The California Supreme Court Goes to Work on Employment Issues

Six cases on every employment lawyer's watch list

by Jason Litt

The California Supreme Court usually takes a healthy dose of employment cases each year and this year is no exception. This year the Court is due to address an eclectic group of issues that range from whether being exposed to offensive sexual humor during the writing of a sit-com constitutes sexual harassment, to an employee's right to medical leave when she can undisputedly perform the same job for someone else, to the scope of employer liability for discrimination by nonemployees, to the proper allocation of the burden of proof in disability discrimination cases, to the time frame in which a one-day employee such as a model must be paid, to whether an "at will" employment really means an employee can be fired without cause.

Counsel handling employment cases in the trial courts would be wise to track these issues pending before the Supreme Court in order to anticipate potential changes in the law, and to preserve arguments that take advantage of any favorable developments. Accordingly, this article lists and summarizes six cases that should be on any employment law attorney's watch list.

Can an employee who works with the writers of a popular sit-com sue for sexual harassment when she is exposed to suggestive and offensive sexual banter during the creation of the show?

In *Lyle v. Warner Brothers Television Productions* (2004) 117 Cal. App.4th 1164, review granted July 21, 2004, S125171, plaintiff Amaani Lyle is pursuing claims for race and sex discrimination, retaliatory discharge and harassment. Lyle, an African American woman, was hired as an assistant to the writers of the popular show *Friends*, a job that primarily entailed taking copious and detailed notes of the story lines, jokes and dialog discussed by the writers during the creation of the show. According to Lyle, after being hired, she repeatedly complained the writers were racially insensitive and that the jokes and dialog she was forced to listen to was highly offensive and degrading. Four months later, Warner Brothers fired Lyle because she was unable to type fast enough to keep up with the fast-paced action in the writers' room. Lyle sued.

The trial court granted Warner Brothers' motion for summary judgment. In an unpublished portion of the opinion, the Second Appellate District, Division Seven affirmed the dismissal of the discrimination and retaliation causes of action. But in the published portion of the decision, the Court of appeal reversed the trial court's ruling as to the harassment causes of action.

In reversing the dismissal of the harassment claims, the court focused on two prerequisites to a harassment claim under FEHA: (1) whether "the harassment complained of was based on sex" and (2) whether "the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608.)

Warner Brothers argued that even assuming the language was vulgar, crude and disparaging as argued by the plaintiff, there was no violation of FEHA as a matter of law because none of the comments were directed toward plaintiff or to women in general, thus the alleged harassment was not "based on sex." Warner Brothers also argued that plaintiff's job was to listen to the writers' discuss sexually charged dialog and jokes as part of the creative process, thus as a matter of law being exposed to such comments did not alter "the terms and conditions of [Lyle's] employment."

The Court of Appeal rejected both contentions. It held that FEHA does not require that sexually harassing conduct be directed toward a particular plaintiff to be considered hostile; instead, FEHA requires only that the plaintiff personally witness the harassing conduct and that the harassing conduct be in her immediate work environment. Because plaintiff allegedly suffered a "barrage of gender denigrating conduct" during the meetings she was required to attend as well as in the common areas, she was at least potentially harassed on the basis of her sex.

The court also held there was more than sufficient evidence of sexually offensive and degrading comments to establish severe and pervasive conduct that could have changed the terms and conditions of Lyle's employment. The Court noted that if frank sexual discussions were necessary as part of the creative process to create jokes, dialogue, and story lines as Warner Brothers contended, that was an issue of fact that could be considered by the jury in evaluating whether there was a hostile work environment, but it was not a basis to dismiss the plaintiff's claim as a matter of law.

The Supreme Court granted review of the Court of Appeal's opinion to address two questions: (1) whether the sexually coarse and vulgar language complained of by the plaintiff could

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constitute harassment under FEHA? and (2) whether potential liability under FEHA for sexual harassment based on such speech would violate defendants' rights of free speech under the First Amendment or the state Constitution?

Based on the justices' questions and comments at oral argument on February 14, 2006, it appears the Supreme Court will address only the first of these two questions. The court asked no questions about the constitutional issues. Instead, the Court's questions all centered on whether exposure to the language was part of plaintiff's job and whether the offensive language was based on the plaintiff's sex. Because the Court must reach the second constitutional question only if it finds against Warner Brothers on the first statutory question, it seems likely the Court will reverse the ruling of the court of appeal and hold the offensive language could not constitute a violation under FEHA as a matter of law where the offensive language was not directed at the plaintiff's sex and it was clear to the plaintiff she would be exposed to potentially offensive and vulgar speech as part of her job. That speculation is supported by the questions of several justices who asked how Lyle could perform her job without being exposed to sexually charged conversations.

NOTE TO READER: the author's firm, Horvitz & Levy llp is participating in this case, representing several *amici curiae* in support of the defendants.

