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SUPREME COURT DECIDES KEY DISCRIMINATION CASES

Recent Decisions

In *Jones v. The Lodge at Torrey Pines Partnership* 147 Cal. App. 4th 475 (2007), employee Jones sued his employer, The Lodge at Torrey Pines Partnership (“The Lodge”) and his supervisor Jean Weiss

for sexual orientation harassment and discrimination and retaliation, all in violation of the Federal Employment and Housing Act (“FEHA”). The California Supreme Court granted review only as to the question of whether an individual supervisor may be held personally liable for retaliation under FEHA. The Court concluded that individuals may not be held personally liable for retaliation. The Court reached its conclusion by analogizing retaliation to discrimination under FEHA.

In a prior decision, the Court found that individuals cannot be held personally liable

for discrimination under FEHA because personnel decisions, which might later be considered discriminatory, are inherently necessary to perform a supervisor’s job. Thus, to allow individual liability for discrimination would essentially deter supervisors from performing their jobs

and to second-guess any decision which might be construed as discriminatory. On the contrary, the Court has found that individuals may be held personally liable for harassment because harassment is not conduct of a type necessary for management of the employer’s business or performance of a supervisory employee’s job. In short, the courts have reasoned that supervisors can avoid harassment, whereas they cannot avoid personnel decisions.

The *Jones* Court held that retaliation and discrimination should be treated equally, because acts which may be construed as retaliation are personnel decisions which supervisors cannot avoid. Therefore, in order not to interfere with the performance of supervisory duties, the Court held that only employers can be liable for retaliation under FEHA, rather than nonemployer individuals.

In *Sprint v. Mendelsohn*, 466 F. 3d 1223, employee Mendelsohn brought an age discrimination suit against her employer, Sprint. In support of her claim, Mendelsohn sought to introduce testimony by five other former Sprint employees who claimed that their supervisors had discriminated against them because of age. None of these other supervisors worked in the same group as Mendelsohn, nor had any of them worked under the supervisors in her chain of command. Sprint moved to exclude the evidence as irrelevant because it did not involve employees who dealt with the same supervisor and were subject to the same standards governing performance evaluation and discipline. The U.S. Supreme Court held that in an employment discrimination case, federal rules of evidence do not require admission of testimony by nonparties alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff. The Court held that the question whether evidence of discrimination by other supervisors is relevant in an individual age-discrimination case is fact-based and depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.

□ P.B. Shukla

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Pending Cases

Two employment discrimination cases are up for oral argument by the U.S. Supreme Court this month. The first case, *Crawford v. Metropolitan Government of Nashville*, 211 Fed.Appx. 373 (6th Cir. 2006), addresses whether employees are protected against retaliation under Title VII for participating in internal company investigations. In the second case, *Meacham v. Knolls Atomic Power Laboratory*, 461 F.3d 134 (2d Cir. 2006), the Supreme Court will determine who has the burden of proof to show a reasonable business justification in an age discrimination case.

In *Crawford*, Vicky Crawford, a former employee of the Metropolitan Government of Nashville and Davidson County (Metro), was questioned by Metro's legal department as part of a sexual harassment investigation. Several other employees had complained of inappropriate behavior by Metro's employee relations director. At Metro's legal department's request, Crawford met with investigators and informed them that the director had sexually harassed her and other employees. Three other employees who had made statements against the director were immediately investigated and fired. Crawford was also subsequently terminated after being accused of embezzlement and drug use, charges later determined to be unfounded. Crawford sued Metro for retaliation under Title VII.

In order for an employee to bring a claim of retaliation, one of the elements that the employee must prove is that he or she engaged in an activity protected by Title VII. The trial court found that Crawford had not engaged in any protected activity since she merely participated in an

investigation but was not the individual who initiated the complaint against the director. On appeal, the 6th Circuit Court of Appeals affirmed the trial court's ruling noting that Title VII has traditionally only protected investigations made pursuant to pending Equal Employment Opportunity Commission (EEOC) charges. Here, no EEOC charge had been filed at the time of the investigation, therefore employees participating in the investigation were not protected by Title VII. Furthermore, the court reasoned that employers would be discouraged from proactively launching internal investigations if retaliation protection were expanded to cover any participant in the investigation. The Supreme Court has not yet indicated when it will hear oral arguments in this case.

