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RECENT APPELLATE DECISIONS

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COMPLIANCE WITH THE LAW IS NO DEFENSE TO DISCRIMINATION

by **Dee H. Stasnopolis, Esq.**

Many employers believe that an act that constitutes compliance with a law will immunize them from any claims of wrongful discharge. Inasmuch as our employment laws are based, in large part, on a wrongful intent analysis, simply complying with the law is not sufficient. There cannot be any wrongful intent on the part of the employer, lest the employer be subject to claims of wrongful discharge.

In the recent Ninth Circuit case of *Incalza v. Fendi* (2007), this issue was addressed directly. In *Incalza*, the plaintiff worked for the defendant in the United States for 13 years, during which time the defendant helped the plaintiff secure and renew an E-1 Visa. When a French national purchased a majority interest in the defendant's business, plaintiff's E-1 Visa was no longer valid. Plaintiff's position was a "for cause" position, thus, he could only be terminated for cause. He was not an at-will employee. Although the employer continued to employ another Italian citizen and obtained a H1-B Visa for him, allowing him to work for the French company, as to plaintiff, he was told that nothing could be done to remedy his Visa problem and, pursuant to the Immigration Reform and Control Act of 1986 ("IRCA"), he had to be terminated. The plaintiff offered options to his employer short of termination, indicating that he was about to be married to an American and would be able to obtain the

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Dee H. Stasnopolis



Dee H. Stasnopolis is a Partner in the Bakersfield office of Borton Petrini, LLP. Dee graduated from Southwestern School of Law in 1982. In addition to his admittance to the State Bar of California, he is admitted to practice before the U.S. Supreme Court, the Ninth Circuit Court of Appeals and all Federal District Courts for the State of California.

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Dee is a member of the Kern County Bar Association, as well as the State Bar of California. His professional involvement also has included instructing insurance companies on settlement tactics, conducting legal-liability assessments for companies, handling unfair labor practice charges in front of the NLRB, advising clients on collective bargaining issues, conducting seminars on employment law for businesses, and has served as an arbitrator for the Los Angeles and Kern County Superior Courts. He sits on the Labor and Employment Law Committee of the Bakersfield Chamber of Commerce. He is a member of the Bakersfield Employers Advisory Council and the Society for Human Resource Management. He also is a member of the Employment Law Section of the State Bar of California.

RECENT APPELLATE DECISIONS

By Dee H. Stasnopolis

FEDERAL CASES

In *Garcia v. Horizon* (2007), the United States First Circuit Court of Appeals interpreted and applied the Uniform Services Employment and Reemployment Rights Act (“USERRA”) and held that an employer who terminates an employee protected under USERRA has the burden of proving that the termination was unrelated to his military service. The court disallowed the trial court’s use of the McDonald Douglas framework, and instead, held that the burden remains with the employer at the time of trial to establish the propriety of the termination.

In *San Manuel Indian Bingo & Casino, et al. v. NLRB* (2007), the United States Court of Appeals for the District of Columbia held that the National Labor Relations Act (“NLRA”) applies to a California Indian casino that employs both members and nonmembers of its Tribe and derives much of its business from outside the reservation. The court held that there was no exemption for the Indian Tribe under Tribal sovereignty and that the NLRA’s jurisdiction over the casino would not significantly impair the Indian Tribe’s ability to exercise its sovereignty.

In *Gambini v. Total Renal Care, Inc.* (2007), the Ninth Circuit Court of Appeal reversed the district court’s decision with respect to instructions given at the trial level. In this case, the plaintiff had requested FMLA Leave based upon complications that arose from her bipolar disorder. The plaintiff had previously explained to her employer that she had this condition, and it would occasionally make her be curt and/or emotional. Following an outburst by the plaintiff, the plaintiff requested leave to deal with her bipolar condition. On the following business day after the leave was provisionally approved, the plaintiff was notified that her employment was being terminated. The basis for the termination was her co-workers’ statements to their employer of concern for their safety due to plaintiff’s violent outburst. At trial, the plaintiff objected to the district court’s substantive jury instruction on each of her legal claims. The appellate court found that the district court abused its discretion when it declined to give an instruction regarding conduct resulting from disability. The employer stated in discovery that one of the reasons it terminated plaintiff was because she had frightened her co-workers with her violent outburst, the Court of Appeal held that plaintiff was entitled to have a jury instructed that if it found that her conduct at issue was caused by or was part of her disability, it could then find that one of the “substantial reasons” she

was fired was her bipolar condition. The court reversed the district court’s decision in this matter.

CALIFORNIA APPELLATE DECISIONS

In *Carter v. Escondido Union High School District* (2007), a teacher, who was also a basketball coach, claimed that the District declined to reelect him to his probationary teaching position because, while employed as a teacher at another school district, he informed the athletic director there that the football coach had recommended a nutritional supplement to a student. The Court of Appeal held that even if this was the basis for declining to reelect him to his probationary teaching position, the disclosure was not protected under the whistle blowing statute, because it was a routine internal personnel disclosure that was, at its core, a disagreement between the football and basketball coaches about the proper advice to give to student athletes. The court held that this type of disclosure was not encompassed by Labor Code section 1102.5 and, consequently, could not support a wrongful termination claim. The court held that while the District’s decision to terminate the teacher may have been arbitrary, misguided and petty, it was not prohibited by law or in contravention of well-established public policy, inasmuch as giving advice to take nutrient supplements was not prohibited by any regulation or law.

