Fenwick Employment Brief

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COURT SHEDS LIGHT ON EVIDENCE NEEDED TO ESTABLISH HOSTILE WORK ENVIRONMENT HARASSMENT

A California court of appeal recently clarified which kinds of conduct will support a hostile work environment harassment claim under California's Fair Employment and Housing Act (FEHA). In *Roby v. McKesson*, the court found insufficient evidence to support a jury's finding of harassment based on disability, and struck the verdicts against the defendants for harassment.

Charlene Roby worked for McKesson for 25 years and was regarded as a stellar employee until she developed a debilitating panic disorder in 1998. As a result of her disability, Roby suffered severe panic attacks which, along with her trips to her psychiatrist, caused her to miss several days of work. Roby's already strained relationship with her supervisor, Karen Schoener, worsened as Schoener reprimanded Roby for missing work and threatened to terminate her for excessive absenteeism.

Roby alleged that Schoener unfairly singled her out because of her disability. To that end, Roby produced evidence at trial that other employees were allowed to miss work for medical reasons without adverse consequences. Roby also presented evidence that Schoener went out of her way to exclude and humiliate Roby. For example: (1) every month Schoener would leave a McDonald's apple pie at the desk of each employee except Roby; (2) when Schoener would return from vacation she would bring a small gift for every employee except Roby; (3) during the company Christmas party, Schoener required Roby to answer the phones instead of reveling with her coworkers; (4) Schoener referred to the physical side effects of Roby's disability as "disgusting"; (5) Schoener would purposely ignore Roby at staff meetings; and (6) when the medication Roby took for her disorder caused Roby to develop an offensive body odor, Schoener told Roby to bathe and shower more frequently.

Eventually Schoener fired Roby for excessive absenteeism, and Roby sued McKesson and Schoener for discrimination and harassment. A jury found in favor of Roby on the harassment claim as to both defendants. The defendants then appealed, claiming that there was insufficient evidence of hostile work environment harassment.

The court of appeal focused on the distinction between conduct that constitutes impermissible discrimination and conduct that constitutes harassment. The court observed that actions necessary to carry out the duties of business and personnel management (*e.g.*, selection of duties and employee reprimands) can be found to be discriminatory but cannot be the basis for a harassment claim. Although the court did not find that Schoener's actions were "necessary" for the performance of her duties, it did find that most of the actions Roby complained of bore a "reasonable relationship" to Schoener's management duties and that Schoener's treatment of Roby—with general scorn and contempt and failure to show sympathy for her disability—was not sufficient to trigger liability for hostile work environment harassment under FEHA. Accordingly, the court struck the harassment verdict against both Schoener and McKesson, and reduced the punitive damages assessed against McKesson.

The court's application of a "rational relationship" test rather than a "necessary to carry out duties" test is arguably a departure from well-established California Supreme Court precedent. And, the *Roby* decision is unique to its facts. As a result, employers are cautioned not to over-emphasize the significance of this decision in carrying out their duties to prevent discrimination and harassment in the workplace. Nevertheless, the *Roby* decision provides helpful guidance regarding the distinctions between unlawful discrimination and harassment, and the kinds of evidence needed to support such claims.

COURT CLARIFIES BURDEN OF PROOF FOR USERRA DISCRIMINATION/RETALIATION CLAIMS

The First Circuit Court of Appeal recently clarified the burden of proof employees and employers bear in connection with discrimination and retaliation claims under the Uniform Services Employment and Redeployment Rights Act of 1994 (USERRA), and thereby aligned itself with all other federal courts of appeal that had previously considered the issue.

Plaintiff Velázquez-García worked as a marine supervisor for Horizon Lines of Puerto Rico. In December 2002, Velázquez enlisted in the U.S. Marine Corps Reserves. During Velázquez's military service, Horizon continued to pay Velázquez his full salary, and adjusted his work hours to accommodate his military training. However, Velázquez contended that his superiors complained about and pressured Velázquez regarding

the shift modifications. Velázquez also claimed he was taunted by other Horizon employees for his military service.

