CaliforniaUpdate

EMPLOYMENT LAW NEWSLETTER

Fox Rothschild LLP
ATTORNEYS AT LAW

First Quarter 2013

Uncooperative Employees are not Protected from Discipline

In a favorable decision for employers, a Court of Appeal determined that an employee can be terminated for being misleading and uncooperative during an employer's internal investigation of discrimination claims. In *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510., after a female employee complained that her supervisor was discriminating against her based on her gender and sexual orientation, the employer initiated an investigation led by an outside female attorney. The investigation revealed that the supervisor did not discriminate against the female subordinate based on gender or sexual orientation, but he had violated the employer's policies by telling jokes and making remarks based on race or sex. The investigator also concluded that the supervisor was uncooperative and appeared to have intentionally misrepresented some facts during the course of the investigation. Based on the investigator's findings, the supervisor's employment was terminated. The supervisor then sued for wrongful termination in violation of public policy, claiming his termination was the result of bias against men and in retaliation for his participation in the internal investigation. He further alleged he was defamed when the employer's vice-president of human resources told another employee the reasons for his termination. Ultimately, the appellate court affirmed the trial court's order granting summary judgment in favor of the employer. This decision provides useful guidance for employers:

- Being uncooperative or deceptive during an employer's internal investigation is not protected activity. In fact, "such conduct is a legitimate reason to terminate an at-will employee."
- "No inference of discrimination can reasonably be drawn from the mere lack of conclusive evidence of misconduct." An employee must present actual evidence that the employer's motivation was *illegal*, not just unreasonable.
- Statements by management and coworkers to other coworkers explaining why an employee was disciplined are conditionally privileged. Such statements can be considered defamatory only if they were made with "malice" — i.e., that the employer made a statement in reckless disregard of the employee's rights and that the employer *either* did not reasonably believe them to be true.

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DFEH: New Procedures for Investigation and Litigation

Effective January 1, 2013, the California Department of Fair Employment and Housing (DFEH) has changed the way it investigates and litigates employment discrimination complaints. These changes affect any employer with five or more employees working in California. The most significant changes are as follows:

- The new law eliminates the Fair Employment and Housing Commission. The Department will now have a Fair Employment and Housing Council, which will consist of seven members appointed by the Governor, who will assume the former Commission's regulatory functions.
- The law ends administrative adjudication of complaints. The DFEH has authority to file a civil action directly in the superior court. For any accusations currently pending before the former Commission, the DFEH may remove it to superior court, though the Office of Administrative Hearings has been retained to adjudicate the few remaining administrative actions.
- The administrative investigative process now proceeds as follows: after a Charge of Discrimination is filed, the complainant can request an immediate right to sue, or the DFEH will investigate the Charge. If the DFEH finds no merit to the Charge, it will be dismissed. If the DFEH finds that the Charge has merit, the matter will be directed to mandatory dispute resolution, free of charge, in the DFEH's internal Dispute Resolution Division. If the matter is not settled during the mandatory dispute resolution process, the DFEH can file a civil action in court.
- The DFEH may be awarded attorneys' fees and costs when it is the prevailing party in litigation. The agency will use $170 per hour as its standard fee.

New State Disability Regulations

New disability regulations took effect this year for California employers with five or more employees. They include the following:

- Examples of physical disabilities, namely "deafness, blindness, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, cerebral palsy and chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis and heart disease." These examples are illustrative – not exclusive.
- Examples of mental disabilities include "emotional or mental illness, intellectual or cognitive disability (formerly referred to as 'mental retardation'), organic brain syndrome or specific learning disabilities, autism spectrum disorders, schizophrenia, and chronic or episodic conditions such as clinical depression, bipolar disorder, post-traumatic stress disorder and obsessive compulsive disorder." Also included are specific learning disabilities "manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning or mathematical abilities."
- Examples of the types of temporary impairments that do not merit protection, namely "the common cold; seasonal or common influenza; minor cuts, sprains, muscle aches, soreness, bruises, or abrasions; non-migraine headaches, and minor and nonchronic gastrointestinal disorders."
- Examples of reasonable accommodations include:
  - "[P]roviding accessible break rooms, restrooms, training rooms or reserved parking places; acquiring or modifying furniture, equipment or devices; or making other similar adjustments;"
  - Allowing use of assistive animals (more on this below);
  - "Transferring an employee to a more accessible worksite;"
  - "Providing assistive aids and services such as qualified readers or interpreters to an applicant or employee;"
  - Job restructuring (although the employer is not required to reassign essential job functions);
  - Part-time or modified work schedules;
  - Changing "when and/or how an essential function is performed;"
  - Adjusting or modifying "examinations, training materials or policies;"
  - Modifying policies or supervisory methods;
  - Providing additional training;
  - Letting the employee work from home;
  - Leaves of absence (although indefinite leaves are not required); and
  - Reassignment to a vacant position (although there is no need to create a position or disregard an established, bona fide seniority system).