In *Reyes v. Van Elk Ltd.* (2007), the California Court of Appeal reviewed the superior court’s granting of a summary judgment on the grounds that undocumented workers were precluded by federal law from asserting prevailing wage claims and that the supremacy clause preempted California statutes declaring immigration status irrelevant to claims under California labor, employment, civil rights and employee housing laws. In reversing the trial court, the Court of Appeal held that the federal case law did not prohibit undocumented workers from having standing to raise claims for prevailing wages where those claims were for work already performed. Further, the Immigration Reform and Control Act of 1986 (“IRCA”) did not preempt the prevailing wage law, in part because the prevailing wage law removed a major incentive to hiring undocumented workers. Therefore, it reversed the granting of the summary judgment in favor of the employer and remanded the case back to the trial court level.

In *Amalgamated Transit Union Local 1756 v. First Transit, Inc.* (2006), the petitioners consisted of two labor unions and 17 members or former members who were



seeking a writ of mandate and/or prohibition after the superior court ruled that the unions lacked standing to recover civil penalties and attorney's fees under the state labor code Private Attorney's General Act of 2004 embodied within Labor Code section 2699 or to sue for unfair competition under Business and Professions Code section 17203. The petitioners had alleged that the employers failed to provide their employees with the meal and rest breaks required by law. The appellate court denied the writ petition brought by petitioners. The appellate court agreed that the unions had standing as assignees to assert the claims of union members who had assigned to the unions their rights to recover wages owing to them. However, the unions could not assert claims on behalf of members who had not assigned their claims to the unions. An assignment purporting to transfer to the unions "my right to sue in a representative capacity on behalf of current and former employees" was not transferred "by the owner" of "a right to recover money or other personal property" within the meaning of Civil Code sections 953 and 954. Consequently, the unions did not have standing to assert the rights of members who had not assigned their recovery rights to the unions. The court held that representative claims could be brought only if the injured claimant complied with Code of Civil Procedure section 382, meeting the procedural requirements applicable to class action lawsuits.

In *Ross v. San Francisco Bay Area Rapid Transit District* (2007), the Court of Appeal affirmed the trial court's granting of a summary judgment in favor of the Bay Area Rapid Transit District ("BART"), based upon BART's immunity under Government Code sections 815.2 and 821.6. Plaintiff, a former employee, had sued BART for discrimination and wrongful termination in violation of public policy. The employee argued that the common law torts of discrimination or wrongful termination in violation of public policy created direct rather than vicarious employer liability that, in the case of a public entity employer, were unaffected by the government code. The Court of Appeal disagreed. The Court of Appeal held Government Code section 815 established the basic rule that public entities were immune from liability except as provided by statute. Thus, when it came to common law tort injuries, BART's liability could only be predicated on its vicarious liability, if any, for the wrongful acts of its employees. The acts complained of were immune from liability under Government Code section 821.6 and, therefore, BART was immune from liability under Government Code section 815.2.

In *Hall v. The County of Los Angeles* (2006), the Court of Appeal affirmed the granting of a summary judgment in favor of the County. In this case, the plaintiff female attorney filed a class action suit against the County, its counsel and a legal services company, alleging gender-based wage discrimination

in violation of the State and Federal Equal Pay Acts and the California Fair Employment & Housing Act ("FEHA"). The attorney alleged that the legal services company's attorneys, who were predominately female, received substantially less pay and benefits than County counsel's attorneys, who were predominately male. The court concluded that the attorney had used the wrong comparator. The undisputed evidence established that, at any given time, County counsel and the company both employed a substantial number of women and that, within the company, women were paid the same as men. The court held there was no basis to use a male County Counsel lawyer as a comparator to the legal services company's attorneys. For this reason alone, the attorney's claim of discrimination failed. The court affirmed the lower court's judgment in this matter.

In *Miller v. Union Pacific Railroad Co.* (2007), the Court of Appeal affirmed the trial court's order striking the employee's request for expert witness fees pursuant to Code of Civil Procedure section 998. This was a case involving a claim by an employee under the Federal Employer's Liability Act ("FELA"). In affirming, the Court of Appeal held that the availability of expert witness fees in a FELA action filed in state court was controlled by federal law, and that federal law did not authorize an award of expert witness fees to a prevailing plaintiff in a FELA action.



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appropriate documentation to work for the defendant. The defendant, who apparently did not want the plaintiff working at their business anymore, refused any accommodation.

The Ninth Circuit found that even though IRCA requires proper documentation to work and would be a valid reason for termination, in this particular case, there were other remedies short of discharge that were permissible under federal law. The evidence adduced at trial established that the supervisor disliked plaintiff and given the disparate treatment of the other Italian employee, the court found sufficient evidence to support the jury verdict of \$1,088,440 on the plaintiff's discrimination claim. The court noted that there was no preemption issue to decide, given the alternative immigration remedies that were available to the employer.

Employers should be cognizant of their supervisors' actions and decisions. Any termination needs to be fully reviewed by upper management to ensure that it is for a correct basis and properly documented. Many times, on close calls, the review should be by a third party, either a human resource specialist or an attorney, to ensure that the termination is properly documented and nondiscriminatory.



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