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RECENT FIRST DISTRICT DECISION AGAINST ALBERTSONS SUPERMARKETS HIGHLIGHTS AN EMPLOYER'S DUTY TO CONSISTENTLY PROVIDE ANY AGREED ACCOMMODATIONS TO DISABLED EMPLOYEES

by Jonathan P. Geen, Esq.

A recent First District decision against Albertsons supermarkets that resulted in a judgment for $200,000 damages under the Fair Employment and Housing Act to a disabled employee resulted from an incident in which a 45-year-old employee suffered severe emotional distress from Albertsons' failure to accommodate her need for frequent bathroom breaks, illustrates how important it is for employers to honor the accommodations they have agreed to make with disabled employees. In that case, the plaintiff A.M. had returned to work after having had cancer treatment for her tonsils and larynx and had undergone chemotherapy and radiation treatment that affected her salivary glands, leaving her mouth very dry and requiring her to constantly drink water. As a result of the large volume of water she consumed, she had to go to the bathroom frequently to urinate.

Albertsons was aware of Ms. A.M.'s need for accommodation, and had worked with her in the past to make sure that her need for frequent bathroom breaks was granted. However, on the particular day that led

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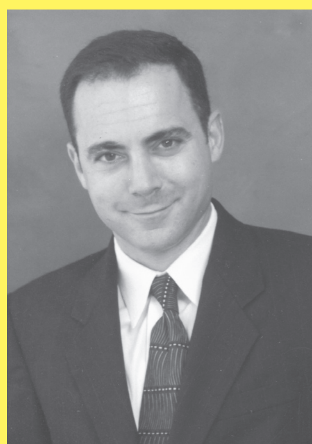

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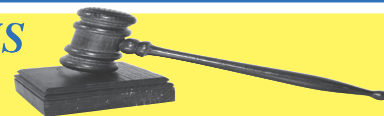
Jonathan has practiced law in Illinois, as well as California. He is experienced in both litigation and non-litigation matters. He has successfully defended employers from wrongful termination, wage and hour, discrimination, harassment, and retaliation claims before both courts and administrative agencies, and managed to get employee cases decided in employers' favor on summary judgment.

He is regularly consulted by numerous companies on all of their day-to-day human resources issues, including employee disputes, effective discrimination/harassment investigation and training, as well as evaluation and drafting of their employment policies. He has presented seminars on employment law for several organizations, including the San Diego Employers' Association.

SUMMARY OF APPELLATE DECISIONS EMPLOYMENT LAW



By Jonathan P. Geen, Esq.

STATE

In *Schachter v. Citigroup, Inc.,* the California Supreme Court affirmed the lower court's granting of summary judgment in Citigroup's favor on a purported class action relating to employees' forfeiting company stock they had received at a reduced price in lieu of a portion of their annual cash compensation, but which had not yet vested as of the time the employees voluntarily left their employment. The plan in question provided that in such circumstances the employees forfeited the stock, as well as the compensation the employees had waived in order to exercise the stock option. The purported class of employees contended that this forfeiture violated the sections of the California Labor Code that require that employees be paid all earned unpaid wages upon termination or resignation and that prohibit agreements that purport to circumvent that requirement. The Supreme Court agreed with the Court of Appeal that there was no legal reason the plan could not be enforced. In reaching such decision, the Supreme Court recognized and noted, as did the Court of Appeal, that there was nothing preventing the employee from having been paid his wages and then use such wages to purchase the stock with a forfeiture provision. The Supreme Court commented that the lack of the additional step did not render the forfeiture stock plan violative of the California Labor Code.

