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Dennis B. Cook
Ronald W. Brown
Geoffrey F. Gega
Brian D. Bertossa
Terry A. Wills
Carrie E. Bushman
Barbara A. Cotter
Lisa V. Ryan
Regina Silva
Stephen McCutcheon
Brent J. Seifert
Robert L. Boucher
Leslie A. Patko
Blaze Van Dine

James E. Mesnier
Of Counsel

555 Capitol Mall
Suite 425
Sacramento, CA 95814
Tele: 916-442-3100
Fax: 916-442-4227

1851 E. First Street
Suite 1440
Santa Ana, CA 92705
Tele: 714-542-1883
Fax: 714-542-1009

450 Lincoln Avenue
Suite 202
Salinas, CA 93901
Tele: 831-755-7940
Fax: 831-755-7944

www.cookbrown.com

Court Finds Supervisors Not Personally Liable For Retaliation

By Blaze Van Dine, Esq.

On March 3, 2008, the California Supreme Court held that individual supervisors are not personally liable for their role in retaliation claims under the Fair Employment and Housing Act. While on its face this appears to be a victory for employers, it's important to be aware that this ruling does not affect the liability of the employer.

In *Jones v. Lodge at Torrey Pines Partnership* (2008) (42 Cal.4th 1158) defendant, The Lodge at Torrey Pines Partnership, owned and operated a hotel and restaurant next to the Torrey Pines Golf Course in La Jolla, California. Plaintiff, a male banquet employee, was hired in 1995 as a supervisor and was promoted in 1997 and again in 2000 to manager of the restaurant, bar, catering and banquet events, and the beverage cart service to golfers on the golf course. In October of 2000, The Lodge hired a new food and beverage director, defendant Weiss. Plaintiff alleged that Weiss, along with the kitchen manager Jerry Steen, made daily jokes and sexual comments about female employees as well as about the plaintiff. Weiss and Steen used offensive language and told graphic "gay bashing jokes" aimed at the plaintiff. When plaintiff attempted to discuss the issue with Weiss, he was told that if plaintiff "aired any dirty laundry," he would be fired.

Despite the threat, plaintiff did complain to the director of human resources. After

complaining, plaintiff was given a letter entitled "30-day notice of poor work performance," which gave plaintiff 30 days to "comply." Plaintiff claims the offensive practices continued and that plaintiff overheard Steen threaten to "punch the faggot in the mouth," in reference to the plaintiff.

Eventually, plaintiff filed a Discrimination Complaint with the Equal Employment Opportunity Commission ("EEOC") and a court action alleging wrongful discharge, sexual orientation harassment, sexual orientation discrimination, retaliation, breach of implied contract for continued employment and intentional infliction of emotional distress. Plaintiff also sued Steen and Weiss individually for sexual orientation harassment, retaliation and intentional infliction of emotional distress.

After a trial, the jury returned a verdict in favor of Jones against The Lodge and individual defendant Weiss. Weiss appealed and the California Supreme Court granted review of the case to determine if the Legislature intended to allow individual supervisors to be liable for retaliation under the Fair Employment and Housing Act. While cases had determined that supervisors could be liable for harassment, it was largely undecided whether they could be liable for retaliation.

While plaintiff had argued that the law was

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intended to cover supervisors, the California Supreme Court disagreed noting that such a law would force supervisors to make decisions that are the least likely to result in retaliation claims, instead of making the best decision for the employer. By doing so, the interest of the supervisor would be in conflict with his or her employer’s interest, particularly when the supervisor is making personnel decisions. Therefore, the court held that the employer is liable for retaliation under the Fair Employment and Housing Act, but supervisors (and other “non-employer” individuals) are not personally liable for their role in that retaliation.

While The Lodge at Torrey Pines ruling is good news for supervisors, it does not offer any relief for employers. Retaliation is still a very viable cause of action and one whose punishments can be quite severe. For the 2007 fiscal year the EEOC received 26,663 charges of retaliation discrimination, resulting in \$124 million in awards to the complaining parties. Worse yet, these statistics don’t include money obtained for complainants as a result of private civil litigation.