Assistive Animals

- Renewed emphasis on employees' rights to use "assistive animals" – not just guide dogs. The requirement extends to animals that provide "emotional or other support" to people with emotional problems or brain damage. So it won't necessarily be clear at first glance whether the animal performs a support function. Employers are entitled to set standards for service animals, such as:
  - Requiring that the animal behave appropriately in the workplace, not smell offensive and not befoul the workplace with urine and feces.
  - Prohibiting the use of animals that endanger any employee's health or safety.
  - Requiring the animal be trained to provide assistance.
  - Requiring employees to get certification from their health care provider that they need the animal as an accommodation.

Interactive Process

- Increased emphasis on the obligation to engage employees in a "timely, good faith interactive process" to explore possible accommodations. This obligation arises not just when an employee requests accommodation, but also when:
  - The employer becomes aware of the need for accommodation "through a third party or by observation;" and
  - Whenever an employee exhausts his or her leave under other laws, such as the Family Medical Leave Act, California Family Rights Act, or workers' comp laws" and has not been released to return to work.

More than ever, California employers (and their managers) must be alert to the breadth of impairments that can constitute a disability and the range of accommodations that they are required to explore. Employers should also review their policies to ensure that they comply with the regulations and review their job descriptions and performance evaluation forms to clearly identify which job functions are essential. There is no doubt that expanding the employer's obligations to this extent will result in an increase in the number of claims under these laws.

California Broadens the Protections for Pregnancy

Rights for pregnant women begin with pregnancy disability leave but certainly do not end there. Recently, in *Sanchez v. Swissport* (2013) 213 Cal.App.4th 1331 an appellate court held that four months of leave may not be enough for a woman disabled by pregnancy. Rather, the employer has a duty to engage in the interactive process under the FEHA and may need to provide additional time off for a pregnant employee as a reasonable accommodation.

Ninth Circuit Employment Law Happenings

EEOC Gets a Taste of Its Own Medicine

The plaintiff in *Mary Bullock v. Jacqueline Berrien*, 688 F.3d 613 (9th Cir. 2012) worked with the Equal Employment Opportunity Commission (EEOC) for eight years as an Administrative Law Judge (ALJ), while suffering from multiple sclerosis and systemic lupus. She claimed that she requested a reasonable accommodation for her multiple sclerosis, but that her requests were ignored and that she was thereafter subjected to retaliation. The plaintiff then filed an administrative complaint alleging disability discrimination, pursuant to the Rehabilitation Act of 1973, 29 U.S.C. §701, et. seq. An ALJ denied her request for relief, in part. The plaintiff initially pursued an administrative appeal of the ALJ'S decision, but later withdrew this appeal in favor of filing a civil complaint on the same facts in federal district court. The EEOC challenged her civil complaint on jurisdictional grounds, claiming that the plaintiff failed to exhaust her administrative remedies because she had not waited 180 days after filing her administrative appeal before proceeding to court.

The Ninth Circuit disagreed with the EEOC. It held that the plaintiff was within her rights to file a civil complaint because an ALJ had already ruled upon her complaint and the administrative appeal that she withdrew was merely optional. The fact that the EEOC failed to comprehend the nuances of its own administrative appeal procedure doesn't bode well for employers trying to make sense of them on their own.

Disability Discrimination Action Against Montblanc "Runs Dry"

The plaintiff in *Cynthia Lawler v. Montblanc North America, LLC and Jan-Patrick Schmitz,* 704 F.3d 1235 (9th Cir. 2013), worked as manager at one of Montblanc's boutique retail outlets for approximately eight years. In mid-2009, the plaintiff's physician diagnosed her as having psoriatic arthritis and recommended that she be permitted to work a reduced schedule of 20 hours "for medical reasons." In its response, the defendant employer reminded her that as manager, she was required to work 40 hours per week. It requested medical documentation to support the request for a reduced schedule. Several weeks later, the plaintiff injured her foot in a fall as an "indirect consequence" of her arthritic condition. She requested temporary disability leave. A member of the employer's upper-management questioned the plaintiff about the legitimacy of her injuries and leave request. After several confrontations with management, the plaintiff produced a letter from her physician recommending that she take an extended leave of absence to avoid "further flare-ups" of her psoriatic arthritis. While on leave, the plaintiff was terminated because her position needed to be filled immediately, notwithstanding her physician's recommendation that she return to work after an additional three-month period. The plaintiff filed suit against the employer alleging disability discrimination under California's Fair Employment and Housing Act, retaliation, harassment and intentional infliction of emotional distress.