In September 2004, Horizon terminated Velázquez after a supervisor discovered that Velázquez was operating a side business cashing payroll checks for Horizon employees, in violation of Horizon's Code of Conduct. Velázquez sued, claiming that Horizon fired him because of his military service. The trial court dismissed the claim, finding that Velázquez failed to show a discriminatory motive for his firing or that Horizon's stated reason for his firing - the Code violation - was pretextual. The First Circuit reversed, and sent the case back for trial.

The court held that, under USERRA, employees need only prove that discrimination was "a [not the] motivating or substantial factor" in the discriminatory treatment. The employer must then prove that the discriminatory action would have been taken even absent the employee's military service. The court found that Velázquez offered sufficient evidence to allow a jury to determine whether Horizon fired him because of his service. The court also held that the trial court incorrectly required Velázquez to prove that Horizon's stated reason for termination was pretextual.

Employers should note the distinction between the burden of proof for claims under USERRA and Title VII (where the employee bears the burden to prove that the employer's proffered reason is pretextual).

NEWS BITES

Court Upholds Government Search of Employee's Workplace Computer and Rejects Privacy Claim

After rehearing *U.S. v. Ziegler*, a case involving an employer giving police access to an employee's workplace computer containing evidence of child pornography, (originally reported here), the Ninth Circuit Court of Appeals once again held that an employee had no reasonable expectation of privacy in his workplace computer. Because the company had a widely known monitoring policy, the employee could not reasonably have believed his computer was his personal, private space, and therefore privacy rights did not attach.

FAQs Clarify Ambiguities with San Francisco's Paid Sick Leave Law

In December, we summarized the San Francisco paid sick leave ordinance (reported here). San Francisco's Office of Labor Standards Enforcement has issued a FAQ list providing helpful clarification on key aspects of the ordinance. The FAQ is available at http://www.ci.sf.ca.us/site/olse_index.asp?id=54150.

Schwarzenegger Attempts to Resurrect IWC

When Governor Schwarzenegger introduced his budget proposal in early January he included a line-item to fund the Industrial Welfare Commission ("IWC"). The IWC had been dormant since 2004 when the State Legislature stopped funding the IWC over, in part, the IWC's failure to consider a minimum wage increase. It is unclear what agenda, if any, the Governor has in mind for the IWC should it receive the funding he proposes.

Damages in Disability Case Reduced from $20 Million to $1.25 Million

In *Valladares v. Madera Quality Nut*, a Madera County, California judge drastically reduced a jury's punitive damages award in favor of two plaintiffs. The jury had returned a verdict in favor of the plaintiffs' disability claims, with an award of $200,000 in compensatory damages and $20 million in punitive damages. Letting the compensatory damages award stand, the judge ruled that the verdict was "clearly excessive under constitutional standards." The judge's ruling reduced the ratio of punitive damages to compensatory damages from 100:1 to approximately 6:1, which the judge found was the maximum ratio supported by the facts.

NLRB Seeks Input on Employee's Use of Company E-mail Systems for Union Organizing Activities

In a rare move, the National Labor Relations Board ("NLRB") has scheduled oral argument in a group of related cases, and will focus on what rights, if any, employees have to use company e-mail and other computer-based communications systems to engage in union or other concerted, protected activities.

California Minimum Wage Increased to $7.50 per Hour, Effective January 1, 2007

As a reminder, California's minimum wage has increased from $6.75 per hour to $7.50, effective January 1, 2007. As a result, the minimum salary thresholds for the administrative, executive, professional and inside sales overtime exemptions must be adjusted accordingly. A further minimum wage increase to $8.00 per hour will take effect on January 1, 2008.

Also effective January 1, 2007, the state's Computer Professional exemption's minimum hourly rate rose to $49.77 per hour.