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Weekly Employment Brief

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Self-Defense To Workplace Brawl Not A Basis for Public Policy Claim

In *Escalante v. Wilson's Art Studio,* a California court of appeal held that an employee terminated for defending himself in a workplace brawl initiated by another employee could not maintain a claim against his former employer for wrongful termination in violation of public policy. During a shift, Hector Escalante was attacked without provocation by a co-worker. Rather than flee the scene, Escalante defended himself by rushing and tackling the assailant. Wilson's Art Studio terminated Escalante because he chose to engage his assailant rather than leave the scene and avoid further confrontation, a decision with which his employer did not agree. Escalante sued for wrongful termination in violation of public policy, on the theory that he was terminated for exercising his constitutionally and statutorily guaranteed right of self defense. The court rejected this theory and held that with public policy tort claims, it is not enough for a plaintiff to demonstrate that some statutory or constitutional policy is violated by the termination. Rather, the plaintiff's exercise of a protected right must be "promotive of a public policy" to sustain such a claim. Based on this analysis, the court found no basis to conclude that the right of self defense always promotes safety or any other public policy. Moreover, the court found no reason why the public interest is harmed by the employer's requirement that employees avoid physical conflict whenever possible in the workplace. This decision not only identifies a specific defense employers may proffer in public policy tort claims, it also supports the notion that employers should institute clearly worded policies that prohibit physical and verbal conflict in the workplace.

Employer Not Liable for Harassment by Customer

In *Carter v. California Department of Veterans Affairs,* a California court of appeal held that a veterans residence facility could not be held liable for the harassment of one of its nurses by a patient (who was neither employed with nor provided services to the facility). The patient verbally harassed Helga Carter on several occasions during her shifts. Carter complained about the harassment to her supervisor, who then ordered the patient to cease and desist from any further contact with Carter. Carter sued the facility for sexual harassment and intentional infliction of emotional distress, among other claims, and the trial court granted the VA Department's motion to dismiss the claim. The court concluded that California's Fair Employment and Housing Act (FEHA) does not impose liability on employers for third-party, non-employee harassment. The court grappled with two competing FEHA provisions. On one hand, FEHA proscribes harassment of an employee by an employer "or any other persons." Carter seized on this language to argue that "any other person" means a non-employee like the harassing patient. On the other hand, FEHA also states that harassment of an employee or a person providing services pursuant to a contract "'by an employee'. . .shall be unlawful. . ." The VA Department seized on this language to argue that FEHA proscribes only harassment inflicted by an employee. The court concluded that FEHA imposes liability "only for a coemployee, and only if the employer both had notice of the coemployee's harassment and failed to take corrective action." In significant contrast, both federal regulations and federal case law do permit a cause of action against an employer for harassment inflicted upon an employee by a customer or other third-party. While the Carter court concluded that the California Legislature expressly declined to incorporate such law into FEHA, there likely would have been a different result if Carter had sued under federal law. This decision assures employers they will not be liable under California law for harassment inflicted by third parties against their employees, even though federal law may permit such a claim. Moreover, and apart from FEHA's limitations, employers should carefully review their internal policies regarding harassment and employee protection, and assess whether they have voluntarily adopted an obligation to protect employees against third party harassment.

United States Supreme Court Clarifies Evidentiary Burden to Obtain Mixed-Motive Jury Instruction under Title VII

