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SAN FRANCISCO

Embarcadero Center West
275 Battery Street
Suite 2000
San Francisco, CA 94111
Telephone: (415) 986-5900
Fax: (415) 986-8054

SAN DIEGO

101 West Broadway
Suite 1600
San Diego, CA 92101
Telephone: (619) 696-6700
Fax: (619) 696-7124

LOS ANGELES

One California Plaza
300 S. Grand Avenue
Suite 2075
Los Angeles, CA 90071
Telephone: (213) 576-5000
Fax: (213) 680-4470

SACRAMENTO

740 University Avenue
Suite 130
Sacramento, CA 95825
Telephone: (916) 565-2900
Fax: (916) 920-4402

ORANGE COUNTY

4695 MacArthur Court
Suite 1200
Newport Beach, CA 92660
Telephone: (949) 255-6950
Fax: (949) 474-2060

PORTLAND

1001 S.W. Fifth Avenue,
Suite 1100
Portland, OR 97204
Telephone: (503) 220-1679
Fax: (503) 907-6636

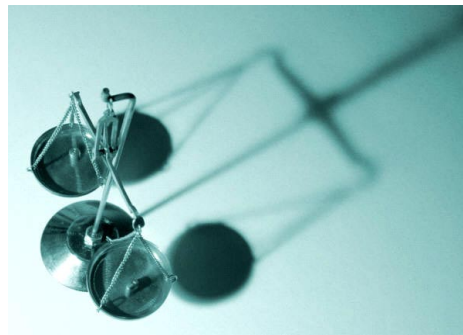
LAS VEGAS

3753 Howard Hughes Parkway,
Suite 200
Las Vegas, NV 89109
Telephone: (702) 784-7646
Fax: (702) 784-5146

Visit us at www.gordonrees.com

UNFAIR COMPETITION LAW UNLEASHES UNWANTED LITIGATION

California's Unfair Competition Law (UCL), codified at Business & Professions Code Section 17200, *et seq.*, has been garnering a lot of press recently. Last spring, attention was focused on the Trevor Law Group, and claims that the three-member Beverly Hills firm was using the UCL to extort money from hundreds of small business. Abuses brought to light by the case may have led to the introduction of a pair of bills presently pending in the State Legislature designed to reform the law, but the California Chamber of Commerce says the proposed changes do not go far enough.



While the Legislature works to revise the law to placate its detractors, however, the courts continue to give its provisions the broadest possible reading. In June, the Court of Appeal for the Second Appellate District upheld a \$5,163,600 jury verdict against Nestle USA, Inc. in an age discrimination case where the plaintiff also made a claim under the UCL. The case, *Herr v. Nestle U.S.A., Inc.*, 109 Cal.App.4th 779, adds even more fuel to the already-raging fire that is the debate over the UCL.

The UCL prohibits "any unlawful, unfair or fraudulent business practice or act." Courts have held that the "unlawful" provision means that the UCL "borrows" violations of other laws and treats them as unlawful practices under the UCL, even if the underlying statute does not itself allow for civil claims. Plaintiffs' attorneys have used the "unlawful" and "unfair" provisions as the basis for lawsuits against, among other targets, nail salons which use nail polish from the same bottle for more than one customer and automobile dealerships which used the wrong size print on advertisements.

The reason plaintiffs' attorneys favor the UCL is the same reason employers fear it – the UCL allows class action-type remedies without all the procedural hurdles. "Any person" may bring an action under the UCL on behalf of the "interests of the general public." While damages are not available under the UCL, injunctive relief is, as well as

“disgorgement,” which means an order compelling a defendant to surrender all money obtained or profits earned through an unfair business practice.

In addition to its rise to prominence in consumer litigation, the UCL is becoming increasingly popular in employment litigation. In 2000, the California Supreme Court held in *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163, that an employer could be compelled under the UCL to restore unpaid overtime to current and former employees who were not named plaintiffs in the case after it was found to have failed to properly set up an alternative workweek.

The recently-published *Herr* case is another example. In *Herr*, the 55-year-old plaintiff had been repeatedly passed over for promotion and overlooked for interviews for internal openings after the Carnation Company merged with Nestle and the head of the new company issued a directive encouraging the “[c]ontinue[d] hiring, identifying and developing [of] young people to have in the long-term enough resources for future management.” Evidence introduced at trial showed that most of those hired for positions for which the plaintiff applied were in their early 30s. After a jury found that the company was guilty of age discrimination in violation of the FEHA, the judge determined that the company’s conduct also constituted a violation of the UCL. While no disgorgement or restitution was awarded, the judge permanently enjoined the company from discriminating on the basis of age and ordered the company to issue a memorandum repudiating the “young people” strategy and to provide a copy of the judgment to all employees.



