K&LNG Alert

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California Employment Law

Good and Bad News for Employers Operating in California: Impact of Two Significant Rulings

On August 11th, the California Supreme Court issued two significant rulings affecting nearly all employers in California. These decisions, one in the area of unlawful retaliation and the other involving personal liability for wage and hour violations, offer good and bad news for those operating in the state.

LIABILITY FOR RETALIATION EXPANDS

The first of these Supreme Court opinions, *Yanowitz v. L'Oreal USA Inc.*, presents new challenges and risks for the California employer. The Court, by a vote of 4 to 2, held that an employee who refuses a supervisor's order that she reasonably believes to be discriminatory can sue for unlawful retaliation **even if** the employee never specifically tells the employer that she believes the order to be improper. The Court also held that retaliation is a broad concept and not limited to demotion or to termination of employment.

Under the California Fair Employment & Housing Act ("FEHA"), employees who complain internally about conduct they reasonably believe to be discriminatory are protected even if the allegation later turns out to be mistaken. Courts in the state have long held that employees may maintain actions for unlawful retaliation when they have been terminated or severely disciplined as a result of reporting or resisting discriminatory conduct in the workplace. This approach is the same as that followed in other states and under federal law and historically has been predicated on the employee saying something that clearly alerted the employer of his or her concern.

Now, however, the California Supreme Court has declared that "when the circumstances surrounding an employee's conduct are sufficient to establish that an employer knew that an employee's refusal to comply with an order was based on the employee's reasonable belief that the order is discriminatory, an employer may not avoid the reach of the FEHA's anti-retaliation provision by relying on the circumstance that the employee did not explicitly inform the employer that she believed the order was discriminatory." As noted by the dissent, the issue is "whether a person can be a whistleblower without blowing the whistle." For employers in California, unfortunately, the answer is now "yes." Again per the dissent, this makes little if any sense: "The whole point behind giving whistleblowers special protection is to encourage them to speak out to try to prevent employment discrimination before it takes place or to expose it after it occurs."

The majority of the Court also expanded the range of "adverse actions" that can qualify as retaliation. Rejecting the view of many other states that retaliation claims are more limited, the Supreme Court held that California employees are protected from any employment action which is "reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." As a result, employers in California are faced not only with the difficult task of identifying unspoken complaints, but also are exposed to greater potential liability if they do not succeed in the effort.

This outcome may be explained by the adage "bad facts make bad law." In *Yanowitz*, the plaintiff was a female regional sales manager for L'Oreal who received outstanding reviews, bonuses, and high

praise during a 17-year career. However, upon being given a greater level of responsibility and being assigned to work for a new set of executives, the situation began to deteriorate. One of her new superiors allegedly directed Ms. Yanowitz to terminate a darker skinned female sales associate because he felt the sales associate was not sufficiently physically attractive. The supervisor expressed preference for blondes and directed Ms. Yanowitz to hire someone "hot." When the supervisor later discovered that the sales associate had not been fired, he angrily directed Ms. Yanowitz to terminate her and hire someone young, blonde, and sexy. Ms. Yanowitz asked the supervisor to justify terminating the sales associate (who had an exemplary record of performance), but he ignored the request. On several subsequent occasions, the supervisor inquired again about the sales associate. Ms. Yanowitz again asked for justification and once more was ignored. Ms. Yanowitz refused to carry out the order, but never complained to anyone at the company that she believed that the directive to her was discriminatory.

At roughly the same time, Ms. Yanowitz was subjected to a series of ill-advised actions by company management. Her subordinates were pressured to provide negative comments about her. She was summoned to a meeting where her work style was criticized and she was subtly threatened. A supervisor screamed at Ms. Yanowitz in front of subordinates. L'Oreal refused requests for support in work-related efforts but increased demands for performance. Ultimately, Ms. Yanowitz was expressly threatened with loss of her job. She went on stress disability leave and filed a discrimination complaint with the California Department of Fair Employment & Housing, after which she filed suit.