Must an employer grant medical leave to an employee who is continuing to perform a substantially similar job for a different employer?

In *Lonicki v. Sutter Health Central* (2004) 124 Cal.App.4th 1139 [22 Cal.Rptr.3d 177], review granted March 16, 2005, S130839, plaintiff Antonia Lonicki is pursuing claims for violation of the Moore-Brown-Roberti Family Rights Act, also known as CalFRA. Lonicki worked as a medical technician for two hospitals, Kaiser and defendant Sutter Health Central (Sutter). Lonicki became unhappy when Sutter moved her to a later shift. Claiming she was too emotionally upset, she did not show up for work. When asked to provide a doctor's note, Lonicki obtained a note from a nurse practitioner stating in its entirety "Plan to return to work 8/27/99. Medical reasons."

Based on the note, Lonicki demanded medical leave under CalFRA, which permits an employee to request leave where that employee has "a serious health condition" that makes the employee "unable to perform the functions of the position of that employee." (Gov. Code, § 12945.2, subd. (c)(3)(C).) Sutter, unable to verify Lonicki's inability to work, demanded she return to work, and fired her when she did not return to work. Meanwhile, Lonicki continued to work for Kaiser doing substantially the same job she contended she was unable to perform at Sutter. Lonicki then sued Sutter under CalFRA.

Sutter moved for summary judgment, which the trial court granted because the undisputed evidence established Lonicki was performing the same functions for a different employer, thus there was no violation of CalFRA as a matter of law. The Court of Appeal affirmed. It noted there is an "obvious distinction between an employee who has become medically unable to perform the essential functions of the job and one who has become unwilling to do so for the employer." (*Lonicki v. Sutter Health Central, supra, 22* Cal.Rptr.3d at p. 186.) To qualify for medical leave under CalFRA, an employee must be "unable to work at all or unable to perform any one or more of the essential functions of the position of that employee." (Cal. Code Regs., tit. 2, § 7297.0, subd. (k).) Plainly, where it was undisputed that the plaintiff was performing the essential functions of her job for another employer, the plaintiff was not entitled to medical leave as a matter of law.

The Court of Appeal also rejected Lonicki's contention that Sutter had waived its right to challenge the leave by not getting a second opinion after she submitted a note from a medical professional. The Court acknowledged that an employer is required by statute to obtain a second opinion, and then a third opinion if there is disagreement with the employee's doctor, but the Court held the nurse practitioner's note submitted by Lonicki was "manifestly insufficient" to establish a qualifying medical condition under CalFRA.

In rendering its decision, the Court was clearly concerned that it appeared the plaintiff was abusing the disability and medical leave laws to her advantage. It noted that plaintiff conceded in her deposition that "she did not have a problem with work and thought she could have returned to work for Sutter if it had changed the working conditions to suit her." The court also noted that the disability laws were increasingly becoming a vehicle for abuse by employees who come up with "selective" disabilities such as stress and anxiety to avoid job conditions they do not like. Because stress "inheres in most jobs, and personality conflicts with coworkers, particularly supervisors, can arise," the court noted that it was all to easy for a disgruntled employee to claim such stress requires the employer to change the employee's working conditions at threat of a lawsuit, making it impossible for supervisors to effectively manage their employees. (*Lonicki v. Sutter Health Central, supra,* 22 Cal.Rptr.3d, at p. 185.)

A short dissent took issue with the majority's broad opinion and focused on the narrow question whether the fact Lonicki performed the same job functions barred her claim as a matter of law. On that issue, the dissent noted that even the hospital itself conceded that it is legally possible to be disabled from working for a particular employer and at the same time be able to perform the general job duties elsewhere. The dissent pointed to several authorities, including Justice Chin's employment law treatise, which state that statutory language requiring that an employee be unable to perform the essential functions "of that employee"

refers to the particular job for the particular employer in question, not whether the employee could fulfill the functions of a similar job elsewhere. Thus, the dissent concluded the case could not be decided as a matter of law and the question whether Lonicki could perform the essential job functions was a question for the jury.

The Supreme Court granted review to determine (1) whether the provisions of CalFRA entitle an employee to a leave of absence where the employee's serious health condition prevents him or her from working for a specific employer, but the employee is able to perform a similar job for a different employer and (2) whether the hospital's failure to invoke the statutory procedure for contesting the plaintiff's medical certificate preclude the hospital from later contesting the validity of that certificate?

The case is fully briefed, and the parties await scheduling of oral argument. As illustrated by the Court of Appeal's majority and dissenting opinions, the questions raised by the Court of Appeal potentially raise far-reaching questions of the scope of the State's disability laws, but could also be resolved as a fairly narrow legal issue. It remains to be seen which path the Supreme Court will take when it issues its opinion. In the meantime, employers should be cautious in rejecting medical leave claims where the plaintiff has a doctor's note even if the employer has knowledge the employee is generally capable of performing the functions of the job.

