

EMPLOYMENT MATTERS

FEHA DISABILITY DISCRIMINATION UPDATE

California courts recently issued two decisions favorable to employers in defending disability discrimination/harassment cases brought under the California Fair Employment and Housing Act (“FEHA”).



Supervisory Behavior Related to Business and Management Duties Cannot Form the Basis For Harassment

In *Roby v. McKesson Corp.*, a longtime employee who developed a panic disorder was terminated for violating the employer’s attendance policies when she was repeatedly absent due to her condition. After trial, the jury rendered a verdict for the plaintiff on all of her disability discrimination

related claims. On appeal, the court overturned the verdict on the harassment claim, holding that there was insufficient evidence to support a finding that her supervisor harassed her.

What is a hostile environment?

After 25 years of employment with excellent performance and good attendance, the plaintiff developed a panic disorder, which caused her to pick at her arms and sweat profusely. In addition, the plaintiff’s panic medications caused her to exude a significantly unpleasant body odor. Soon after the plaintiff developed her panic condition, she was assigned a new supervisor. The new supervisor did not return the plaintiff’s greetings, referred to the plaintiff’s job as “a no brainer,” gave all of the other employees gifts, assigned the plaintiff to answer phones during the holiday party, frequently reprimanded the plaintiff in front of her co-workers,

U.S. SUPREME COURT UPHOLDS STRICT INTERPRETATION OF STATUTE OF LIMITATIONS FOR TITLE VII CLAIMS

Employers had a victory this month when the U.S. Supreme Court ruled that a plaintiff must file her complaint with the EEOC within 180 days (or 300 days in California) after a discrete act of alleged intentional discrimination occurred. In *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*, Ms. Ledbetter claimed that in the past she had received poor evaluations because of her sex. These past decisions resulted in lower pay and continued to affect her salary throughout her employment. The Supreme Court held that even though Ms. Ledbetter continued to feel the “continuing effects of the alleged discrimination” each time she received a paycheck, the actual discriminatory pay decision had occurred many years ago, and thus that decision “is merely an unfortunate event in history which has no present legal consequences.” The Court pointed out that Ms. Ledbetter “should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her.” Employers should expect that efforts will be made to change this ruling in Congress.

and made negative comments about the plaintiff’s body odor.

The court noted that actionable hostile work environment harassment requires conduct that

falls outside the scope of the alleged harasser’s job duties, is not necessary to the business and personnel management of the employer, and is based in some manner on the

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COMPETITIVE EMPLOYERS BEWARE: A LITTLE SOLICITATION CAN LEAD TO BIG CLAIMS

The Ninth Circuit recently allowed one employer to go forward with claims against another employer based only on the competing employer's alleged intentional interference with employment contracts.

Background

In *CRST Van Expedited, Inc. v. Werner Enterprises, Inc.* the complaining employer, CRST, paid for its truck drivers' training and certification in three phases. During the first two phases, the prospective drivers were subject to a "Pre-employment Driver Training Agreement," after which CRST and the drivers entered into an "Employment Contract" for phase three. (Both parties agreed that the employment contracts were governed by California law). CRST's employment contracts contained an initial one-year term during which the employees were not terminable at-will. After one year, however, the employees became "at-will." The employment contracts also contained a provision that required the employee to devote "full-time" to their employment with CRST and take no actions in conflict with CRST's interests.

The impetus for the lawsuit occurred when CRST learned that two of its drivers had applied for jobs as truck drivers with one of its competitors, Werner, only

one month after they signed their employment contracts with CRST. CRST immediately sent letters to Werner informing the company of the employment contracts and alleging interference with these contracts. Despite the letters, Werner hired the truck drivers, which CRST alleged was