The EEOC states that an employer cannot “retaliate” against an employee by firing, demoting, harassing, etc., that employee for filing a discrimination charge, participating in a discrimination proceeding, or opposing discrimination. Additionally, the Americans with Disabilities Act (“ADA”) prevents interference, coercion, intimidation, threat or harassment of individuals in the exercise of their rights, or the encouragement of the exercise of another’s rights, granted by the ADA.

When analyzing a claim of retaliation, there are three key terms to be aware of: adverse action, covered individual, and

protected activity.

- **Adverse Action:** An adverse action would be an action to prevent an employee from opposing discrimination, or participating in employment discrimination proceedings. Some examples would include firing, refusing to hire or promote, threatening, increasing surveillance, giving negative evaluations, assaulting or making unfounded civil or criminal charges. Making petty slights and annoyances or giving a justified negative evaluation would not be an adverse action.

- **Covered Individual:** A covered individual would be an employee who opposed unlawful practices, requested some accommodation related to employment discrimination of sex, religion, race, color, national origin, disability or age, or who participated in discrimination proceedings. Employees with a close relationship to an individual covered by ADA have the same protection under ADA. For example, it would be unlawful to fire an employee whose brother filed a discrimination claim.

- **Protected Activity:** A protected activity is the opposite of unlawful discrimination; for example, complaining about alleged discrimination or refusing to obey an order is reasonably believed to be discriminatory. Participating in an employment discrimination proceeding is also a protected activity and examples would include filing a discrimination charge or serving as a witness in a proceeding. Requesting reasonable accommodations based on disability or religion is also a protected activity.

Employers with any questions or concerns about retaliation, discrimination, the Fair Employment and Housing Act, or other employment issues should call Cook Brown, LLP for assistance. ❖

The California Family Rights Act Requires Careful Consideration of Leave Requests on a Case-By-Case Basis

By Steve McCutcheon Esq.



The California Family Rights Act (CFRA) provides full time employees with leave to address family needs such as the birth or adoption of a child, serious illness of a family member, or the employee's own "serious health condition" that makes the employee "unable to perform the functions of the position of that employee." The recent California Supreme Court decision in *Lonicki v. Sutter Health Central* addresses two important questions under CFRA: whether the employer must seek a neutral opinion regarding the employee's medical condition in order to challenge that the employee had a "serious health condition," and whether the employee's performance of the same job for a different employer conclusively establishes that the employee is able to perform the functions of the job. The Court's decision highlights the need for employers to make CFRA leave decisions on a case-by-case basis, and to carefully evaluate how to proceed when entitlement to leave is disputed.

CFRA is the California equivalent of the Family Medical Leave Act (FMLA) adopted by Congress, and applies to companies with 50 or more employees. It allows an employee to take up to 12 weeks of unpaid "family care and medical leave" if the employee has worked for the company for more than a year, and has at least 1,250 hours of service with the employer during the previous 12 months. Upon granting the leave request, the employer is required to guarantee that the employee will be given the same or comparable position upon the termination of the leave.

When the purpose of the leave is to address the employee's own "serious health condition," the employer may require that the request for leave be supported by the employee's health care provider's certification that the employee has a "serious health condition," is unable to perform the functions of the job, and thereby qualifies for leave. If the employer doubts the validity of the certification, it may require the employee to be examined for a second opinion by its own provider. In the event there is a disagreement between the two opinions over whether the employee has a "serious health condition," the employer may require that the employee obtain a third opinion from a neutral provider, approved by the employer and employee. This neutral third opinion is "binding on the employer and the employee" on the question of whether a "serious health condition" exists.

In *Lonicki*, the plaintiff was employed as a technician in the hospital's sterile processing department. The hospital became a level II trauma center, leading to an increase in her workload and stress. At the same time, *Lonicki* was employed at and performed the same duties at another hospital. When her shift scheduled was set to change and a request for vacation was denied, *Lonicki* went home in tears. *Lonicki* obtained a note from a nurse practitioner supporting a one-month leave of absence for "medical reasons" and completed a form requesting a one-month leave of absence.

