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Weekly Employment Brief

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Isolated Sexual Remark Not Necessarily Harassment

One stray remark may not be enough. The U.S. Supreme Court recently decided that a supervisor's single crude remark fell short of sexual harassment under federal law. In *Clark County School District v. Breeden*, the plaintiff was reviewing job applications with her supervisor and a co-worker. On one of the applications, an applicant admitted that at his last job he told a co-worker that "making love to [her] is like making love to the Grand Canyon." Her supervisor and co-worker laughed about the statement, and laughed at her when she said she didn't know what it meant. She complained to her employer, and a month later she was transferred to a job with less supervisory authority. The Supreme Court ruled that the supervisor's remark did not support her claim for sexual harassment, saying no reasonable person would consider that one remark to equal harassment. While this decision demonstrates that in many cases, one remark may not be enough to support a claim of sexual harassment, a well-advised employer should remember that a single especially egregious remark may be enough in some circumstances.

Wal-Mart Managers Can Go Braless

Forcing an employee to wear a bra might be a form of sex discrimination. That's what a New Jersey court has recently concluded. In *Wilson v. Wal-Mart Stores*, the employee, a Wal-Mart manager, claims she was fired from Wal-Mart because she refused to wear a bra. Her supervisor told her to wear a bra and asked her whether she would prefer to "have a job and wear a bra or not wear a bra and not have a job." The employee claims that Wal-Mart's dress code does not say anything about requirements for underwear, and feels that she should not have to wear a bra if the men don't have to wear them. The New Jersey court ruled that the employee could proceed with her discrimination suit against the store, even though Wal-Mart claims she wasn't fired for the way she dressed. This case may limit an employer's right to establish dress codes with gender distinctions.

WARN Act Back Pay Includes Tips and Vacation Pay

Up to sixty days of tips, vacation pay, and holiday pay as back wages. That's what employees are entitled to under the WARN Act, according to a recent federal court in California. In *Local Joint Executive Board of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, a Las Vegas casino told its employees that it would close the casino 45 days before the actual closing date. The notice fell 15 days short of the sixty days the WARN Act requires, and the casino owed its employees 15 days of back pay. The casino paid the employees for this time, but did not include tips, vacation pay, or holiday pay in its calculation. The federal court ruled that those items were all part of an employee's stream of income and that an employee is entitled to them under the WARN Act. Based on this decision, employers may need to change the way they calculate WARN Act payments to include these three items.

Nationwide Upsurge in Wage and Hour Class Actions

More employees are suing for overtime pay than ever before. Recently, there has been a huge upsurge in wage and hour class actions brought under the Fair Labor Standards Act and state law. Plaintiffs' attorneys across the country are challenging employers who are violating these wage and hour laws, and are

finding a lot of easy targets. Statistics from the Labor Department show that 60 to 80 percent of employers are violating federal laws requiring that covered employees work no more than 40 hours a week without overtime pay (or, in California, in excess of daily overtime requirements). Based on the recent increase in litigation, employers should carefully review their wage and hour policies to make sure they are in compliance with California and federal law.

Participation in Drug Rehab Program May Not Be Enough

Not all employees in drug or alcohol rehabilitation programs are disabled. A federal court in California recently ruled that an employee who missed work to attend her drug rehabilitation program was not protected by the Americans with Disabilities Act. In *Brown v. Lucky Stores, Inc.*, a grocery checker missed work three consecutive shifts to attend her drug rehabilitation program and was fired. Although the grocery store knew the employee wouldn't be coming into work, she never asked for an accommodation to attend the program during her shift. The Court found that the employee's drug and alcohol use was ongoing, and she had not refrained from using drugs or alcohol long enough to be protected under the ADA. This case is a reminder that while the ADA protects employees who are addicted to drugs or alcohol and are seeking rehabilitation, it may not protect every employee in a drug rehabilitation program.