In *Meacham*, twenty-six employees of Knolls Atomic Power Laboratory (Knolls) were laid off as part of an involuntary reduction in force. In implementing the layoffs, Knolls established ranking procedures evaluating employees on performance, flexibility, and criticalness of their skills. After employees were ranked, layoffs occurred beginning with the lowest ranked employee. All the employees Knolls laid off were over forty years old.

The laid off employees sued Knolls under the Age Discrimination in Employment Act (ADEA), which protects employees forty and older from discrimination based on age. At trial, the employees prevailed. However, the Court of Appeals reversed the ruling pointing out that employers are not liable under the ADEA so long as the challenged employment action is a reasonable means other than age to achieve the

employer's legitimate goals. The Court of Appeals opined that the employees had participated to meet their burden of showing that Knolls' business justifications were unreasonable. While Knolls could have utilized better factors in determining employee rankings for layoffs, the methods and procedure chosen were not unreasonable. On appeal to the Supreme Court, the employees are arguing that it is the employer's responsibility to prove reasonable business justification rather than the employee's responsibility to prove the justification unreasonable. The Supreme Court has scheduled oral arguments for this case on Wednesday, April 23, 2008.

□M. Nakano

TREND WATCH

Strip-search Decision Before Ninth Circuit

Two female students were subjected to a strip-search at the request of the school vice principal after the principal had been informed that students were distributing pills at school. One of the complaints came from a mother, whose son (Jordan), had become ill, after a student gave him a pill. On the day of the search, Jordan went to see the principal and informed him that a student named Marissa had given him a pill. *Id.* at 830. Jordan also alleged that students planned on taking pills during lunch that day.

The vice principal went to Marissa's classroom and asked Marissa to collect her belongings and accompany him to his office. The vice principal noticed a black planner lying on the desk next to Marissa's and asked if it belonged to her. She replied that it did not. The vice

principal picked up the planner and handed it to a teacher, who promised to attempt to find the owner. Soon thereafter the teacher discovered that the planner contained knives, lighters, a cigarette and a permanent marker. He promptly communicated this information to the vice principal.

When the vice principal and Marissa arrived at the vice principal's office, he invited a female administrative assistant to come in and observe. The vice principal asked Marissa to turn out her pockets and open her wallet. Marissa did so, producing one blue pill, several white pills and a razor blade. When the vice principal asked Marissa where the blue pill had come from, she implicated a classmate, Redding. When questioned about the planner, Marissa denied ownership and claimed no knowledge.

The vice principal requested the school nurse to conduct a search on Marissa, in the presence of the female administrative assistant. The nurse and administrative assistant took Marissa into the nurse's office, closed the door and asked Marissa to "(1) remove her shoes and socks, (2) lift up her shirt and pull out her bra band, and (3) take off her pants and pull out the elastic of her underwear" (504 F.3d 828). At no point during the search did either the nurse or the administrative assistant touch Marissa.

The vice principal retrieved Redding from her classroom and asked her to accompany him to his office. He questioned Redding about the black planner and pills that had been in the possession of Marissa when she was brought to the vice principal's office. The vice principal asked Redding if she would object to being searched and she told the vice principal she did not mind being searched. The vice

principal invited the female administrative assistant into his office and together they searched Redding's backpack in Redding's presence. When the search proved fruitless the vice principal asked the administrative assistant to take Redding into the nurse's office and conduct a search of her person.

RECENT VICTORIES

- R&S successfully obtained a default judgment on behalf of a school district against a former employee who had agreed to reimburse the district for any salary paid to him during the summer months if he accepted employment with a different district prior to the start of the next school year. After receiving a salary during this period, the employee took a position with another district. R&S filed suit on behalf of the district and, in the absence of an appearance by the defendant, obtained a default judgment.
- After a hearing, the Fair Employment and Housing Commission found that the district met its obligations to accommodate reasonably a disabled employee. As a result, it held in the district's favor and dismissed the case that the DFEH had filed on behalf of the employee.

At the time of the search Redding was wearing "stretch pants without pockets and a T-shirt without pockets." The Administrative assistant asked Redding to "(1) remove her jacket, shoes, and socks, (2) remove her pants and shirt, (3) pull her bra out and to the side and

shake it, exposing her breasts, and (4) pull her underwear out at the crotch and shake it, exposing her pelvic area" (Ibid). At no point during the search did the nurse or administrative assistant touch Redding. Petitioner subsequently brought a 42 U.S.C. § 1983 action against the school principal and vice principal, school nurse, and the District, alleging they had violated her Fourth Amendment rights.

