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Weekly Employment Brief

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Employee May Not Be Terminated For Protected Political Speech Outside Workplace

In *Ali v. L.A. Focus Publication*, Ali worked as the community affairs columnist for a Los Angeles monthly newspaper. While a guest on a local radio show, Ali voiced his personal support for an L.A. mayoral candidate, and criticized Maxine Waters, a local U.S. Congresswoman and long- time friend of the newspaper's owner, for her support of another candidate. Waters objected to the newspaper owner, and in his efforts to appease Waters, the owner terminated Ali. Ali sued the paper for wrongful termination in violation of public policy.

Rejecting the newspaper's motion to dismiss, the California Court of Appeal ruled that Ali had properly stated a claim for violation of public policy under Labor Code §1101, which provides that an employer may not forbid or prevent employees from engaging or participating in politics. The court also rejected the newspaper's contention that Ali could not sue for wrongful termination because he was an independent contractor, not an employee. The court concluded that sufficient facts existed to permit a jury to decide the issue, including: (1) the newspaper told Ali he could not submit articles to other publications without its permission; (2) the paper required Ali to attend weekly employee staff meetings; (3) it provided him with an office, computer, his own telephone extension, and business cards that identified him as a newspaper editor and (4) it described Ali as an "employee" when it obtained a press pass for him. The newspaper relied heavily on the fact that it paid Ali by the article, rather than through a salary or hourly rate, to establish his contractor status. The court held this fact may be considered by a jury at trial, but it was not sufficient, on its own, to establish contractor status or warrant a dismissal of the claim.

This decision emphasizes the caution California employers should utilize when they attempt to restrict an employee's lawful, off-duty political activities, and when they classify workers as independent contractors.

California Mandates Domestic Partner Health Benefits For State Contractors in 2007

As one of his last acts as Governor, Gray Davis signed into law AB 17, the Equal Benefits in State Contracting Act. The law requires all employers with state contracts worth more than $100,000 to offer domestic partner health benefits to employees beginning in 2007 (and only if they currently provide spousal benefits to employees). The law applies to the contractor's employees both inside and outside California who are connected to the goods and services provided to California. For instance, as a condition of a state contract to provide California with machinery manufactured at an out-of-state factory, the contractor must provide domestic partner coverage to the non-California factory employees.

It is anticipated that lawsuits may be filed to overturn the new law as an impermissible regulation of interstate commerce. However, similar local ordinances (for instance, in San Francisco) have largely withstood legal challenge.

"Isolated" Slurs About Latinos Did Not Amount To Hostile Environment

In *Vasquez v. County of Los Angeles*, Vasquez worked as a county probation officer at a youth detention center. He experienced conflicts with his supervisor Berglund, culminating in an incident where, according to Berglund, Vasquez allowed the youth to play football in violation of facility policy. Vasquez claimed Berglund gave permission so long as it was only touch football. The employer issued Vasquez a written warning and transferred him to a field position. Vasquez sued alleging racial harassment in violation of Title VII based upon two comments by Berglund, six months apart, that Vasquez has a "typical Hispanic macho attitude," and that Vasquez should consider transferring to the field because "Hispanics do good in the field."

Affirming summary judgment for the employer, the federal Ninth Circuit Court of Appeals (covering California) held that the above events were not "severe or pervasive enough to violate Title VII." One judge, however, strongly dissented on that basis that these "blatant" racial comments directed at Vasquez were severe enough to permit the case to proceed to a jury trial. Despite this good result, employers should be mindful that this case went all the way to a federal appellate court to be resolved. It is far better to prohibit and immediately stop any incidents of racial comments in the workplace, rather than to be forced to litigate these issues.

News Alert: Job Growth Sign Of Growing Economy

The U.S. Government reported that employers added 126,000 jobs in October and that the nationwide unemployment rate dropped to 6%. Although the unemployment rate in the Bay Area continues to exceed

the national rate, the addition of jobs generally throughout the country is a positive development. We encourage employers who may be in (or considering) a hiring phase to carefully review their hiring policies and practices to ensure that employment applications, offer letters, etc. are compliant, and that hiring managers are trained to avoid unlawful interview questions.