In *Haberman v. Cengage Learning, Inc.*, the Fourth District affirmed the trial court's granting plaintiff's summary judgment in favor of Cengage, as well as the plaintiff's former supervisor, on claims for sexual harassment, retaliation, breach of contract, and intentional infliction of emotional distress. Ms. Haberman had claimed that she was sexually harassed and retaliated against by her supervisor who had on a few occasions mentioned how gorgeous she looked and made a few comments that could have been viewed as male chauvinistic. There was also one particular alleged suggestive comment in which the supervisor called Ms. Haberman on her cell phone while they were both parking for a convention and he said that he was "coming right up behind her and that it felt pretty good." The Court of Appeal agreed with the Superior Court of Orange County that the alleged harassing conduct claimed by the complainant was isolated and trivial enough to not constitute severe pervasive conduct as required for sexual harassment. For the same reason the Court of Appeal agreed with the trial court that the complainant had not alleged outrageous conduct required for an intentional infliction of emotional distress claim. The Court of Appeal also affirmed the trial court's granting of summary judgment on Ms. Haberman's retaliation claim. She had claimed that she had complained of sexual harassment to the HR department. She further claimed that her short- and long-term disability payments were delayed, as was her workers' compensation case, and her employee benefits unjustly curtailed. The Court of Appeal agreed with the trial court that plaintiff had produced no evidence regarding the circumstances of such delays, who was responsible for the delays, or the length thereof. The court held that her general and conclusory statements were insufficient to establish a sufficient triable issue of material fact that Cengage itself took any adverse action against her.❖

ACCOMMODATIONS TO DISABLED EMPLOYEES

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to the A.M. case, A.M., who worked as a cashier/checker, reported to a different supervisor who had never worked with the plaintiff before and had no knowledge of plaintiff's disability. The general policy was that a checker could never leave the front end of the store unattended and the person who A.M. was working with, a courtesy clerk, was not allowed to operate a register and therefore could not relieve A.M. at the checkstand. On the day of the incident, A.M. repeated tried to get the supervisor to allow her to take a break to go to the bathroom, indicating she "really needed to go." The supervisor did not give her permission to leave her checkstand and apparently just hung up on the telephone when A.M. urgently called her on the store's internal telephone system. After the courtesy clerk found the supervisor to tell her that A.M. needed her, the supervisor said that she was busy and that A.M. had to wait longer.

Finally, A.M. could not wait any longer and urinated at the checkstand in her clothes and, because she was also having her menstrual period at that time, became covered in both urine and blood.

A.M. had extreme emotional stress from the incident, including suicidal thoughts, and was committed to a psychiatric hospital for several days.

The supervisor left her employment with Albertsons. The plaintiff tried returning to work at Albertsons three months later, but the store was unable to offer her a schedule that allowed her to continue to attend therapy meetings, a condition of her return to work. Eventually, A.M. did return to work, though she had trouble getting a shift that she needed. She nonetheless did receive bathroom breaks at the store whenever she asked for them, at least at the time of trial.

The trial court had denied Albertsons motion for nonsuit based on its assertion that there was no liability for failure to accommodate A.M.'s disability, as a result of this one occasion, from a supervisor who did not even know about plaintiff's disability. The trial court had denied that motion.

In affirming the trial court's denial of the motion for nonsuit, the Court of Appeal held that single failure to accommodate can support a finding of disability discrimination under FEHA. In so holding, the Court of Appeal noted that as was demonstrated by A.M.'s case, a single failure to make reasonable accommodation can have tragic consequences for a disabled employee. In a separate part of the decision, the Court of Appeal further found that the jury did not err in finding that A.M. was an unusually susceptible plaintiff so as to be entitled to greater emotional distress damages due to prior psychiatric and stress issues she had sustained in her life.

As a result of the A.M. case, it is clear that an employer who has agreed to accommodate a disabled employee must ensure that all supervisors who work with the subject employee know from the start of any special accommodations they must provide to such employees, and make sure those accommodations are granted on every single occasion. ❖

YOUR EMPLOYMENT HANDBOOK NEEDS REGULAR CHECKUPS AND REVISIONS

By Jonathan P. Geen, Esq.

Most successful businesses are already well aware that they need to have an employment handbook to act as both a shield from potential employment claims from disgruntled employees, as well as a means of educating and inspiring employees about their workplace. However, employee handbooks are not intended to be permanent and unchangeable. To the contrary, they are meant to be ever-developing and fine-tuned based on changes both in the law, as well as because of changes in the details of how the particular employer does business. There are at least three important reasons why employers should have their employee handbooks reviewed at least every two years, and preferably annually, in order to ensure that they work to the employer's benefit, as opposed to detriment.