In finding that these circumstances were sufficient for L'Oreal to know that Yanowitz was opposing what she reasonably believed to be a discriminatory action, the Court emphasized that subordinate employees may wish to avoid direct confrontation or charging a supervisor with discrimination. Instead, according to the Court, the employer must be alert to more subtle, inartful, or circumspect remarks which should be "perfectly clear" to the employer. Moreover, the employer should not expect employees to use legal terminology when raising issues of discrimination in the workplace.

The Supreme Court majority did state that vague and conclusory remarks that fail to rise to the level of "notice" do not constitute protected activity. Similarly, California employers need not treat an employee statement as a riddle which, if solved, might reveal a cloaked complaint. Nonetheless, the line that employers must now draw between what does and does not constitute notification remains blurry at best.

Yanowitz highlights a compelling need to properly train—and to continually re-train—managers and supervisors in appropriate decision-making, communication, and conduct toward subordinates. Managers and supervisors must be able to identify issues when they arise and must know to seek more expert guidance from human resources professionals. Employers must also consider having sufficient checks and balances in the disciplinary process to ensure that thorough investigations are conducted. Where employees who have performed well over time come to be regarded as poor performers with negative attitudes, objective inquiry into the reasons underlying such a change is a necessity.

LIABILITY FOR WAGE & HOUR VIOLATIONS DIMINISHES

In a unanimous decision, the California Supreme Court rejected the California Division of Labor Standards Enforcement's ("DLSE") long-standing practice of attempting to make officers and controlling managers personally liable for violations of the state's complex and restrictive wage and hour laws. This decision in the case of *Reynolds v. Bement* is an important victory for California employers.

For many years (until terminated by Governor Schwarzenegger in 2004), the California Industrial Welfare Commission ("IWC") promulgated orders

applicable to particular occupations and industries to define, among other things, the circumstances under which employers are required to pay overtime wages. Since 1947, the IWC defined "employer" broadly to include any person who directly or indirectly controls hours, wages, or working conditions. This is in contrast to definitions in most other states and under federal wage and hour guidelines, where individual managing agents of a company are not deemed to be "employers" except in narrow and unusual circumstances. Consistent with the IWC's broad definition of "employer" in California, the DLSE often brought wage and hour enforcement actions not only against companies, but also against individual officers and controlling managers of the enterprise.

Also since 1947, the California Legislature has enacted and revised many sections of the state's Labor Code empowering employees to seek redress for violations of wage and hour laws. But the Legislature never provided a definition of the term "employer." The plaintiff in *Reynolds* argued that, as a result, the Legislature must have accepted the IWC's broad definition of "employer." He also argued that a definition of "employer" that included individuals who help decide compensation and hours is necessary to fully effectuate protections of California's wage and hour laws.

Rejecting these contentions, the Supreme Court held that the mere silence of the Legislature in defining "employer" was insufficient to infer adoption of the IWC's approach. The Court rationalized that the common law, which generally protects corporate agents from individual liability when acting within the course and scope of their employment, is an overriding policy which must not have been ignored by the Legislature. If the Legislature had intended to change that long-established policy, it would have done so expressly.

Although the Supreme Court noted that it was rejecting the DLSE's view of the law, it declined to renounce or restrict DLSE administrative proceedings. Instead, the Court acknowledged that DLSE was free to continue its policy of naming individuals as defendants in taking administrative action but that courts in the state would not enforce any resulting order or engage in similar practice.

The DLSE may still join individual controlling agents from time to time in administrative proceedings. That could require the director, officer or managing agent to appear and participate in the agency action or to apply to the agency or to a court to be dismissed. However, even if the individual is not dismissed and later found liable, any resulting order cannot be enforced. We expect the DLSE to eventually abandon its burdensome and questionable practice as a result. For the California employer, obviously, the sooner the better.

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