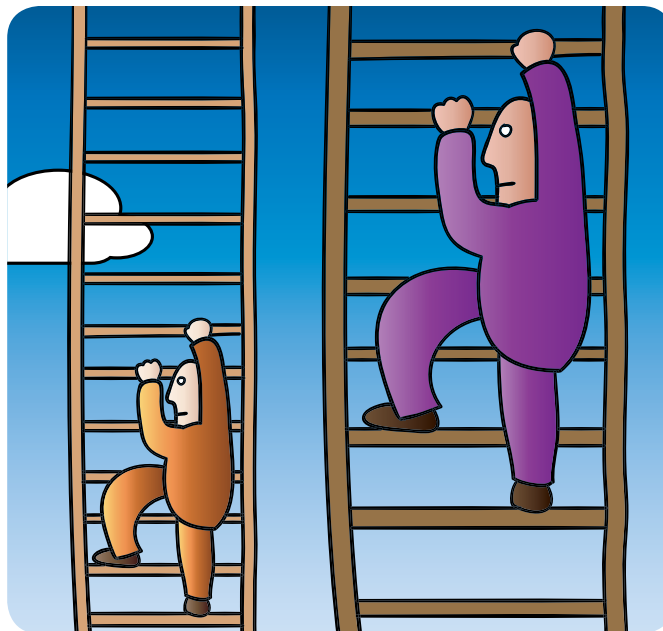
the employees to breach the contracts, the alleged resulting breach, and the alleged damages in the form of unreimbursed training, recruiting and advertising costs. The court next found that CRST had adequately established a violation of Section 17200 of the Business and Professions Code

allowing CRST to proceed with these claims.

What Does This Mean For Employers?

The Ninth Circuit's decision demonstrates that employers alleging unlawful solicitation of current employees can viably assert three different causes of action – two torts and one statutory violation. Additionally, employers should be aware that these three causes of action can all be based on only one cause of action – intentional interference with contract. Here, CRST's ability to establish the elements of intentional interference with contract does triple duty. Firstly, it establishes that cause of action; secondly, it serves as the basis for a UCL violation, and thirdly, it also serves as the basis for the independent wrongful act required to establish a claim of intentional interference with prospective economic advantage.

Given this case, we strongly advise all employers to think twice and seek legal advice before soliciting and hiring competitors' employees. Please contact any of our lawyers if you require more information.

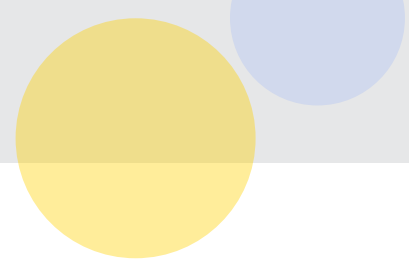


part of Werner's ongoing pattern of poaching drivers from CRST after CRST had trained them.

The Ruling

The court found that CRST had adequately established the elements of the tort of intentional interference with contract based on the existence of the employment contracts, Werner's knowledge of these contracts (given CRST's letters), Werner's alleged intentional inducement of

based only on its intentional interference with contract claim. Finally, the court found that although establishing a claim of intentional interference with prospective business advantage required the aggrieved party to establish a wrongful act independent of the alleged interference, the alleged 17200 violation met this requirement. The court expressed no opinion as to the merits of CRST's claims, but it overturned a prior dismissal, thereby



NOTIFICATION OF RIGHTS UNDER CALIFORNIA'S LEAVE LAW REQUIRED

A California Court of Appeal recently held that an employer was not entitled to summary judgment on an employee's claim under the California Family Rights Act ("CFRA") where the employer failed to show that it posted a notice or otherwise informed the employee of his rights under CFRA.

When the employee in *Faust v. Portland Cement Company* first began his leave, he sent his employer a note from a psychiatrist. After the first month of the leave, the employee then submitted a note from a chiropractor extending the leave for another month. The employer responded to

the chiropractor's note by telling the employee that the note was "inappropriate" and "incomplete." When the employee failed to send additional information, the employer terminated him.

The Suit and The Appeal

The employee's lawsuit included a claim for violation of CFRA. The trial court granted the employer's motion for summary judgment based on the plaintiff's "in-subordination" in refusing to communicate about his requested leave and failing to provide additional information. The Court of Appeal reversed the summary judgment, explaining that the employer had

failed to provide notice to its employees of the right to request CFRA leave. The Court of Appeal further explained that Faust "provided verbal notice sufficient to make [the employer] aware that he needed leave pursuant to CFRA."

What Does This Mean For Employers?

The *Faust* decision serves as a reminder of the importance of posting the required notices under CFRA and all other applicable laws. In addition to the required postings, employers should also include descriptions of their leave of absence policies in employee handbooks. Care should be

taken when drafting such policies to ensure that they put employees on notice of all of their obligations when requesting approval for such leaves.



Our lawyers have extensive experience with personnel policies. If you would like to discuss revisions to your Employee Handbook, please contact any one of them.

