



FENWICK & WEST LLP

## Fenwick Employment Brief

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### **California Court Refuses to Dismiss Retaliation Claim, Even Though Decision-Maker Was Unaware of the Terminated Employee's Protected Activity**

In a case that narrowed the ignorance defense to retaliation suits, a California court recently held that ignorance of a worker's protected activity or status is not a defense to a retaliation claim unless lack of knowledge extends to all corporate actors who materially contribute to the adverse employment decision. In *Reeves v. Safeway Stores*, William Reeves, a Safeway food clerk, sued Safeway alleging retaliatory discharge after Reeves raised concerns about claims of sexual harassment made by fellow employees. Shortly after raising his concerns, Reeves was involved in an altercation with a fellow employee. Reeves' supervisor, who had been involved in the underlying harassment allegations, instructed Safeway's security department investigate Reeves involvement in the altercation. After conducting an investigation, Safeway's investigator recommended to a district manager that Safeway terminate Reeves for violating the company's policy against workplace violence. The district manager agreed and decided to terminate Reeves. Although Reeves had mentioned to the investigator that he had previously raised concerns about purported sexual harassment, the district manager never knew that Reeves had previously raised such complaints. The trial court granted Safeway's motion to dismiss on the ground that Safeway had a legitimate reason for the discharge which Reeves could not show to be retaliatory because the ultimate decision-maker was unaware of the prior sexual harassment complaints. The Court of Appeals reversed, finding that where

the supervisor's retaliatory motive could have been an actuating, but-for cause of the discharge, the employer may be liable for retaliatory discharge. The court emphasized somewhat critically that: (a) the supervisor chose not to involve Safeway's human resources department in the matter; (b) the supervisor implied to the investigator that Reeves was in fact guilty of misconduct; and (c) there were signs that the investigator was immediately inclined to agree with the supervisor's initial suggestion that Reeves had engaged in misconduct. The court required that Safeway make a showing that all material contributors to the discharge decision acted for legitimate nondiscriminatory reasons; ignorance of Reeves' protected activity by the ultimate decision-maker was by itself insufficient to show that Reeves' discharge was not caused by his complaints of sexual harassment. This case illustrates the importance of creating "laboratory conditions" for misconduct investigations, including selection of an unbiased investigator who has no allegiance to, and whom cannot be influenced by, any party with an interest in the outcome of the investigation; involvement of human resources professionals to ensure compliance with investigatory best practices; ensuring that there are no pre-determined results to the investigation; and ensuring a full and impartial investigation that considers all available proof.

### **Court Allows USERRA Suit Against Employer to Proceed**

A federal district court in South Dakota recently allowed an employee to proceed with a claim against his employer that the company failed to restore his job

upon his return from military leave, despite the fact that the employer rehired the employee a few months later. In *Vander Wal v. Sykes*, Plaintiff Ron Vander Wal, a member of the South Dakota National Guard, was called to active military service overseas in January 2003. Prior to leaving for duty, Vander Wal informed Sykes Enterprises that his military duty would last until June 2004. However, Vander Wal returned to the United States on March 23, 2004, and on March 31 notified Sykes he would be available to return to work on May 4, 2004. Vander Wal's subsequent April 6 and April 23 inquiries to Sykes regarding his reemployment received no response. Accordingly, on April 28, Vander Wal filed suit alleging Sykes refused to rehire him in violation of the Uniform Services Employment and Reemployment Rights Act (USERRA). However, the following day, Sykes corresponded to Vander Wal to advise him to report to work on May 4, 2004. Vander Wal nevertheless persisted with his suit to recover damages for harm suffered by him from March 31 (the day he reapplied for employment) through May 4 (the date he was told to report to work). Sykes moved to dismiss on the grounds that Vander Wal's case was moot due to his re-employment with the company. The Court denied Sykes' motion to dismiss, finding that, while Sykes mitigated its liability by rehiring Vander Wal in May, Vander Wal's rehiring did not erase the harm suffered by him between the date he reapplied at Sykes and the date he began working. This case highlights the importance of ensuring compliance with USERRA and dealing with employees returning from military service in a prompt and fair manner.

### **Jury Awards \$19 Million to California Employee Discharged for Missing Work Due to Panic Attacks**

A California jury recently awarded \$19 million in damages to a Sacramento woman whose employer terminated her due to extensive absences caused by panic attacks. In *Roby v. McKesson HBOC*, Charlene Roby was discharged for excessive absenteeism after a 25-year career with McKesson. Roby alleged that her absenteeism was caused by a panic attack condition, a condition that worsened after her supervisor harassed her for her frequent absences. Roby argued that McKesson's "no fault" attendance policy, which punished unscheduled absences regardless of the reason for the absence, gave managers overbroad powers in interpreting and enforcing the policy. Roby alleged the rigid use of the "no fault" attendance policy in her case violated state and federal laws protecting against disability discrimination and guaranteeing employees' medical leave when needed. The jury found for Roby and awarded her \$1.3 million in economic losses, \$2.2 million in noneconomic damages and \$15 million in punitive damages. The jury also awarded Roby \$500,000 against her manager individually. This case highlights the importance of retaining flexibility in policies to accommodate employees with medical disabilities where necessary, and the importance of engaging interactively with employees to discuss potential reasonable accommodations. This case also reminds managers that they may also face exposure for non-compliance with employment laws.