FENWICK & WEST LLP

Fenwick Employment Brief

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Shawna Swanson	Editor	415.875.2487
Saundra L. M. Riley	Contributor	650.335.7170
Patrick Sherman	Contributor	650.335.7224
J. Carlos Orellana	Contributor	650.335.7234

REFUSAL TO FOLLOW SUPERVISOR'S DISCRIMINATORY ORDER IS PROTECTED ACTIVITY UNDER FEHA

The California Supreme Court recently held that an employee's refusal to follow a supervisor's order that the employee reasonably believes is discriminatory—even absent a formal complaint—is a protected activity under the California Fair Employment and Housing Act (FEHA) that can serve as the basis for a retaliation claim.

In *Yanowitz v. L'Oreal USA, Inc.*, plaintiff Elysa Yanowitz refused to follow her male supervisor's order that she fire a female subordinate because, in the supervisor's view, the subordinate was not sufficiently "hot." Yanowitz did not expressly state she believed the order to be discriminatory and did not report the incident to L'Oreal's Human Resources Department. Yanowitz argued that the supervisor sought to undermine her position at L'Oreal and with customers in retaliation for her refusal to carry out the termination order.

Employers may not retaliate against employees who oppose acts that are unlawful under FEHA. To establish a retaliation claim, the employee must show that she engaged in protected activity and suffered an adverse employment action as a result. The supreme court did not squarely address whether the supervisor's order—to terminate an employee because she was not good-looking enough—constitutes unlawful sex discrimination. However, the court did rule that an employee's refusal to carry out an order the employee reasonably views as discriminatory is a protected activity "when the employer, in light of all the circumstances, knows that the employee believes the order to be discriminatory," even when the employee does not explicitly communicate such belief.

Employers are encouraged to evaluate the circumstances surrounding an employee's refusal to carry out an order to ensure the refusal would not be considered protected activity.

CALIFORNIA STANDARD TO PROVE DISABILITY DISCRIMINATION ADDRESSED

Until recently, to prove a *prima facie* case of disability discrimination in California, a plaintiff needed to demonstrate: (i) plaintiff suffers from a disability; (ii) plaintiff is a qualified individual; and (iii) plaintiff was subjected to an adverse employment action because of the disability. Two recent holdings may alter these requirements.

In *Green v. State of California*, plaintiff Dwight Green suffered from Hepatitis C. At the request of his doctor, Green's employer placed him on light duty. Ultimately, after several complications from treatment and a separate back injury, Green's employer denied his request to return to his original position. Instead, management completed a disability retirement application on Green's behalf, effectively forcing Green's retirement. Green sued for disability discrimination and the jury found for Green. In affirming the jury's determination a California appellate court held that Green did not have to prove his capacity to perform essential duties of the job—that is, element (ii) of the prima facie case. Rather, the Court held that to

defeat a disability discrimination claim, the **employer** must prove that a plaintiff cannot perform his duties with reasonable accommodation. Due to the split in California authorities, the California Supreme Court may review this issue in the near future. In the meantime, it is critical for employers to maintain sufficient documentation (separate from a personnel file) to prove an employee's inability to perform essential functions of the position, even with reasonable accommodation.

In a separate case, the Ninth Circuit recently held that: (1) reading is a major life activity under the Americans with Disabilities Act; and (2) to prevail in a discrimination action, an employee merely needs to show that a disability was a motivating factor rather than the sole factor in the company's adverse action. In *Head v. Glacier Northwest*, plaintiff Matthew Head suffered from depression. This impaired his ability to read, among other difficulties. Sometime after his diagnosis, Glacier Northwest terminated Head's employment, purportedly for getting a loader stuck in the mud. Head sued, alleging Glacier Northwest terminated his employment in part due to his disability. In a case of first impression before the Ninth Circuit, the Court held that reading is a major life activity under the ADA because of its central importance to most people's daily lives. Therefore, an individual is disabled if the ability to read is substantially limited (in California, an individual may be disabled if the ability to read is merely "limited"). The Court further held that Head did not need to prove Glacier Northwest terminated his employment "because" he was disabled. Rather, it was sufficient for Head to prove his disability was a "motivating factor" in his termination. Although California follows the "because of" standard, employers are cautioned to ensure that an employee's disability does not play any unlawful role in adverse employment actions, particularly because many federal courts are shifting to the employee-friendly "motivating factor" standard of proof.

