Fenwick Employment Brief

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Victor Schachter Editor 650.335.7905
Mary Wang Contributor 650.335.7154

FENWICK & WEST LLP

CALIFORNIA SUPREME COURT HOLDS SUPERVISORS NOT INDIVIDUALLY LIABLE FOR RETALIATION UNDER FEHA

In a victory for employers, the California Supreme Court held in a 4-3 decision in *Jones v. The Lodge at Torrey Pines Partnershi*p that supervisors cannot be held personally liable for retaliation under the California Fair Employment and Housing Act (FEHA). In this case, the plaintiff sued both his employer and his manager, alleging among other claims, sexual orientation discrimination and retaliation. The Supreme Court held that liability for retaliation claims should be confined to the employer and not include individual managers.

The *Jones* case resolved the long unsettled question of whether there is individual liability for retaliation. In 1998, the California Supreme Court ruled in *Reno v. Baird* that supervisors cannot be personally liable for *discrimination* under FEHA because discrimination arises out of the performance of necessary personnel management duties that are an unavoidable part of the supervisory function. In contrast, supervisors may be held personally liable for harassment, which consists of conduct not necessary for the performance of a supervisory job and is presumably engaged in for personal motives.

Following the reasoning in *Reno*, the Court in *Jones* found that retaliation, like discrimination, involves adverse employment actions that arise out of the performance of necessary personnel management duties. It reasoned that imposing liability on supervisors would do little to enhance recovery of monetary damages, but would severely impair the exercise of supervisory judgment. The Court explained that a supervisor facing personal liability for normal personnel actions (*e.g.*, demotion, termination, failure to promote, discipline, etc.) would face a conflict of interest every time he or she considered whether to take adverse action against an employee. The Court also recognized that corporate decisions are often made collectively by a number of persons and it would be difficult to assess individual blame if personal liability were permitted.

It is significant to note that the California Supreme Court explicitly declined to express an opinion as to whether a supervisor who is personally liable for harassment can also be individually liable for retaliating against an employee who reports or opposes that harassment.

CALIFORNIA SUPREME COURT RULES ON FIRST CFRA CASE

In *Lonicki v. Sutter Health Central*, the California Supreme Court handed down its first decision interpreting the California Family Rights Act (CFRA). The Court held that an employer's failure to follow CFRA's dispute-resolution mechanism to determine whether an employee qualifies for medical leave does not bar the employer from later claiming that the employee did not suffer a serious health condition. The Court also held that the fact a full-time employee on medical leave continues to perform a similar job for another employer on a part-time basis does not conclusively establish the employee's ability to perform the job for the original employer.

In this case, Lonicki took a leave of absence from Sutter due to depression and work-related stress. After plaintiff submitted a doctor's note stating she needed a medical leave of absence, Sutter directed her to be examined by its own physician, who concluded that plaintiff was able to return to work without any restrictions. Significantly, while Lonicki was on medical leave from Sutter, she worked part-time at Kaiser Hospital, performing essentially the same duties. Sutter directed Lonicki to return to work and terminated her employment after she failed to do so. Lonicki sued Sutter alleging violation of the CFRA.

Under the CFRA, an employer may require the employee to submit a certification from the employee's health care provider that the employee has a "serious health condition" rendering her unable to perform her job. If the employer has reason to doubt the validity of the employee's health certification, it may require, at the employer's expense, that the employee obtain the opinion of a second health care provider selected by the employer. If there is a difference of opinion between the two, the

employer may require, at the employer's expense, that the employee obtain the opinion of a third health care provider, approved jointly by the employer and the employee, whose determination is binding.

In this case, plaintiff argued that because Sutter never sought the opinion of a third health care provider, it was barred from challenging her claim that she had a serious health condition that rendered her unable to work at Sutter. The Court disagreed, stating that an employer's failure to obtain the binding determination of a third health care provider does not bar the employer from later asserting that the employee did not have a serious health condition that rendered her unable to do her job.

However, the Court refused to find that the plaintiff's performance of nearly identical duties at Kaiser Hospital on a part-time basis while on medical leave was *conclusive* evidence of her ability to perform her job duties for Sutter. Focusing on the employee's ability to perform essential job functions for a specific employer, the Court found that when a serious health condition prevents an employee from performing the tasks of an assigned position, this does not necessarily indicate that the employee is incapable of performing a similar job for another employer. The Court also noted that some physical or mental conditions may prevent an employee from having a full time job, but not render the employee incapable of working part time.

This decision underscores the care with which employers must evaluate requests for statutory medical leave, including whether the employee has a "serious health condition" under CFRA. Employers should also be mindful that federal courts interpreting the FMLA may rule differently on this issue.