The Potential for Inaccuracies or Imperfect Language in the Handbook. In our experience, it is not unusual for employee handbooks to need fine-tuning and/or revisions, regardless of any changes in law or circumstance. Unfortunately, many employee handbooks currently being used by employers and that we are asked to review contain sufficient errors to not only act as an inadequate shield for employers, but also provide employees with sufficient ammunition for breach of contract and/or wrongful termination claims after their departure from the workplace. Unfortunately, particularly in the current economy when businesses are trying to cut costs, many companies are choosing to download and use employee manuals they find online or borrow from friends and colleagues. The expression, "you get what you pay for," could not be more applicable. Not only does using such a form not provide the business with the kind of custom document that addresses any specific concerns or circumstances unique to that employer, but it also provides language that the employer may not understand, and that may be completely inapplicable to that business. It therefore may provide inherent contradictions and booby traps for the employer using it. The risk is particularly high because most employers do not thoroughly read, let alone understand, the legal purpose of the various sections within a form employee handbook or how such sections are to be interpreted. Therefore, finding a law firm such as Borton Petrini, LLP, that is willing to work with employers to find a cost-efficient way to prepare custom employee handbooks, is the kind of preventative law that is particularly worth its weight in gold.

Additionally, because, as stated above, so few employers truly take the time to read through their employee handbooks and make sure that the facts and policies set out in such document accurately reflect what is truly going on in their workplace, even those employers who hired a competent law firm to prepare their handbook run the risk of claims and inconsistent legal positions if the handbook they have distributed to employees simply does not reflect how the employer and employee interact in their day-to-day workplace.

Changes in the Law. Perhaps no area of law is as ever changing as employment law. Both federal and state law provisions are amended, or added, every year. Many of these changes are so significant that any employer who does not follow the changes from federal and state legislatures ends up with employee handbooks that contain legal violations that in some cases create per se liability. Not all of these changes can be anticipated so easily. For example, one of the changes within the past few years under California law had to do with lactation accommodation to those female employees who wish to pump breast milk for their babies.

In addition to changes in statutes from the state and federal legislatures, court decisions also come down every day, either changing or clarifying provisions of California law. Unless you have kept up to date with these legal decisions through counsel, you will simply not know whether changes to your employee handbook are advisable based on new case authority. Additionally, lawyers who practice employment law continue to get feedback from judges and other attorneys at seminars and in court cases without formal legal opinions that nonetheless shed light on how courts are likely to interpret employee handbook provisions that likewise may dictate recommended changes in handbook language.

Changes in the Employer's Policy Circumstances. Even if your employee handbook was completely reflective of how your business worked at the time it was implemented, since that time, there may well have been changes to your business that mandate changes in your handbook language. Many employers do their best to continually implement new policies or improve those they previously had. However, if the employer fails to amend its employee handbook to ensure that such language reflects how it is currently doing business, it runs the risk of creating a contradiction that could cause an employer significant harm in a lawsuit for wrongful termination. Because one of the significant issues in employment discrimination claims is always whether or not the employer's stated reasons for termination are pretextual, discrepancies in employment practices and policies create a real risk of a finding of pretext.

Additionally, certain employee handbook provisions, such as provisions under the federal and California Family Medical Leave Act, only apply to employers with a certain number of employees. To the extent the employer's workforce has significantly increased or decreased since the preparation and distribution of the initial handbook, it is likely that handbook sections need to be added or deleted to reflect the legal requirements now applicable to that employer.

Conclusion. In summary, employee handbooks are an important tool for employers to shield themselves from potential employment claims and to assist with effective communication with their employees. However, employee handbooks that were either not ideally prepared in the first place, or that become outdated, are more of a weapon for disgruntled employees than a benefit to employers. A cost-efficient legal "checkup" on an annual basis with our firm will help to ensure that your company is adequately protected and up to date with the legal minefield that is employment law. ❖

DISCLAIMER: THE INFORMATION PROVIDED IN THIS UPDATE IS NOT A SUBSTITUTE FOR LEGAL ADVICE. READERS SHOULD BE ADVISED THAT IF THEY HAVE QUESTIONS ABOUT THIS OR ANY OTHER AREA OF LABOR AND EMPLOYMENT LAW, THEY SHOULD SEEK THE ADVICE OF COMPETENT COUNSEL SPECIALIZING IN LABOR AND EMPLOYMENT LAW.

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