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Weekly Employment Brief

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Individual Supervisor May Be Liable For Retaliation

In the 1998 case of *Reno v. Baird,* the California Supreme Court ruled that a plaintiff may not sue an individual supervisor for discrimination because a manager needs some freedom to make business decisions. However, the Court left undecided the question whether an employee may sue a manager for retaliation (for complaining about discrimination). Recently, in *Walrath v. Sprinkel,* a California Court of Appeal ruled that an individual supervisor may be liable for retaliation against an employee who purportedly complained about age discrimination. Walrath worked for Hatcher Press performing conventional press work until he was laid off as the company converted to electronic publishing. He alleged age discrimination against the employer and a separate claim for retaliation against his supervisor, Sprinkel. Walrath alleged that Sprinkel retaliated against him after Walrath complained to him about younger employees transferring into the electronic press department. If the supervisor appeals, a Supreme Court review of this important decision is likely.

Former Employee Prohibited From Contacting Coworkers Because Of Threats

In a recent unpublished decision, the California Court of Appeal enjoined a former employee from contacting her former coworkers whom she blamed for her failed romance. In *Chubb & Son v. McDermott,* McDermott became romantically involved with a male employee who was introduced to her by a coworker. As the relationship failed, McDermott threatened to "get" the employee who had introduced her to the man. The employer warned her not to involve other employees in her personal problems. After McDermott left voicemail messages threatening the coworker and her stepdaughter, the company fired her. In addition, the employer sued McDermott under the California Workplace Violence Safety Act to restrain her from contacting former coworkers. The court issued the injunction, concluding that McDermott remained a threat to coworkers even after her termination. This case reminds us that an employer's obligation to furnish a safe workplace may require, not only terminating a potentially violent employee, but taking additional steps such as obtaining an injunction.

Employer May Be Liable For Insurance Company's Failure To Provide COBRA Notice

In what appears to be a case of first impression, the federal Eleventh Circuit Court of Appeals ruled that the employer may be liable for a $10,800 penalty where its insurance company failed to send a former employee his notice of COBRA rights. COBRA provides for a penalty of up to $100 per day for 18 months for failure to provide such notice. In *Scott v. Suncoast Beverage Sales Ltd.,* the employer argued that it relied in good faith on the insurance company to send the requisite notice. (The employer's contract with the insurer apparently provided that the insurance company would be responsible for providing COBRA notice.) Rejecting the argument, the court held that employers may not avoid liability by contracting away an obligation that COBRA specifically assigns to the employer. This is a cautionary tale that, although employers may increasingly outsource HR benefits functions (such as COBRA notices), the employer remains ultimately liable for a failure by the vendor to perform the employer's legal obligations.

Employee's Discrimination Lawsuit Barred By Release Of Workers' Compensation Claims

In an unusual decision, the California Supreme Court ruled that a workers' compensation release agreement effectively barred the employee's civil discrimination lawsuit. In *Jefferson v. California Department of Youth Authority,* plaintiff filed a workers' compensation claim for work-related stress, and at about the same time, a sex discrimination claim with the state Department of Fair Employment and Housing. Later, Jefferson signed a standard workers' compensation release agreement that contained broad language releasing "all claims and causes of action." Most significant, the parties included a waiver of Jefferson's claims against "employees of the defendants." Subsequently, Jefferson filed her sex discrimination lawsuit. The employer argued that the workers' compensation release barred the lawsuit. In response, Jefferson offered no evidence that, at the time the release was signed, she expressed her intent to exclude the discrimination claim from the release. The Supreme Court opined that the release of co-employees (who are not liable under workers' compensation laws), Jefferson's failure to exclude the discrimination claim, combined with the broad language of the release, led to the conclusion that she knew, or should have known, that she was releasing the civil discrimination claim. The Court cautioned, however, that in general the standard workers' compensation release should be narrowly construed to release only workers' compensation claims. As a result, employers should urge workers' compensation insurance counsel to obtain release language as broad as possible to include civil claims.

OFCCP To Improve Construction Contractor Reviews

The Office of Federal Contract Compliance Programs announced its intention to improve procedures for selecting construction contractors for affirmative action compliance reviews. The agency agreed that changes were needed to select contractors for compliance review using more uniform and neutral criteria. We will report on the details of such changes as they are published.