Warrantless Search:

A search of a student by a public school official is reasonable under the Fourth Amendment if it is both: (1) justified at its inception; and (2) reasonably related in scope to the circumstances which justified the interference in the first place. *Id.* at 832. A search is justified at its inception if there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. A search is permissible in scope if the measures adopted are reasonably related to the objectives of the search and not excessive in light of the age and sex of the student and the nature of the infraction.

Reasonable at Its Inception:

The Ninth Circuit concluded the search was reasonable from its inception because, the principal had some independent evidence separate and apart from the student's tip, to raise reasonable suspicion. The vice principal had sufficient evidence to suspect that petitioner had drugs. Petitioner Redding had been identified by Marissa, and she admitted that she and Marissa were friends. Moreover, the vice principal also knew that petitioner had lent a planner to Marissa to conceal contraband from her parents. That same planner was turned over to a

teacher who discovered knives, cigarettes, and a lighter. The reasonableness of the suspicion was buttressed by the fact that the school had experienced at least one prior incident where students had distributed prescription drugs on campus.

Reasonable In Scope:

The Court was persuaded that a strip search of thirteen-year-old Redding was reasonable in scope because it was reasonably related to determining whether she was violating the school's anti-drug policy. According to the Court, the school was justified in conducting a strip search on Redding, after a search on her backpack yielded no results, and she was wearing pants without pockets. *Id.* at 835. Also, the district had an important governmental duty to bar unauthorized use of prescription drugs on school premises because of the inherent risks posed by drugs. Moreover, the District had a strong interest both in safeguarding students entrusted to its care from the harm posed by the misuse of drugs, and in enforcing the District's anti-drug policy. *Id.*

The search was also reasonable in scope because it was administered in a reasonable manner. A nurse and administrative assistant who were of the same gender as Redding conducted the search of Redding's person, and the search took place in the privacy of the school nurse's office with the door securely locked.

Accordingly, Defendants' warrantless search of Redding's person during school hours and on school premises did not violate Redding's Fourth Amendment rights because it was justified at its inception and was reasonable in scope.

□ M. Delgado

Employee on Medical Leave May Seek Other Employment

Employee Lonicki brought an action against her employer Sutter Health Center ("Sutter") under the California Family Rights Act (CFRA) for firing her and for failing to follow CFRA procedures in questioning the validity of her medical leave. Lonicki worked as a certified technician in the hospital's trauma center. After several personnel shortages, her workload increased and so did her stress level. When her work schedule was changed, she became too upset to work. Sutter requested she obtain medical authorization for her absence. Lonicki's private health provider declared her unable to work due to medical reasons. Sutter then sent employee to see a physician chosen by Sutter, who determined that plaintiff/employee was able to return to work without restriction. Plaintiff then consulted a psychiatrist, who determined she was "disabled by major depression," and required sick leave. Sutter informed plaintiff/employee that she would need to return to work or be fired. Since plaintiff followed the advice of her psychiatrist, when she returned, she was notified she had been terminated.

Under the CFRA, if there is a difference in opinion between the employee's and the employer's physician, the employer, at its own expense, may obtain a third opinion, to resolve the dispute. *See* § 12945.2. Employee Lonicki argued that because employer Sutter failed to request a third opinion, Sutter was barred from later arguing that employee did not suffer a serious health condition and was capable of performing her job. [emphasis added] The Court disagreed. Relying on prior FMLA cases, the

Court concluded that an employer's failure to seek a third opinion, would not bar the employer from asserting the employee is able to perform her job, because a third opinion is optional, not mandatory.

