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Weekly Employment Brief

November 5, 2002

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Employer Not Liable For Client's Sexual Harassment

In *Salazar v. Diversified Paratransit Inc.,* a California Court of Appeal held an employer was not liable for sexual harassment committed against an employee by a client. Raquel Salazar worked as a driver for Diversified, a company that transported developmentally disabled adults and children from their homes to health care providers. Salazar sued Diversified after she was sexually assaulted in 1997 by one of the company's adult clients. Salazar claimed the California Fair Employment and Housing Act ("FEHA") imposes employer liability when employees are sexually harassed by customers. Salazar's position is supported by the preamble to FEHA, which states that employers must protect employees from sexual harassment by customers. Surprisingly, however, the court held that FEHA does not provide for employer liability for harassment committed by customers. In contrast, federal courts interpret Title VII to allow an employee to sue an employer for failing to stop harassment by a customer. In response to the *Salazar* decision, the California Legislature will most likely amend the FEHA to specifically cover customer harassment.

Inappropriate Jokes Do Not Constitute Protected Speech

A Santa Clara Superior Court judge has ruled that an employer who disciplined and demoted a manager for making inappropriate comments at a colleague's farewell roast did not violate the manager's right to free speech. In *Pelka v. Lockheed Martin Corp.,* the plaintiff, Eugene Pelka attended an off site dinner that was not sponsored by his employer, Lockheed Martin. At the dinner, Pelka lampooned his departing colleague's move to a rural area with a slideshow including pictures of the Ku Klux Klan. After several black employees complained to management about the slides, Lockheed suspended Pelka without pay for one month and demoted him for his inappropriate conduct. In response, Pelka retired and sued Lockheed for violating his right to free speech. Pelka claimed his slides were part of a political parody, and thus protected speech under the California Labor Code. Lockheed argued that Pelka's comments were not meant to be political in any sense. The judge agreed that the jokes did not meet the standard of protected political speech or activity. This case helps employers define the limits of protected speech. However, employers are cautioned that anything bordering on "political" speech, especially if it occurs off duty and offsite, is protected activity and should not form the basis for disciplinary action.

Employees Must Meet Performance Standards to Claim Discrimination

The federal Eighth Circuit Court of Appeals (encompassing Nebraska, North Dakota, South Dakota, Missouri, Minnesota, Iowa, and Arkansas) recently held that a plaintiff must show that s/he was meeting performance standards to establish a prima facie case of race discrimination. In *Grayson v. O'Neil,* plaintiff Ralph Grayson, the head of a Secret Service field office, resigned and sued the Secret Service for racial discrimination, claiming that his performance was closely scrutinized because he was African-American. Grayson did not dispute that there were numerous complaints about his job performance. Moreover, Grayson could not show that his employer's reasons for dissatisfaction with his performance were a pretext for discrimination. The court therefore affirmed the trial court's summary judgment dismissing Grayson's claims. This case demonstrates that careful documentation of performance deficiencies is critical in defense of a discrimination claim.

Bare Bones Pleading Adequate in ADA Suit

A federal district court in Pennsylvania recently ruled in *Cruz v. Northwest Airlines* that plaintiffs need not provide details about their disabilities in order to properly plead a claim under the Americans with Disabilities Act. Angel Cruz, who suffered from diabetes, claimed that he was offered a job as a flight attendant at Northwest, but the offer was rescinded when the airline found out about his disability. In his complaint, Cruz simply stated that he "was a qualified individual with a disability." When Northwest attempted to dismiss the case, the judge ruled that Cruz' complaint was sufficient to survive challenge. This lenient pleading standard confirms that it is difficult for employers to obtain dismissal of disability cases at the pleading stage.

DID YOU KNOW??

According to the California Labor Commissioner, terminating an employee for moonlighting (even if the outside work is for a competitor) is unlawful unless an actual or direct conflict of interest is shown.