Her employer directed *Lonicki* to see its occupational health physician who concluded that she was able to return to work without restrictions. Thereafter, *Lonicki*'s employer directed her to return to work or face dismissal. The employer did not obtain a third opinion from a neutral health care provider. After discussions with *Lonicki*'s union representative, her employer approved paid time off—but not medical leave—and directed her to return to work upon the expiration of the paid time off or face dismissal. Thereafter *Lonicki* did not return to work, and saw a psychologist to support a claim for additional leave. Ultimately she failed to return to work as directed and was discharged.

Lonicki filed suit claiming the hospital violated CFRA for failing to provide leave due to her serious health condition

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which “makes the employee unable to perform the functions of the position. Her employer sought, and was granted, summary judgment on the ground that because she was performing the same functions at another hospital, she did not have a “serious health condition” that made her “unable to perform the functions” of her job, and did not qualify for medical leave under CFRA. The Court of Appeal upheld this decision, and Lonicki sought review by the California Supreme Court.

The California Supreme Court reversed, and addressed two important questions under CFRA. First, the Court concluded that the employer’s decision to not seek a neutral third opinion regarding whether Lonicki had a “serious medical condition” did not preclude it from challenging in court her claim that her condition made her unable to do her job. Instead, CFRA gives the employer the option of obtaining a binding decision from a third health care provider.

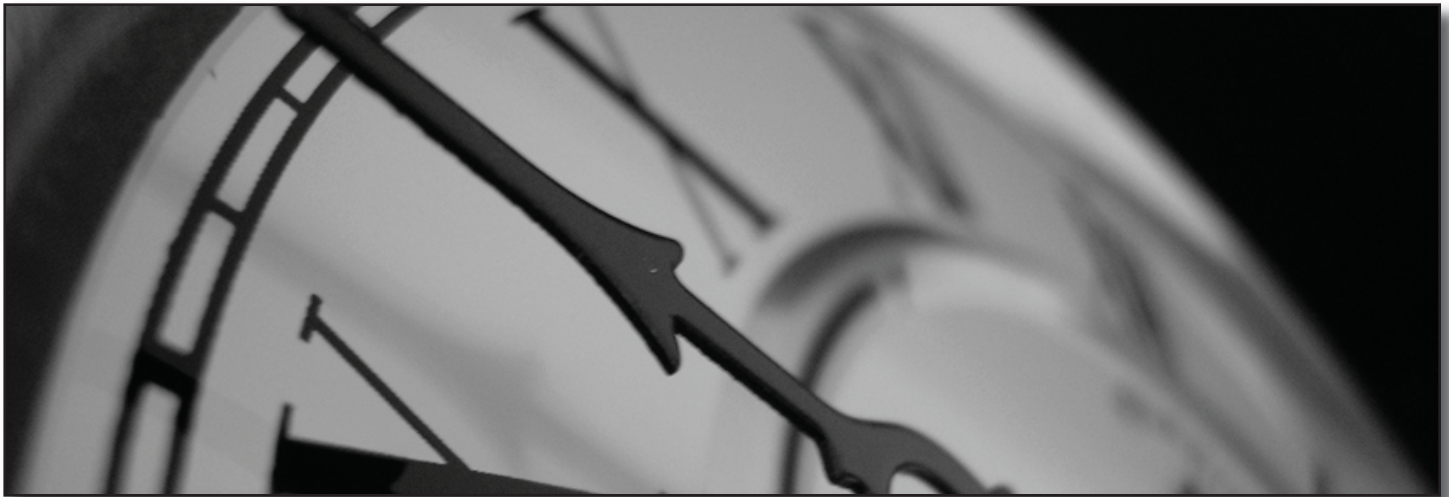
The decision of whether to obtain a third opinion must not be taken lightly. An employer electing to forego a binding third opinion risks a lawsuit by the employee and the potential for a finding that the employer’s refusal to provide leave violated CFRA. But, in the absence of that third opinion, the employer is not barred from challenging whether the employee met the requirements for CFRA leave.