Sutter also argued Lonicki was not entitled to sick leave because she was employed part-time at another hospital, performing essentially the same job duties she had at Sutter. Sutter argued that this demonstrated that Lonicki was able to perform her job duties at Sutter. The Court disagreed, noting that when a serious condition prevents an employee from doing the tasks of an assigned position, this does not necessarily indicate that the employee is incapacitated for similar duties at another job. The Court reasoned that though it is strong evidence that the employee is capable of performing both jobs, caseloads and stress levels may vary to a degree to allow the employee to perform at one job and not the other. □ M. Delgado

Acts Outside Statute of Limitations May Show Discrimination

In *Hammond v. County of Los Angeles*, 2008 WL 740375 (Cal.App. 2 Dist.), Yvonne Hammond, an African-American nursing instructor employed by the Los Angeles County Sheriff's Department (Department), sued the County alleging violations of California's Fair Employment and Housing Act (FEHA). In 2001, Betty Brennan (Brennan) was assigned to be Hammond's supervisor. Prior to Brennan's arrival, Hammond taught 25 to 30 hours a week. After Brennan's arrival, Brennan asked Hammond to "demote," meaning to accept a lower paid position. Additionally, Brennan removed Hammond from the classroom

leaving Hammond to sit in an office all day doing nothing. Brennan allegedly told Hammond that she was "too old" to be in a classroom. Over the following years, Hammond never received comparable teaching schedules to her pre-Brennan teaching schedule.

Additionally, Hammond alleged that Brennan made derogatory remarks regarding other African-American employees. Hammond also allegedly made a comment about not being able to understand Hammond because she "was probably speaking 'Ebonics.'" Hammond made multiple complaints internally before ultimately filing a claim with the Department of Fair Employment and Housing (DFEH) in 2004.

The Department first argued that the statute of limitations barred Hammond's FEHA claim. Under FEHA, a plaintiff has one year from the occurrence of the unlawful act to file a claim. Here, the Department argued that the alleged acts of discrimination, harassment, and retaliation all occurred more than a year prior to the date that Hammond filed her claim with DFEH and should therefore be dismissed. The California Court of Appeal ruled that while there were discrete acts that occurred outside the statute of limitations period, Brennan's periodic decisions concerning Hammond's teaching assignments occurred within the statutory period. Evidence of Brennan's statements and actions outside the statutory period could be used as background information to show that her actions during the statutory period were based on age and race.

The Department also argued that Hammond was unable to show she had been the victim of racial discrimination, that she had been

discriminated against because of her age, and that she had been the victim of retaliation. The Court of Appeal ruled Hammond may be able to show race discrimination because Brennan made derogatory remarks about African-Americans, and Hammond had suffered an adverse employment action by getting assigned a reduced work schedule. The court also ruled that Hammond may be able to show discrimination because of Brennan's comments to Hammond that she was too old to be in the classroom and Brennan's desire to have younger people in the classroom. Finally, the court ruled that Hammond may be able to show retaliation because after Hammond's initial complaint, Brennan confronted her stating, "Nobody screws me! I will screw you back!" This supported a reasonable inference that the adverse employment actions were in retaliation for Hammond's complaints. □ M. Nakano

**EMPLOYERS' CHECKLIST:
VACATION POLICIES SHOULD'S,
COULD'S, AND SHOULDN'TS**

Vacation is a *de facto* wage that vests proportionally as employee's work, and it can be kept separate from other paid time off benefits (e.g., sick time). Paid time off (PTO) is a combined benefits package that can be used for anything. Employers:

Should offer vacation or PTO – generally, it enhances employee morale and productivity and reduces workplace turnover.

Could reasonably restrict when employees can use the vacation they have earned (e.g., any earned vacation can be used only if the employee has worked twelve months).

Shouldn't have a "springing" vacation policy, where employees

earn their vacation only if they work for a specified period (e.g., two weeks vacation only if the employee works twelve months).

Should pay out any and all earned, but unused, vacation or PTO promptly upon separation. Otherwise, employers may be subject to waiting time penalties: a day's pay per employee who was not paid, up to a maximum of thirty days.

Could limit the amount of vacation or PTO an employee can earn.

Shouldn't have a "use it or lose it" policy, where earned vacation or PTO can be forfeited if unused.

Should permit a reasonable time in which employees can use any earned vacation or PTO. That means that vacation accrual caps should be set between fifteen to twenty-one months.

Could offer vacation benefits to selective categories of employees (e.g., full-time) or require employees to obtain approval sufficiently in advance so as not to disrupt business operations.

Shouldn't discourage employees from actually using their vacation by, for example, offering pre-separation buyouts for earned vacation time.

Should effectively cap vacation accruals, because for employees who hoard their vacation over a long period of time, an unanticipated separation could create liability for a large payout.

□ Based on "Getting Away From Work" by Robert S. Nelson.

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