

Three Areas Augur Spikes in Litigation

By Leonid M. Zilberman

As employers look forward to 2007, what are likely to be the burning employment issues? What types of claims will dominate the litigation landscape? Over the last several years there has been less employment-related legislation coming out of Sacramento, in large part because of the governor's veto pen.

Perhaps the year's most significant employment law was the two-step increase in California's minimum wage. It will increase 75 cents to \$7.50 per hour effective Jan. 1 and will increase again on Jan. 1, 2008, to \$8.00 per hour. And last year brought about mandatory sexual harassment training requirement for supervisors and managers.

While nobody can see the future, it seems that three areas are ripe for continued expansion: (1) retaliation claims; (2) disability claims; and (3) wage-and-hour class actions, where plaintiffs' attorneys are coming up with new theories of recovery every day.

Retaliation

Some of California's largest recent employment verdicts were retaliation claims. An Alameda County jury awarded \$12,500,000 to a 59-year-old pilot who was fired after allegedly reporting safety violations. And the largest verdict in Madera County history - \$25 million - went to three workers who were terminated after blowing the whistle on alleged fraud at a nut processor.

These cases show two common characteristics of retaliation claims: Juries typically like to "send a message" to employers for adverse employment actions against employees who make valid, good-faith complaints. Retaliation claims are usually easier to prove to a jury than garden-variety discrimination or harassment claims, which tend to have more technical proof issues.

The United States Supreme Court arguably lowered the bar for employees in its ruling in *Burlington Northern & Santa Fe Railroad v. White*, 126 S.Ct 2405 (2006). The court resolved a deep circuit split and gave a single definition of an adverse employment action. The Supreme Court had to determine how harmful the adverse actions must be to fall within the scope of Title VII's anti-retaliation protection.

Justice Stephen Breyer wrote that a court cannot solely focus on actions that occur in the workplace. Practically speaking, an employer can retaliate against an employee by causing harm outside the workplace. Thus, the anti-retaliation provisions, unlike the substantive provisions of Title VII, are not limited to purely discriminatory actions that affect terms and conditions of employment. For this reason, the court held the anti-retaliation provisions must be broadly interpreted.

This case could have substantial implications for 2007 and beyond. The court has articulated a much broader test for retaliation than had previously existed in many federal judicial circuits.

Burlington Northern will make it more difficult for employers to summarily adjudicate Title VII retaliation claims. Employers who regularly seek to remove cases to federal court may think twice about doing so. California employees may once again begin to pursue federal claims despite other procedural obstacles. As a result, look for more whistleblower and retaliation claims in 2007 and larger jury verdicts to boot.

Disability Bias Claims

Until recently, employers had the upper hand in disability discrimination lawsuits. However, a 2006 decision of the state Court of Appeal may reverse their odds of prevailing in disability discrimination claims under California's Fair Employment and Housing Act.

In *Gelfo v. Lockheed Martin*, 140 Cal.App.4th 34 (2006), the court held that the plaintiff's own statements that he was not disabled didn't bar a claim that his employer "regarded him" as disabled. The court further held that an employer must engage in an interactive process aimed at effecting a reasonable accommodation and provide necessary and reasonable accommodation to an applicant or employee whom it regards as physically disabled, even when he is not actually disabled. The employer's reliance on the employee's prior work restrictions constituted an admission it regarded him as disabled.

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In this case of first impression, the court rejected an opposite ruling reached by the 9th Circuit Court of Appeals in *Kaplan v. City of North Las Vegas*, 323 F.3d 1226 (9th Cir. 2003). There, a police officer was terminated because of a misdiagnosis that he had rheumatoid arthritis. The court held that because Kaplan wasn't actually disabled, she was not a "qualified" individual under the American's with Disabilities Act. Summary judgment went to the city.