Does an amendment to FEHA holding employers responsible for the harassing conduct of its clients or customers constitutionally apply retroactively?

In *Carter v. California Dept. Of Veterans Affairs* (2004) 121 Cal.App.4th 840, review granted Dec. 1, 2004, S127921, a nurse in a veterans residence facility sued her employer, the Department of Veterans Affairs, alleging it was liable under FEHA for sexual harassment based on a hostile environment allegedly created by one of the other patient residents. In a prior case, *Carter I,* Division Two of the Fourth Appellate District upheld a judgment in favor of the employer, holding that the relevant provision of FEHA did not impose liability upon an employer for sexual harassment by an employer's customer or client. That case was accepted for review by the Supreme Court, but was transferred back to the court of appeal after the California Legislature amended FEHA to expressly provide that employers are liable for sexual harassment by nonemployees where the employer has notice of the harassing conduct and fails to take reasonable steps to prevent further harassment.

On remand, the Court of Appeal addressed the question whether the amendment to FEHA was to apply to cases already pending as of the effective

date of the amendment. Generally, to determine that question, courts first look to whether the amendment is a clarification of existing law or a change in the law. If the amendment is merely a clarification of existing law, it is applied to all cases equally. If, however, the amendment constitutes a change in the law, the amendment can be applied to pending cases only if the Legislature intended the amendment to apply retroactively *and* such retroactive application of the law does not offend the due process clauses of the state or federal constitutions.

Here, the Court of Appeal held the amendment could not be constitutionally applied in the present case to create liability. It first noted that, notwithstanding the Legislature's declaration that the amendment was intended to "clarify" existing law, based on the reasons given in its first opinion in *Carter I*, the former Government Code section 12940 could not have been read to impose employer liability for sexual harassment committed by nonemployees. The Court noted, however, the Legislature's declaration reflected a clear intent to apply the amendment to pending cases even if it could not be deemed declaratory of existing law.

Nevertheless, despite the clear legislative intent, the court concluded that application of the new law to this case was constitutionally prohibited because it would, without clear notice, impose substantially new obligations and liability on employers for conduct that was already completed in the past. The Court further noted that the amendment's obligations were substantively unfair because they applied only to claims of sexual harassment and did not apply to labor organizations or employment agencies, groups that are generally covered under FEHA. Thus, the Court appeared to believe the amendment itself was perhaps unconstitutional even as to newly filed cases, noting "[i]f it is applicable at all, its effect must be prospective only."

The Supreme Court granted review to resolve three issues: (1) whether prior to its amendment, FEHA imposed a duty on an employer to take reasonable steps to prevent hostile environment sexual harassment of an employee by a client with whom the employee is required to interact?; (2) If not, did the Legislature intend the 2003 amendment to apply retroactively to incidents that occurred prior to the effective date of the amendment?; And, (3) If so, would application of the amendment violate the due process clauses of the state or federal constitutions?

This case is noteworthy for several reasons. First, the Court of Appeal's opinion conflicts with Second Appellate District, Division Three's opinion in *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, which took the Legislature at its word and held the amendment was merely a clarification of the law and therefore applied to all pending cases. Second, the Court of Appeal's opinion is the first published decision in California to hold a statutory amendment could not be applied to previously filed cases on constitutional grounds where there was a clear legislative intent for such retroactive application (which explains why that portion of the opinion has no citations). And third, the implication that the statutory amendment itself is unconstitutional because it is substantively unfair would present a really interesting question for the court, and an issue that defense counsel in employment cases may well wish to preserve in answer to complaints based on the new statutory language.

The case has been fully briefed and was set to be argued on April 5, 2006.

In a claim for disability discrimination under FEHA, who has the burden of proving whether the plaintiff is able to perform the essential job functions?

In *Green v. State of California* (2005) 132 Cal.App.4th 97, review granted Nov.16, 2005, S137770, an engineer employed at a correctional facility operated by the State of California sued under FEHA for disability discrimination and failure to provide reasonable accommodation. The engineer contracted Hepatitis C while employed by the State and, during the next 10 years, he continued to perform his job. On several occasions, he was placed on light duty or disability leave due to two unrelated back injuries and side effects from his Hepatitis treatment. His employer ultimately determined he was incapable of performing his duties and placed him on disability retirement. The employee then sued his employer under FEHA for disability discrimination and failure to provide reasonable accommodation.

A jury found in favor of the employee, awarding economic damages and $2 million in noneconomic damages, and the resulting noneconomic damage award was later reduced by the trial court upon the employee's acceptance of a remittitur in lieu of a new trial. The employer appealed from the judgment and the employee appealed from the new trial order.