GIVE THEM A BREAK! THE CALIFORNIA SUPREME COURT CLARIFIES STATUTE OF LIMITATIONS FOR MISSED MEAL AND REST PERIOD CLAIMS

The California Supreme Court has held that meal period premiums are "wages," not penalties. While this might sound like a positive development for employers, it is actually quite the opposite. The Supreme Court's holding in *Murphy v. Kenneth Cole Productions, Inc.* that the premiums are wages means that meal period and rest period claims are subject to a three-year (and sometimes even four-year) statute of limitations, rather than the one-year statute of limitations for penalties.

A Little Background

In an effort to provide a

remedy for employees who were not provided meal or rest periods as required by the California wage orders, section 226.7 was added to the Labor Code effective January 1, 2001. Section 226.7 provides for "one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." The issue before the California Supreme Court in *Murphy* was whether the payments required by section 226.7 are considered a "wage," subject to a three or four-year statute of limitations,

or a "penalty," subject only to a one-year statute of limitations. The Court held that the payment is considered a "wage."

What Does This Mean For Employers?

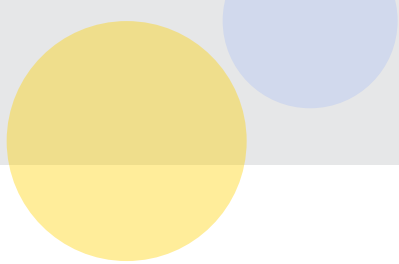
1) Pay on time

Because meal and rest period premiums are wages, employers must pay the premiums for missed meal and rest periods on the payday for the pay period in which the meal or rest periods were missed. Also, all of the premiums that are owed to an employee when his or her employment ends must be

paid promptly, because the failure to timely pay meal and rest period premiums can now give rise to waiting time penalties under Labor Code Section 203.

2) Withhold and Record Properly

In addition to its other implications, the *Murphy* decision also confirms that meal and rest period premiums will, as wages, now be subject to the withholding of income and payroll taxes. This holding is in conformity with a letter opinion previously issued by the IRS that stated premiums were subject to taxation as wages.



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victim's protected status. In applying this standard, the court found that most of the alleged harassing behavior by the plaintiff's supervisor fell within the supervisor's legitimate business and management duties, i.e., selection of job assignments, reprimands regarding work performance, and even comments regarding body odor, as the plaintiff's body odor disturbed her co-workers and affected the work environment.

The court found that while the supervisor may have disliked the plaintiff and showed no compassion for her condition, neither cold indifference nor lack of sensitivity toward a disabled employee is sufficient to establish a hostile work environment based on disability. Accordingly, the court struck down the jury's verdict with respect to the harassment claim (although the plaintiff prevailed on her remaining claims).

Caution: Supreme Court to Decide

On April 18, 2007, the California Supreme Court granted review in the *Roby* case, which means that this decision may not stand. The Supreme Court has indicated that it granted review to determine whether a harassment claim under FEHA must be established entirely by reference to acts that have no connection with matters of business and personnel management.

By Itself, Assignment To Less Preferred Duties Does Not Constitute An Adverse Employment Action

In *Malais v. Los Angeles City Fire Dept.*, a fire captain sued for disability discrimination when he was assigned to training duty instead of firefighting platoon duty after he lost his leg during a work-related accident. It was undisputed that the plaintiff was assigned to training duty because he

had a prosthetic leg. The plaintiff alleged that his assignment was discriminatory because he could earn more overtime firefighting, and because he preferred firefighting, the platoon schedule, and the platoon environment.

The court held that the plaintiff had to show that his assignment to training duty had a detrimental and substantial effect on his employment, and noted that a change in working conditions that was merely different from what the employee wanted was insufficient to establish adverse action.

The court found that both training and platoon duty had equal pay and promotional opportunities. After being assigned to training duty, the plaintiff continued to receive promotions, and he admitted that additional promotional opportunities were available, but that he did not pursue them.

Furthermore, although the plaintiff claimed he earned less overtime, there were many overtime opportunities on training duty that he failed to maximize. The court concluded that the plaintiff's assignment to the less preferred training duty, by itself, was insufficient to establish adverse action. As there was no adverse action, the plaintiff's claims for disability discrimination failed.

What Does This Mean For Employers?

Malais illustrates that not every employment action that an employee dislikes can give rise to a cause of action. The full impact of *Roby* remains to be seen.

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