Second, the Court considered whether Lonicki’s performance of similar duties, on a part-time basis elsewhere, conclusively demonstrated that she was able to perform her duties. The Court concluded that the question of whether she was “unable to perform the functions” of the specific job

assigned to the employee, not whether she could perform the functions “generally.” Thus, when an employee’s health condition prevents him or her from performing a job in one environment, it does not necessarily mean that the employee cannot do a similar job elsewhere. Differing levels of stress, part time versus full time employment, and other distinctions in the workplace environment may mean that an employee may not be able to perform a job for a specific employer, but can perform those same or similar job functions elsewhere. Thus, when considering a request for CFRA leave, employers must focus their inquiry on

whether the employee’s medical condition prevents him or her from performing their job in that specific environment. The employee’s ability to perform those functions elsewhere is a relevant consideration, but does not automatically mean that leave may be denied.

Questions regarding entitlement to CFRA leave may overlap with questions under the FMLA, and each must be analyzed separately. Action upon each request for leave requires careful consideration of the specific facts related to the request, and documentation by the employer of its analysis and the evidence which supports its conclusion. While obtaining a third opinion is not required, and an employer may act in good faith, an incorrect decision may be costly. An individualized response to each request for leave, and obtaining a third opinion where appropriate, may help to minimize potential disputes. ❖



Recent Wage and Hour Cases of Interest to Employers

By Regina Silva, Esq.

Employer “could not have known” about the alleged Unpaid time where there was no notification by employee. In *White v. Starbucks Corp.* (N.D. Cal. 2007) 497 F.Supp.2d 1080, White, a store manager who quit his job 11 days after starting work, failed to meet his burden of showing that Starbucks had failed to pay him overtime wages or provide meal/rest periods where employee admitted that he did not notify Starbucks that he worked overtime or time off the clock, or failed to present evidence that Starbucks denied him meal or rest periods. In response to the employee’s argument that an employer was affirmatively required to enforce meal periods, the court stated that, while Starbucks was required to offer meal breaks, it was not required to ensure that workers took such breaks.

In most cases, an employer won’t be so lucky to have an employee admit that he/she did not notify his employer about working off the clock. In addition, an employer who should have know an employee was working overtime will more times than not be liable for overtime payments. However, this case makes it clear that where an employer has no reason to suspect employees are missing breaks, it is not required to do anything more where it has already offered the breaks.

Employee Who Provided Customer Service and Training Related to Company’s Software Not Exempt From Overtime. In *Eicher v. Advanced Bus. Integrators, Inc.* (2007) 151 Cal.App.4th 1363, employer hired Eicher to provide on-site customer service and training of the company’s software, which is used in sports and entertainment venues to schedule staff, manage payroll, credentialing and security, and to

keep track of costs. The court held that the employer failed to prove that Eicher performed “office or non-manual work directly related to management policies or general business operations” of the company or its customers. The court concluded that Eicher “regularly engaged in the core day-to-day business” of the company, which was implementing the company’s software at customer venues and supporting the customers.

Hence, when classifying an employee who performs computer related duties, it is important to carefully analyze what specific job duties the employee will be performing. So even if the employee has a specialized skill, such as computer expertise, if they are essentially responsible for assisting customers with the product, then the employee cannot be classified as exempt.

Prevailing Wages Owed To Workers For Renovation Work of Building Leased in Part to County. In *Plumbers and Steamfitters, Local 290 v. Duncan* (2007) 2007 WL 4303802, the court held that renovation performed by a real party in interest of a building leased to Humboldt County was a public works project under California prevailing wage law. The court made its finding, in part, relying on Labor Code section 1720.2’s definition of “public works,” which did not limit application to only new construction.

Hence, where “any construction work” exists, regardless of whether it is new construction or renovation work, it will be subject to prevailing wages if it meets the conditions set forth in section 1720.2.