On appeal, the Fourth Appellate District, Division Two reversed and reinstated the jury's verdict. The Court held that under the relevant provisions of FEHA, Government Code section 12940, subdivision (a)(1), the employer has the burden of proving the plaintiff was incapable of performing his essential duties even with a reasonable accommodation as an affirmative defense to a disability claim. Because the employee plaintiff did not have to demonstrate he could perform the essential job functions to establish a prima facie case, substantial evidence supported the verdict.

The Supreme Court granted review to resolve the proper allocation of the burden of proof in such cases. Plainly, the resolution of this case will have a significant impact on how disability discrimination case are tried where there is doubt as to whether the plaintiff is able to perform the job even with a reasonable accommodation. The parties are still briefing the case for the court, so it will be some time before the case is decided. In the meantime, defense counsel should

continue to request instructions requiring the plaintiff to establish his or ability to perform the job as part of the case in chief.

Is an employee, such as a model, who works for a single job "discharged" within the meaning of Labor Code section 201 such that "the wages earned and unpaid at the time of discharge are payable immediately"?

In *Smith v. Superior Court* (2004) 123 Cal.App.4th 128, review granted Jan. 19, 2005, S129476 a model hired for a one-day assignment in a hair show for a flat $500 fee filed a class action on behalf of herself and others similarly situated, contending (among other things) that the hair show promoter "discharged" her upon the expiration of the time of employment and was therefore required to pay her "immediately" upon completion of the hair show, pursuant to Labor Code section 201. The model claimed she was entitled to $15,000 in "waiting time penalties" pursuant to Labor Code section 203 for the 30 days she waited to receive her wages. The trial court granted the employer's motion for summary adjudication and the model petitioned the Court of Appeal for a writ of mandate.

The Second Appellate District, Division Five, denied the petition. The Court held that completion of a job on an agreed upon day does not constitute a "discharge" for purposes of Labor Code sections 201 and 203. The Court of Appeal explained that "'discharge' means the affirmative dismissal of an employee by an employer from ongoing employment and does not include the completion of a set period of employment or a specific task." Because the model was not "discharged" within the meaning of section 201, the court concluded she was not entitled to recover "waiting time" penalties under section 203.

The Supreme Court granted review to resolve the scope of the term "discharge" under the labor statutes. The case has been fully briefed and is awaiting the scheduling of oral argument While the case is under review, employers might consider paying all employees — even one-day employees — as soon as practicable upon completion of the job to avoid possible penalties should the Court of Appeal's decision be reversed.

Where an "at will" employment contract defines "at will" as meaning the employer "has the right to terminate your employment at any time," is the contract reasonably susceptible of the interpretation that employment may be terminated only with cause?

In *Dore v. Arnold Worldwide Partners* (Mar. 24, 2004, B162235) [nonpub. opn.], review granted July 21, 2004, S124494, a former employee of an advertising agency sued the agency for breach of contract and related torts arising from his termination. The employee alleged that the agency breached an implied-in-fact agreement not to terminate him except for "good cause." The trial court granted summary judgment for the employer based on an "at will" provision in the parties' employment contract.

The Second Appellate District, Division Seven, reversed. The Court concluded that the language in the contract, although using the term "at will," was susceptible to the employee's interpretation that he could be terminated only for cause. Specifically, the contract defined the term "at will" as meaning the employer "has the right to terminate your employment at any time just as you have the right to terminate your employment with [the agency] at any time." The contract also stated that, after 90 days, the employee would receive feedback from his supervisor and would have an opportunity to discuss consideration for being named an officer of the agency. Reading these two provisions together and construing the agreement against the agency as the drafter, the Court concluded that the term "at will" did not mean that the employee could be fired "at any time for any reason"; the term merely meant the employee could be fired "at any time." The Court further concluded that, because the agreement was silent as to the cause for termination, parol evidence was admissible on this subject.

The Supreme Court granted review to address this important intersection of employment and contract law. The Supreme Court additionally granted review in another case raising related issues: *State Farm Mutual Automobile Insurance v. Wier* (Dec. 27, 2004, A101791) [nonpub. opn.], review granted Mar. 23, 2005, S131445 (briefing deferred pending disposition of Dore). Several groups such as the California Chapter of the Association of Corporate Counsel, the California Employment Law Council, and the California Employment Lawyers Association have filed amicus briefs in support of the employer. While the case is pending, employers may consider redrafting their employment agreements to make clear that "at will" means an employee can be terminated for any reason, as well as at any time.

As a final reminder, while the Supreme Court labors to decide these pending cases, employment law attorneys who are preparing pleadings, motions in limine, special jury instructions and the like should keep an eye on these cases and try to be creative in preserving arguments that take advantage of imminent favorable decisions, or that protect against damages or penalties that could arise from unfavorable decisions.

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