The Ninth Circuit upheld the district court's order granting summary judgment in favor of the employer. It concluded that the plaintiff's FEHA claim was defeated by her inability to perform the essential functions of her position as demonstrated by her very own statements that her "disability prevents her from performing any work…" Further, the retaliation claim failed because there was no evidence that the reasons for her termination were pretextual. The close temporal proximity between her complaint and her termination could not raise issues of fact for a jury to consider. The Ninth Circuit concluded that the actions of the plaintiff's supervisors were reasonably related to management of a workplace and business operations and, therefore, did not constitute harassment under the FEHA. Lastly, the alleged mistreatment by management was not sufficiently severe to qualify as actionable "emotional distress." In sum, the employer's actions, while arguably gruff, were nondiscriminatory in nature and were plausibly aimed at improving the management of their workplace, which is permissible under FEHA.

President Obama's Appointments to the NLRB May Be Invalid

The U.S. Court of Appeals for the District of Columbia in *Noel Canning* ruled that President Obama's recess appointments of members Flynn, Block and Griffin were "invalid" because the President exceeded his authority under the Recess Appointments Clause to the U.S. Constitution. The D.C. Circuit concluded that the appointments were invalid because the President did not appoint Flynn, Block and Griffin during a recess between two sessions of Congress, but instead did so when Congress was in adjournment during a session of Congress. This is significant for employers currently involved in proceedings before the NLRB. If those three appointments are invalid, the NLRB has not issued a valid decision since 2011 when then-Chairman Liebman's term expired. Further, the NLRB potentially has not had authority to seek 10(j) relief in federal district court or to appoint regional directors to oversee the NLRB's regional offices since then-Chairman Liebman's term expired.

The Justice Department has not decided whether to seek rehearing of the case before the D.C. Circuit or whether to petition the U.S. Supreme Court for certiorari. The constitutionality of the President's recess appointments is an issue pending in other U.S. court of

appeals, as well. In the meantime, the NLRB has elected to continue to process cases. Employers should be aware that NLRB decisions issued in the past year remain Board law, and administrative law judges and the Acting General Counsel of the NLRB will treat those decisions as binding. Employers who disregard the changes in NLRB precedent over the past year do so at their own peril. Employers are advised, however, to raise *Noel Canning* as a defense in current matters before the regions, administrative law judges, in answers to complaints, and to the NLRB itself to ensure the defense is preserved in later stages of the case.

Damages May Be Limited in Mixed Motive Cases

The California Supreme Court held that an employee cannot recover all damages, even if the employee proves that unlawful discrimination was a substantial factor motivating the termination, if the employer can prove that it would have made the same decision regardless of such discrimination.

In *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, California Supreme Court, issued on February 7, 2013), the plaintiff bus driver had a history of performance issues. She had two "preventable accidents" in which she cracked the glass on the bus' back door and hit a parked car. She then failed to report to her assigned shift on two occasions. Plaintiff's manager reviewed her file and determined that she was not meeting the city's standards for continued employment. Plaintiff then submitted a doctor's note confirming her pregnancy. A few days later, the city terminated her employment. The plaintiff filed a sex discrimination suit under Fair Employment Housing Act claiming that she was terminated because of her pregnancy. The city, however, argued that she was terminated for poor performance. At trial, the court refused to instruct the jury that if it found a mix of discrimination and legitimate motives, the city could avoid liability by proving that a legitimate motive would have led to the same termination decision.

The Supreme Court held that the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision. If the plaintiff can make such a showing, the employer is then "entitled to demonstrate that legitimate, nondiscriminatory reasons would have led it to make the same decision at the same time." Proof that the same decision would have occurred regardless of any discrimination thereby precludes any award of damages, back pay or reinstatement. The plaintiff, however, may still obtain declaratory or injunctive relieve, attorneys' fees and costs. Employers are reminded to ensure that all terminations are for legitimate business reasons and well documented. Doing so will help to avoid or limit damages in similar "mixed motive" cases.

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