Gelfo highlights the difference between California's unique disability discrimination laws and the federal Americans with Disabilities Act. Moreover, it exacerbates the dilemma facing employers who are hesitant to rely on an employee's claimed recovery in the face of contrary medical evidence. Based on *Gelfo*, we should see a sharp increase in employee claims that their employer regarded them as disabled, even though they were fully capable of performing the essential functions of the job without reasonable accommodation.

As an example of potential cases to come, we only need to look to a recent jury verdict from Sonoma County, in which a 52-year-old employee, who had been diagnosed with a panic disorder, won a \$6.5 million verdict because he suffered a nervous breakdown when he was transferred to a position that required face-to-face contact with clients.

Apparently, his employer had been accommodating him - for 15 years - by allowing him to work in an environment that did not require such close contact with clients. The jury believed that the requirement of face-to-face contact and the refusal to continue the accommodation was unfair and unlawful.

Wage and Hour Litigation

In 2006, meal-and-rest period litigation continued against employers. It appears there will be no rest (no pun intended) for plaintiffs' attorneys in the year to come. The \$172 million meal-break judgment in *Savaglio v. Wal-Mart Stores*, tried in Alameda County, was entered in October. Wal-Mart has promised to appeal.

In 2007, the California Supreme Court will likely take up *Murphy v. Kenneth Cole*, 134 Cal.App.4th 728 (2005), and a handful of similar cases. The issue on review is whether the one-hour premium pay for violation of meal-or-rest period rules is a penalty or a wage.

If the premium pay is a penalty, a one-year statute of limitations applies and terminated employees suing for the penalty are not entitled to waiting time penalties. If the premium pay is a wage, the statute of limitations can be up to four years and former employees may be entitled to waiting time penalties. There are no fewer than four different appellate opinions on this issue. Only time will tell whether missed meal-and-rest period payments are properly characterized as penalties, wages or both. In the meantime, employers should comply with rest-and-meal period requirements.

The coming year also should be active in misclassification class actions involving white-collar professionals in industries that previously have been untouched by these claims. Securities brokers who have been touting their market-savvy prowess to their customers now are pleading that they really are glorified paper-pushers and have filed a multitude of class actions against Merrill Lynch, Morgan Stanley, Prudential and other brokerage firms. These employees earned millions in annual commissions, but now claim they should have been classified as hourly wage earners eligible for overtime compensation under the California Labor Code.

The misclassification theory affects many commission-based white-collar industries. The plaintiffs are attempting to set their "hourly rate" by dividing their annual commissions over a 40-hour workweek. Thus, for example, a broker who hypothetically earned \$250,000 last year, putting in 60-hour workweeks, made \$120 per hour for a 40-hour workweek. At time-and-a-half for overtime, the employer owes this broker (assuming 50 workweeks per year) \$180,000 per year in overtime.

The irony is that brokerage firms would not continue to compensate their commissioned

employees at the same level if they also had to pay them overtime. Under a commission structure, a broker's compensation is uncertain, and depending on entrepreneurial skills and abilities, a broker can have much more earning capacity than if his or her salary were based on an hourly wage.

Another relatively new area of litigation concerns the reimbursement of business related expenses by employers. Several banks, including Wells Fargo and Washington Mutual, have been sued in California class actions on the claim that they don't reimburse their employees for business-related expenses, in violation of Labor Code Sections 2802.

That statute provides: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employee."

Employers argue that Section 2802 is limited to "necessary" expenditures or losses. And one appeal court has noted that necessity is by nature a question of fact, "susceptible of various meanings" depending on the context in which it is used, which may be helpful to overcome class certification. *Grissom v. Vons Companies*, 1 Cal.App.4th 52 (1991).

However, plaintiffs argue that employers fail to reimburse employees (usually commissioned sales people) for expenses incurred in the performance of their job duties, including expenses incurred by the use of their vehicles, mileage expenses, entertainment expenses, meals, cell phone and home fax machines and Internet connections. The case against Washington Mutual has been certified as a class action, and we will likely see additional activity in this area of wage and hour law in 2007.

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