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Prevailing Wages Denied for Truckers Hauling To Non-public Works. In *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742, the court ruled that truck driver employees who hauled building materials from public works construction sites to nonpublic works project sites were not entitled to prevailing wages under CA law where the off-hauling is unrelated to the performance of the prime public works contract. The court commented that it was irrelevant whether or not the truck drivers carried materials to or from the public work project site.

Thus, in analyzing whether truck hauling from a public works site is subject to the prevailing wage, a major factor is what role the transport of the materials plays in the performance or execution of the public works contract.

Undocumented Workers Had Standing To Assert Violation of Prevailing Wages. In *Reyes v. Van Elk, Ltd.* (2007) 148 Cal.App.4th 604, where there was no evidence that employees had submitted false work authorization documents, the court ruled that undocumented workers had standing to assert a violation of the prevailing wage laws.

Hence, an employer must pay undocumented workers the prevailing wages.

An Employee Incentive Compensation Plan Which Subtracted Operating Expenses From Revenues is Not an Unlawful Deduction. In *Prachasaisoradej v. Ralph's* (2007) 42 Cal.4th 217, Ralphs supermarket implemented a written incentive plan whereby certain employees of each store were eligible to receive, over and above their regular wages, supplementary money based on how the store's actual Plan defined profits (if any) for specified periods compared with preset profitability targets. Profits were determined by subtracting

store operating expenses from store revenues. Employee filed suit claiming that the Plan's formula for calculating profit sharing payments violated CA law that prohibit employer from shifting certain costs to employees by recouping these amounts through employee earnings. The court found that Ralphs' Plan was not illegal just because costs/expenses, etc. were used to calculate store's profit, and, thus, the amount of money Ralphs was going to compensate its employees. Since the employees had already received their base wages from which there was no deduction, it was not improper to subtract the store's expenses from the incentive compensation payments given to employees.

Thus, profit/incentive compensation payments paid to employees may be based on company's profits/losses so long as the company does not make such deductions from employee regular/base wages.

Insurance Claims Adjustors Exempt From FLSA. In *In re Farmers Ins. Exch.* (9th Cir 2007) 481 F.3d 1119, insurance claims adjusters working in states outside the state of California filed suit seeking overtime pay and alleging that Farmers had improperly classified them as exempt administrative employees. In applying a regulation issued by the US Department of Labor (29 CFR 541.203), the court held that the insurance claim adjusters were exempt from the FLSA per the DOL regulation which provided that “[i]nsurance claims adjusters generally meet the duties requirements for the administrative exemption.” But see California's Appellate court decision in *Bell v. Farmers Ins. Exch.* 115 Cal.App.4th 715, which held that insurance claims adjusters working in the State of California are non-exempt employees pursuant to an analysis of the term “administrative employee” provided for in the applicable California Wage Order. ❖

A FORM FOR ALL SEASONS – And Especially For Terminations

By Barbara Cotter, Esq.

Personnel decisions are tough for most managers and supervisors, and especially so when the result is a termination. Delivering the bad news is equally daunting. No matter how gently or sympathetically the message is conveyed, “we don't need you anymore” is difficult to say.

In light of the anxiety that frequently accompanies a layoff or termination, many managers look to put the decisions behind them as quickly as possible. It is easier, after all, to dwell on positive news.

Notwithstanding the impulse to move beyond a termination, however, managers should be urged to take the time to memorialize the events that led to the termination and the specific event that triggered the termination itself. Absent such writing, a company will have difficulty defending the decision. Memories fade, and become distorted over time. Managers may leave or face terminations themselves. Witness to the termination decision inevitably forget critical details.

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Ideally, a standardized form should be used to document the decision. The form should direct the decision maker to explain the key facts leading to and causing the termination. The form should require the decision maker to answer three basic questions:

- (1) What are the grounds for the termination?
- (2) What specific facts and circumstances led to the decision? and
- (3) Who is knowledgeable of these facts?

Preprinted forms are useful tools not only because they help to ensure proper documentation, but also because they are user friendly. Most people are accustomed to filling out forms. Answering carefully crafted questions is easier than staring at a blank piece of paper or computer screen.

