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Weekly Employment Brief

July 1, 2002

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U.S. Supreme Court Does Not Disturb Ruling that Gives Nonunion Employees the Right to Have Coworker Present at Investigatory Interviews

The U.S. Supreme Court recently declined to review a federal appellate court decision that held that employers must honor nonunion employees' requests that a coworker accompany them in investigatory interviews that may result in discipline. In *Epilepsy Foundation of Northeast Ohio v. NLRB,* an employee who was asked to attend a disciplinary meeting refused to attend the meeting unless a fellow employee could accompany him. The employer refused to honor the request, ordered the employee home, and fired him the next day. The employee sued, alleging that the employer violated his "Weingarten rights," which give union members the right to request that a coworker be present at any investigatory interview that is likely to lead to disciplinary action. The Supreme Court's decision to let stand the appellate court decision that had extended those rights to nonunion members may signal the Court's approval of the right of all employees to have an employee accompany them in investigatory interviews. Accordingly, employers should carefully consider whether a particular meeting with an employee constitutes an "investigatory interview" before denying an employee's request to have a coworker present at the meeting.

California Supreme Court Holds that FEHA Does Not Prevent Age Bias in Provision of Benefits

While FEHA prohibits age discrimination in hiring, discharge, suspension and demotion, the California Supreme Court recently held that it does not prohibit age bias in the provision of employee benefits. In *Esberg v. Union Oil Co.,* the employer denied a 56-year-old employee's request for tuition assistance benefits, because the employee was "too old to invest in." The Supreme Court noted that the language in FEHA which prohibits discrimination in the providing of employee benefits does not include age as a protected category. In addition, the FEHA section that addresses age discrimination notably omits mention of employee benefits. The Court refused to read into the law a prohibition of age bias in the granting of employee benefits. This ruling likely will have limited impact, as the federal age discrimination statute extends its prohibition of discrimination to the terms and conditions of employment, so such benefits cases may proceed in federal court. Also, the California legislature is currently considering a bill (AB 1599) that would reverse the impact of the Esberg decision. Thus, despite this ruling, employers should continue to treat their employees and applicants equally when providing educational opportunities and other benefits.

California Legislature Considers Anti-Arbitration Measures

The California Assembly and Senate Judiciary Committee have approved laws that, if passed by the full State Senate and signed by Governor Davis, could significantly impact arbitration of employment disputes. Under AB 3029, if an arbitration agreement designates a particular arbitrator or private arbitration company, or specifies that the rules of a private arbitration company will govern any disputes, the employee may choose a different arbitrator or private arbitration once a dispute arises. Significantly, the employer would have absolutely no input into this selection process. In addition, arbitration agreements would need to inform employees of their right to choose a different arbitrator, or they will be unenforceable. Although it is unclear to what extent this bill may be found to be preempted by the Federal Arbitration Act, the bill would force employers to rewrite their arbitration agreements and reconsider whether to continue arbitration programs at all. The other bill, AB 3030, would expose private arbitration companies to liability for the actions of arbitrators taken in connection with an arbitration. Such a bill could cause private arbitration companies to reconsider the wisdom of doing business in California. Stay tuned to future **W.E.B. Updates** for information on the progress of these bills.

Federal Court Holds Employer Automatically Liable for Quid Pro Quo Sexual Harassment

An employer is automatically liable where a supervisor conditions decisions affecting an employee's employment on the employee's submission to sexual demands, even where the employer shows that it exercised reasonable care to prevent and correct the offending behavior. In *Jin v. Metropolitan Life Insurance Co.,* an employee sued claiming her supervisor subjected her to crude remarks and unwanted sexual advances, and threatened to fire her if she did not submit. The jury found in favor of the employer, because it determined the employer exercised reasonable care to prevent and correct the supervisor's behavior and the plaintiff did not suffer a tangible employment action. In overturning the jury verdict, the Second Circuit ruled that the supervisor's conduct—classic quid pro quo sexual harassment—automatically created a tangible employment action. While significant for federal sexual harassment suits, the decision changes little for California employers, who were already strictly liable for all acts of harassment by supervisors under state law.

Allowing Transgendered Employee to Use Women's Restrooms Is Not an Adverse Action Against Complaining Female Employee

A Minnesota school district's decision to allow a transgendered employee to use the women's faculty restroom was not an adverse action against another female teacher who claimed both sexual harassment and religious discrimination. In affirming the district court's decision, the Eighth Circuit court stated that in order to show she suffered an adverse employment action, the plaintiff had to establish a "tangible change in duties or working conditions that constitute a material employment disadvantage." The plaintiff's claim

failed, because the transgendered employee's use of the female staff restroom had no effect on the plaintiff's title, salary or benefits. This decision highlights the difficulties employers can sometimes face when trying to balance the conflicting interests of its employees.