RELEASE OF FMLA CLAIMS VOID ABSENT PRIOR DOL OR COURT APPROVAL

The Fourth Circuit Court of Appeals (encompassing Maryland and other mid-Atlantic states) recently held an employee's general release of claims unenforceable as to Family and Medical Leave Act ("FMLA") claims where the release is not pre-approved by a court or the federal Department of Labor ("DOL").

In *Taylor v. Progress Energy, Inc.*, plaintiff Barbara Taylor sued Progress Energy, the parent of her employer Carolina Power and Light Company ("CPL"), for improperly denying her requested FMLA leave and unlawfully terminating her for exercising FMLA rights. In connection with her termination, Taylor received severance and signed a general release of claims (which purported to cover FMLA claims). Nevertheless, she later sued CPL for alleged FMLA violations.

The Fourth Circuit held that, pursuant to DOL regulations, employees may settle or waive FMLA claims *only* with the advance approval of the DOL or a court. Because Taylor's release was not approved, it was not enforceable as to her FMLA claims.

It is not clear whether federal and state courts in California will follow this decision. Indeed, at least one other federal appellate court reached the opposite conclusion, which suggests that the U.S. Supreme Court may later resolve the split of authority. Nevertheless, employers should proceed cautiously when entering into a release of claims with employees who have raised or could raise FMLA claims and should discuss the potential limitations of such a release with counsel.

RETRIEVAL OF FAMILY VEHICLE NOT FMLA-PROTECTED ACTIVITY

The Ninth Circuit Court of Appeals (encompassing California and other Western states) recently held that an employee's cross-county trip to retrieve a family vehicle he claimed he needed to take care of his

pregnant wife failed the "caring for" requirement under the Family and Medical Leave Act ("FMLA").

In *Tellis v. Alaska Airlines, Inc.*, plaintiff Charles Tellis sued his employer, Alaska Airlines, for allegedly violating the FMLA when it terminated him for unauthorized work absences. Tellis requested time off to care for his wife, who was having a difficult pregnancy. Tellis requested, and Alaska sent to him, the necessary FMLA leave request forms. However, Tellis did not complete the forms before commencing his leave. During his leave, Tellis' car broke down, and he flew cross-country to drive another family vehicle home, regularly calling his wife from the road. When Tellis did not show up for his next scheduled shift, Alaska unsuccessfully attempted to contact him, and then terminated his employment. Tellis argued that he was on a FMLA-protected leave, in part because he offered reassurance to his wife during his long drive that the family would have a functioning vehicle. The courts disagreed.

Under the FMLA, an employee may take a leave to "care for" a family member with a serious health condition. While such care may include psychological comfort or reassurance, it must also involve **participation**—at some level—in the ongoing treatment of the condition. A federal district court concluded, and the Ninth Circuit affirmed, that Tellis did not "care for" his wife during the cross-county trip. The psychological reassurance to Tellis' wife that the family would have a working vehicle "was merely an indirect benefit of an otherwise unprotected activity—traveling away from the person needing care."

This case confirms that FMLA protections are not limitless and that the "caring for" requirement has meaning. Nevertheless, employers should carefully analyze potential adverse action against employees who return from leaves of absence that may be protected by federal or state leave laws.

DIVERSION OF BUSINESS OPPORTUNITY TO COMPETITOR BREACHES DUTY OF LOYALTY

A federal district court in New York recently held that an employee breached his duty of loyalty when he diverted a lucrative business opportunity to a quasi-competitor. In *Design Strategies, Inc. v. Davis*, plaintiff Design Strategies sued former employee Marc Davis for breach of the duty of loyalty, among other causes of action. During Davis' employment as a Sales Manager for Design Strategies, he discovered a Microsoft business venture, Contenville.com, with a value of approximately $10 million. Upon discovering this venture, Davis appropriately promoted his employer Design Strategies as a contender for the contract. Later, however, Davis altered course and promoted his employer's competitor, IT Web, for the contract. Microsoft awarded the contract to IT Web and shortly thereafter, IT Web hired Davis. The court held that Davis' advocacy of IT Web as a Microsoft partner breached his duty of loyalty to Design Strategies, particularly since IT Web and Design Strategies had competing interests. An employee has "an affirmative duty at all times to act in his employer's best interests." Although California law includes numerous protections for employees, employers need not stand idle when an employee acts in conflict to the company's best interests.