Moreover, when used on a consistent basis, such forms facilitate proper decision making. They direct managers to justify their decisions. They allow such decisions to be reviewed and monitored by counsel, human resources personnel and/or others in the management structure.

“Litigation Hold” More Important in E-Discovery Era

By Terry A. Wills, Esq.

With the onset of recent amendments to the Federal Rules of Civil Procedure regarding e-discovery, companies that maintain document retention and destruction policies as part of an overall document management plan should consider specifically suspending destruction policies with respect to relevant data when litigation or claims arise. Courts have imposed sanctions for even inadvertent destruction of evidence. In *Clark Construction Group v. City of Memphis*, 229 F.R.D. 131 the court imposed a sanction against the City of Memphis for disposing of discoverable data (including emails), even though the City’s actions were not willful. The electronic data was discarded because one employee did not believe it was relevant and the City apparently did not instruct its employees or agents that they should not discard or destroy documents that might be considered relevant to the case. The court held that because there was a duty to preserve records “it was incumbent upon the City to establish a procedure that would eliminate the likelihood that potentially relevant documents would be destroyed.” Given the court’s ruling, it is important that a “litigation hold” or record retention procedure should be part of a preservation plan to avoid the inadvertent destruction of data and the potential for sanctions.

Forms are equally beneficial in connection with personnel actions other than terminations. An “Employee Discussion” form should be used to document any substantive communications regarding performance issues. The form should direct the manager to summarize the basic facts: What was discussed? When? Who was present? What conclusions were reached? Who will follow up and how?

An “incident form” that asks the basic questions (who, what, where, and when) should be used to document a significant event or action.

All such forms should be reviewed with the subject employee and be maintained in his/her personnel file.

In sum, although businesses cannot avoid making difficult personnel decisions, they can at least establish procedures that help guide managers to make the decisions carefully and justifiably. Such procedures include the use of pre-printed personnel forms. ❖

In a perfect world, companies should work with legal counsel to put together a “hold” letter that (a) includes a statement that all documents in the relevant time frame relating to the litigation must be preserved and identifies the sources of possible evidence (i.e., correspondence, memoranda, faxes, email accounts or servers, etc.); (b) specifies a point person to oversee the preservation process and respond to questions; and (c) specifically directs that potentially discoverable documentation (to include email) evidence may not be destroyed or otherwise disposed of, and (d) suspends any implemented document destruction procedures.

Any data or document retention policy, litigation hold procedures, or other preservation strategies have little utility unless employees and senior managers are fully aware of and implement them properly. To the extent possible, companies should train senior personnel, information technology managers and designated electronic data coordinators regarding their policies and required procedures in this area, as well as performing periodic compliance audits to ensure that the companies’ policies satisfy current legal standards. Please feel free to contact any attorney at Cook Brown, LLP about your document retention obligations. ❖

Practical Tips for Smart Businesses

Businesses naturally want their employees to be happy and successful, and to keep them gainfully employed, but it is unavoidable that employee discipline, terminations, and lay-offs must occur. Although employment in California generally is “at-will,” meaning the employment relationship can be ended by either the employer or employee at any time and without cause, there are a number of state and federal laws that prohibit taking any adverse employment action on a discriminatory basis. These laws generally prohibit taking an adverse employment action based upon the employee’s sex, race, color, religion, medical condition, disability, union organizational activities, and other characteristics. Whenever an employer takes any adverse employment action, it is important that the employer maintain a record of following its policies and procedures, and document the legitimate reasons for the decision to discipline, terminate, or lay-off any employee. Documentation of the employer’s adherence to its poli-

cies and procedures and the reasons for an adverse employment decision can be powerful evidence to disprove claims of unlawful discrimination. ❖

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Of Counsel

555 Capitol Mall
Suite 425
Sacramento, CA 95814
Tele: 916-442-3100
Fax: 916-442-4227

1851 E. First Street
Suite 1440
Santa Ana, CA 92705
Tele: 714-542-1883
Fax: 714-542-1009

450 Lincoln Avenue
Suite 202
Salinas, CA 93901
Tele: 831-755-7940
Fax: 831-755-7944

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