FENWICK & WEST LLP

Weekly Employment Brief

June 4, 2001 | Allen Kato | Contributor | 415.875.2464

Free Speech Trumps Union's Right of Privacy

The chief negotiator for a school-teachers union uses a cell phone to discuss sensitive contract negotiations, including strike strategy, with the union president. The call is intercepted, taped and subsequently broadcast on the radio. Has the radio station violated the union's right of privacy? The U.S. Supreme Court in *Bartnicki v. Vopperheld* that free speech trumped privacy concerns and permitted the broadcast. It was unclear who had taped the conversation. The head of a local taxpayer's organization found the tape in his mailbox. He provided it to a radio commentator. The court opined that while the stranger acted unlawfully in intercepting and taping, the radio commentator did not violate the law in obtaining the tape. Because the conversation was a matter of public concern (*i.e.*, a possible public school teachers' strike), the media's right to free speech overrode the union's right of privacy.

Firing Employee Who Reported Employer to the INS is a Wrongful Discharge

An employee has reported your company to the federal Immigration and Naturalization Service as employing undocumented aliens. Does the employer risk violating a state public policy by discharging the employee? According to the California Court of Appeal in *Jie v. Liang Tai Knitwear Co., Ltd.*, discharging the employee in retaliation would constitute a wrongful discharge in violation of public policy based upon the federal Immigration Reform and Control Act. The court rejected the employer's argument that federal IRCA preempted a state tort cause of action for wrongful discharge ruling that allowing the state tort claim was consistent and not in conflict with federal law.

California's Broader Definition of "Disability" to Apply Only Prospectively

In a technical but important decision favorable to employers, the California Court of Appeal in *Colmenares v. Braemar Country Club, Inc.* ruled that California's broader definition of "physical disability" applies only prospectively and not to cases pending before the new law went into effect. Plaintiff had admitted that his disability was not "substantially" limiting to his work. However, he sought to rely on new section 12926.1 to the FEHA that this year broadened the definition of physical disability beyond the federal ADA to include limitations on a major life activity albeit not a substantial limitation.

Cal Supremes to Decide When the Clock Starts Ticking in a "Continuing Violation" Case

Plaintiff asserts she held off suing her employer for discrimination until she had no other choice. In *Richards v. CH2M Hill*, the California Supreme Court is set to rule on whether Richards sat on her rights and may not recover for actions that occurred years before she filed suit. The so-called "continuing violation" theory is often used by plaintiffs to recover for such long-ago conduct on the theory the past actions were part of a course of conduct that continued into the present. Between the time Richards was diagnosed with multiple scleroris and, according to plaintiff, repeatedly denied reasonable accommodations, five years had passed before she filed a complaint with the state FEHA. The employer has urged that the clock started ticking when plaintiff knew or should have known that a violation occurred.

Plaintiff not Faulted for EEOC's Dilatory Conduct

Imagine plaintiff filing a timely complaint of discrimination with the federal EEOC, receiving a right-to-sue letter four years later, and filing a lawsuit within 90 days in federal district court. Should the Rip Van Winkle lawsuit be dismissed as time barred? The Third Circuit Court of Appeals in *Burgh v. Borough Council* held no, that plaintiff would be allowed to pursue his discrimination suit because the original charge of discrimination was timely filed, and he also filed his lawsuit within the required 90 days of receiving his right-to-sue letter. The court opined that the agency delay in processing the charge could not be held against the plaintiff despite his not having pressed the matter for those four intervening years.