On June 9, the United States Supreme Court affirmed a Ninth Circuit Court of Appeals holding (reported in the August 5, 2002 edition of the **W.E.B. Update**) that a plaintiff need not proffer direct evidence of discrimination in a Title VII claim to obtain a mixed motive jury instruction. In mixed motive discrimination cases under Title VII, an employer may avoid liability by proving that it would have made the same employment decision (i.e., termination, failure to promote, etc.) if it had not allowed gender to play a role in the decision. In *Desert Palace, Inc. v. Costa,* Catharina Costa sued her former employer for gender discrimination under Title VII following her termination. At trial, Desert Palace objected to a jury instruction which provided: "if Costa proved by a preponderance of the evidence that sex was a motivating factor in the adverse work conditions imposed on her, but the employer's conduct was also motivated by lawful reasons, she was entitled to damages unless the employer proved by a preponderance of the evidence that it would have treated her similarly had gender played no role." The trial court issued this instruction despite the employer's claim that Costa adduced no direct evidence (a mixed-motive prerequisite) that sex was a motivating factor in its decision. Both the Ninth Circuit Court of Appeals (whose jurisdiction includes the state of California) and the U.S. Supreme Court concluded that direct evidence is not required. Rather, a plaintiff may "demonstrate" that an employer used a forbidden consideration with respect to an employment practice through direct or circumstantial evidence. Employers should note that the Costa opinion does not expressly apply to mixed motive age discrimination cases. Indeed, several federal courts continue to apply the direct evidence requirement to age discrimination cases before a plaintiff may obtain a mixed-motive jury instruction.

Injunction Against Employer under §17200 Includes Unique Disclosure Requirement To Workforce

In *Herr v. Nestle U.S.A., Inc.,* a California Court of Appeal extended California's unfair competition law (Business & Professions Code §17200) to age and other forms of discrimination. At trial, a jury concluded that the plaintiff's former employer discriminated against him repeatedly on the basis of his age. Thereafter, the trial court ordered the employer to repudiate certain discriminatory business policies and disclose to its entire workforce the details of the former employee's $5 million judgment. The court of appeals upheld both the verdict and the court's order. Herr, who was over 40, was an exemplary employee for Nestle. Over the course of several years, Nestle passed over Herr for several promotions in favor of younger, less experienced employees. During his employment, Nestle's European upper management team issued a company-wide "objectives" memorandum. The memo stated that Nestle would "continue hiring, identifying and developing young people to have in the long-term, enough resources for future management." Eventually, Herr became fed up with the numerous rejections for promotion, resigned, and sued Nestle for age discrimination and unfair competition under §17200. A jury concluded that Nestle intentionally discriminated against Herr because of his age and returned a verdict in his favor for more than $5 million. The court concluded that Nestle's age discrimination constituted an unfair and unlawful business practice under §17200, rejecting Nestle's contention that §17200 protects only consumers, and not employees. The court found that employers who discriminate against older—and typically more highly compensated—employees have an unfair competitive advantage against employers who comply with FEHA. Based on these conclusions, the court issued an injunction against the company that included: (1) the repudiation of the discriminatory objectives memo, and (2) the dissemination of all aspects of Herr's judgment (including the repudiation) to all Nestle employees. The court of appeal affirmed both the jury's verdict and the court's injunctive relief award. This case reinforces the wide reach of §17200 claims against employers, and it reveals that an employer's failure to control workplace discrimination can lead to adverse financial consequences and substantial employee morale problems when employers are forced to take steps like those imposed on Nestle. Finally, this case references the notion that foreign-based employers should be cautious about issuing policies (like the "objectives" memo here) that may be permissible outside the U.S. but that serve as fodder for lawsuits under Title VII, FEHA and the like.

Update: California Supreme Court to Review Decision Permitting Employee to Pursue Retaliation Claim Based on Refusal to Fire Clerk Who Was Not "Hot" Enough

The California Supreme Court has voted 6-1 to review the decision by a California court of appeal which permitted a supervisor at L'Oreal to pursue her retaliation claim based on her refusal to carry out her manager's instruction to terminate a clerk who was not "good-looking enough." In *Yanowitz v. L'Oreal* (reported in the March 24, 2003 edition of the **W.E.B. Update**), the Court of Appeal held that California employment law does not allow an employer to insist on attractive female employees while not imposing the same requirement on men. Yanowitz's opposition to that practice was, therefore, protected activity. Look for an update on the Supreme Court's treatment of this case in future **W.E.B. Updates.**