and a longer contract. Both coaches shared a number of basic duties such as organizing daily practices and developing game plans. However, Witchger also served as the team’s external liaison and administrative assistant – duties Horn did not carry out. When Horn learned of the salary disparity, he sued the University, alleging that he and Witchger occupied the same basic positions, and that the school violated the Equal Pay Act and Title VII by failing to pay him a comparable salary.

Upholding a federal district court's dismissal of the action, the Eighth Circuit concluded that Witchger not only possessed distinct duties, but that she carried out those duties by using skills and experience Horn did not possess. In light of this evidence, the positions were not substantially equal as required by the Equal Pay Act and Title VII. Therefore, despite the similar job titles, the University was not required to compensate the positions equally.

This decision confirms that employers may not justify pay differentials based solely on distinct position titles or descriptions. They must analyze the actual duties and responsibilities of potentially similar positions to ensure they are complying with state and federal equal pay obligations.

Written Policies And Prior Discipline of Harasser Fail To Insulate Employer From Sexual Harassment Claim

An Illinois federal district court recently held that an employer's written policies regarding sexual harassment and complaint resolution, and its prior discipline of the plaintiff's harassing manager, were insufficient to dismiss a sexual harassment claim.

In *Koerber v. Journey's End*, the Annex Lounge hired plaintiff Karen Koerber as a waitress. The Annex failed to inform Koerber of any policy against sexual harassment; it provided no sexual harassment training; and it never explained its "open door" policy by which employees could voice concerns about workplace problems. The Annex also neglected to inform Koerber that her manager, Ernie Young, was working under a "last chance" agreement whereby any future harassment by Young would result in his immediate termination (Young previously harassed another female employee). During Koerber's employment, Young harassed her and engaged in sexually lewd behavior. Koerber's complaints were ignored, therefore she filed suit against for sexual harassment.

The court found that Young's behavior subjected Koerber to a hostile work environment. In response, the Annex asserted that: (i) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (ii) Koerber unreasonably failed to take advantage of any preventative or corrective opportunities. However, the court held that the Annex failed to present sufficient facts to establish the defense as a matter of law. Specifically, the court found that the Annex's complaint resolution policy was not posted in writing and not distributed to employees. Further, the company's equal employment opportunity poster did not contain notices about employee rights concerning sexual harassment. Finally, the court found that the prior written warning issued to Young did not establish the first prong of the affirmative defense, because the Annex failed to adequately investigate the prior harassment complaints against him.

Although the affirmative defense asserted by the Annex is not available as a complete defense to California employers for claims of harassment by a supervisor, it may be asserted as a means to limit the plaintiff's damages. In all events, this decision confirms that employers must support the defense with persuasive evidence that they are taking proactive steps to publicize and implement harassment prevention policies. Written policies that are not communicated and which do not reflect actual practice, and half-baked efforts to investigate prior harassment claims, will not suffice.

Ninth Circuit Limits Employer's Ability To Inquire Into Immigration Status

The Ninth Circuit Court of Appeals refused to allow an employer to inquire into a plaintiff's immigration status during discovery in a discrimination lawsuit. In *Rivera v. NIBCO, Inc.*, the Ninth Circuit found that such an inquiry during a Title VII/FEHA case would chill legitimate discrimination claims by undocumented workers. The court recognized that, by revealing their immigration status,

plaintiffs found to be undocumented aliens might face criminal prosecution and deportation. This harsh reality, the court observed, could dissuade many individuals from filing potentially legitimate discrimination claims.

The court also observed (but did not hold as a matter of law) that a successful plaintiff, even if an undocumented alien, might still be able to recover back pay from an employer that violated Title VII, and it suggested that prior decisions that precluded illegal aliens from recovering on claims for wrongful discharge because of their illegal status may no longer be good law.

This decision has significant implications for California employers. First, this case may persuade employee-friendly California state courts to limit the scope of discovery as to an individual's immigration status. Employers are best served confirming a new employee's eligibility for employment in the United States on the employee's first day of employment.

COMING NEXT WEEK: A REVIEW OF THE U.S. DEPARTMENT OF LABOR'S NEW RULES ON WHITE COLLAR OVERTIME EXEMPTIONS!

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