FENWICK & WEST LLP

Weekly Employment Brief

May 21, 2001 Chris Scanlan Contributor

Not So Fast: California Supreme Court To Review Cases

Two controversial employment rulings from the California Court of Appeals may be headed for reversal. Last week, the California Supreme Court granted review of the appellate decisions in *Esberg v. Union Oil Co.* and *Silo v. CHW Medical Foundation*. In *Esberg*, the Court of Appeal ruled that the state law prohibiting age discrimination did not forbid an employer from allowing only younger employees to participate in tuition assistance programs. In the *Silo* case, the Court of Appeal held that an employer had a right under the state constitution to proselytize on the job—even if the employer is a religious employer that disagrees with the employee's religious views. The Supreme Court's grant of review means that the two appellate rulings may no longer be cited as precedent in California state courts.

Failure to Document Harassment Policy Leads to Trial on Effectiveness of Policy

The U.S. Supreme Court held in a pair of 1998 decisions that employers are not liable for hostile work environment sexual harassment if they can show that they have an effective policy for reporting and remedying harassment, and that the alleged victim did not report the harassment. A recent decision from a federal appeals court in Atlanta (Eleventh Circuit) emphasizes the importance of documenting the anti-harassment policy. In *Frederick v. Sprint/ United Management Company*, the court held that a trial was necessary to determine whether Sprint had adequately publicized its policy, and whether the company actually followed through on its complaint procedures. The appeals court reversed a lower court decision granting summary judgment for Sprint, finding that there were disputed facts on this issue. If the employer had better documented its compliance with the sexual harassment policy, a trial might not have been necessary on this issue.

Employers Use-And Act Upon-Surveillance

The American Management Association recently released its annual survey of surveillance in the workplace. The survey, available at http://www.amanet.org/ reports that more than 75% of employers actively monitor employees' communications, with man employers monitoring email and Internet access. Relatively few employers reported video or telephone surveillance. One-third of the responding employers stated that they have terminated employees because of information gathered through surveillance. Although employers may legally use a broad range of surveillance techniques, there are limits. In particular, employers should be cautious about audio surveillance (including telephone monitoring and tape recording), which is heavily regulated under state and federal laws. For all forms of surveillance, employers are advised to warn employees in advance that they are subject to monitoring.

Employees Can Give Less Than 100%

"Be All That You Can Be" may have been the Army's marketing slogan, but other employers may want to think twice before asking their injured employees to give their all. This is the lesson of a recent case decided by the U.S. Sixth Circuit Court of Appeals (Kentucky). In that case, *Henderson v. Ardco Inc.*, the employer insisted that injured employees recover

"100%" from their injuries before returning to work. In some states, this requirement might not violate worker's compensation laws. However, the federal appeals court held that the "100%" rule violated the Americans with Disabilities Act, because it discriminates against employees "regarded as" disabled. The court remanded the case for a trial. Employers should be aware that many states' disability laws provide injured employees with many more protections than worker's compensation laws.