NEWSBITES

Letter to Customers Accusing Former Employee of Breach of Contract and Misappropriation of Trade Secret Protected From Defamation Claim Under California's Anti-SLAPP Statute

In *Neville v. Chudacoff*, a California employer terminated an employee for alleged misappropriation of customer lists and solicitation of customers to start a competing business. Several months before the employer commenced litigation against the former employee for these alleged violations, the employer's attorney sent a letter to the company's customers accusing the employee of breach of contract and misappropriation of trade secrets, and suggesting to customers that they should refrain from doing business with the former employee to avoid potential involvement in the ensuing litigation. The employee sued the company for defamation. The California Court of Appeal held that the company's letter to its customers was protected from a claim for defamation under California's Anti-SLAPP statute, which allows defendants to dismiss a claim seeking to chill the valid exercise of constitutional free speech rights, including writings in connection with a civil litigation. The court found that even though litigation had not commenced, the company's letter to its customers was covered by the anti-SLAPP statute because it directly related to the employer's claims against the employee, and the employer was seriously and in good faith contemplating litigation against the employee.

Employment Agency and Company Were Joint Employers For Purposes of Failure to Reinstate Claim Under FMLA

In *Grace v. USCAR*, plaintiff was an information technology manager who worked as a contractor for eight years for USCAR, a research and development company for the automotive industry. While plaintiff was out on FMLA leave due to her asthma, the contract agency informed her that USCAR had decided to eliminate her position and fill it with a part-time employee of another contractor. Plaintiff sued both the employment agency and USCAR for failing to reinstate her at the end of her FMLA leave. The federal Sixth Circuit Court of Appeals found that the employment agency and USCAR were joint employers for FMLA purposes— the employment agency was the primary employer while USCAR was the secondary employer. Therefore, the court ruled that both could be potentially liable for failing to reinstate the plaintiff.

Employers who hire temporary/leased workers from employment agencies should be mindful of their obligations under the FMLA. Under this statute, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. However, when an eligible employee

takes leave, the regulations require that *both* the primary and secondary employer comply with the job reinstatement obligations under the FMLA. The secondary employer (generally the client company) is responsible for accepting the employee returning from FMLA leave if the secondary employer continues to utilize an employee from the employment agency.

California Judge Awards Over $1 Million in Attorneys Fees Following $30,000 Jury Award For Discrimination

In *Harman v. City & County of San Francisco*, plaintiff, an airfield safety official at the San Francisco International Airport, alleged race and sex discrimination. Following trial, the jury awarded plaintiff approximately $30,000 in damages for economic harm and emotional distress. Subsequently, the trial judge awarded plaintiff $1.1 million in attorney's fees, which the California Court of Appeal affirmed despite the relatively small underlying judgment.

Employee's Diabetes Constituted a Disability Under ADA Where She Was Restricted in Her Major Life Activity of Eating

In *Robbins v. WXIX Raycom Media*, plaintiff sued her employer under the ADA and state law after the company failed to accommodate her request for reduced work hours due to her Type II diabetes. The employer argued that plaintiff's doctor's recommendation of regular meal times, healthful foods, and small portions was no different from that given to nondisabled persons seeking to control their weight. A federal district court in Ohio disagreed. Plaintiff's diabetes, the court found, required her to adhere to eating restrictions that go beyond those recommended for the general population, which if not followed could lead to serious potential health risks, including blindness, kidney failure, stroke, heart attack, or amputation of the legs. The court held that the nature and severity of the consequences for the diabetic, the permanency of plaintiff's impairment, and the fact that there are no mitigating measures that would eliminate or ease plaintiff's restrictions, militated a finding that plaintiff was substantially limited in the major life activity of eating.

Employee Fired Six Weeks After Informing Company of Her Pregnancy Raised Jury Issue of Discrimination Under Title VII

In *Brockman v. Avaya*, a business development manager for a computer consulting company alleged that her employer violated Title VII by firing her approximately six weeks after she informed her supervisor that she was pregnant. A federal district court in Florida rejected the company's argument that plaintiff could not establish a *prima facie* case of pregnancy discrimination because she was not qualified for her job. The company argued that it decided to terminate plaintiff's employment based on her declining performance. However, the court found that the record evidence did not support the company's position because: (1) plaintiff's supervisor failed to produce a "lost" document outlining his reasoning for firing plaintiff; (2) in direct violation of company policy, plaintiff's supervisor failed to document any coaching sessions he allegedly provided to plaintiff regarding her performance; and (3) the company failed to advance any compelling reason why plaintiff's personnel file was missing. In addition, the plaintiff produced evidence of her qualifications for the business development position, including her past performance and experience. The court ruled that the employer's documentation failures and its inability to locate plaintiff's personnel file, raised a triable issue as to whether the company's stated reason for her termination was a pretext for discrimination.

This case serves as a sobering reminder of the importance of careful documentation of performance issues and the need to take immediate and effective measures to preserve relevant evidence.