On appeal, Nestle argued that the award of injunctive relief under the UCL was inappropriate because age discrimination was an “intra company” matter which is not injurious to competitors or consumers. The Court of Appeal disagreed, finding that it was “self evident that older workers, who have worked their way up the ranks, frequently are more highly compensated than their younger colleagues.” “Thus,” the court wrote, “an employer which practices age discrimination may have an unfair competitive edge over employers who comply with the FEHA.”

The two bills pending in the Legislature may not do much to discourage UCL employment claims, or to prevent the abuses that have recently made headlines. AB 95 would require that lawsuits alleging violation of the UCL be served accompanied by a form letter recommending that the recipient seek legal counsel. The California Chamber of Commerce has stated that it believes the notice is intimidating and will encourage unnecessary legal fees. SB 122 would specify that any disgorgement awards be given to the “victims” of the unfair business practice. The Chamber believes that this bill might actually encourage UCL claims by officially sanctioning disgorgement as a remedy. These bills are “double-jointed,” which means one cannot pass without the other.

Expect to hear a lot more about the UCL in the future, as both the courts and the Legislature struggle to define this broad and powerful law. The best way to avoid UCL claims is to comply with other laws with which you are already familiar that pertain to your business. In the meantime, consult an employment attorney promptly should your business be threatened with a UCL claim.

CALIFORNIA SUPREME COURT MAKES IT MORE DIFFICULT FOR INJURED WORKERS TO PROVE DISCRIMINATION



In good news for employers, the California Supreme Court just made it more difficult for employees to prove under Labor Code section 132(a) that they were discriminated against for filing a workers’ compensation claim.

The Case

State of Calif. Dept. of Rehabilitation v. Workers’ Compensation Appeals Board involved a counselor for the California Department of Rehabilitation. He suffered from work-related stress, and depression. When his condition became “permanent and stationary” the employee settled the underlying workers’ compensation claim he had filed. He returned to work, and continued to see his doctor, as provided for in the settlement agreement. However,

his doctor made appointments only during regular business hours. It took the employee two to four hours to get from work to his doctor's office and back. The Department of Rehabilitation informed the employee that it would dock his salary for the time spent going to his doctor visits unless he used accrued sick leave or vacation time. The employee ended up using about 200 hours of sick leave and vacation time to cover his visits to the doctor.

The employee then filed a claim under Labor Code section 132(a), which prohibits discrimination against employees who file workers' compensation claims. He alleged that his employer violated section 132(a) by requiring him to use paid leave to cover his medical appointments. The Workers' Compensation Appeals Board agreed with the employee. However, a California Court of Appeal rejected the ruling, and found for the employer. The employee appealed to the California Supreme Court. The California Supreme Court upheld the lower court, and established a new standard for claims under section 132(a). The previous standard held that an employee could prove discrimination simply by demonstrating that the employer's action caused harm to the injured worker. In other words, a worker could prove a section 132(a) violation by showing that as the result of an industrial injury, the employer engaged in conduct detrimental to the worker.

In siding with the employer, the California Supreme Court decided that the old standard was too broad. The Court announced a new standard that requires the employee to prove that he or she was singled out and treated differently than other employees because of his or her industrial injury. The Court interpreted the legislative intent behind section 132(a) as prohibiting treating injured employees differently, "making them suffer disadvantages not visited on other employees because the employee was injured or had made a [workers' compensation] claim." The Court decided that the employee in this case was not the victim of discrimination because his employer treated him the same way it treated other employees with non work-related injuries. There was no evidence that other employees who had not filed workers' compensation claims were allowed to take time away from the office for doctors' visits without being made to use sick time and vacation time. The Department of Rehabilitation did not single this employee out for disadvantageous treatment because of his industrial injury.

What It Means for Employers



Under the new ruling, to prove discrimination under Labor Code section 132(a) an employee will now have to prove that he or she was treated differently than other employees because of the workers' compensation claim. Therefore, it is crucial that you apply your workplace policies fairly and equally, treating industrially injured workers exactly the same as you treat other injured or disabled workers. If this is done, an employee filing a section 132(a) claim will not successfully be able to present evidence of unequal treatment, and you will avoid liability. Remember that if your organization is found liable for discrimination under section 132(a) you can be charged with a misdemeanor and the employee's workers' compensation benefits can be increased by 50% to a maximum of \$10,000. Most importantly, the employee is entitled to reinstatement and payment of lost wages and benefits. These claims are generally not covered by insurance. Given these severe remedies, you should make every effort to avoid section 132(a) liability by applying your policies impartially. The California Supreme Court's welcome new ruling makes avoiding 132(a) liability an easier task.

EXCEPTIONS TO THE FIVE YEAR RULE UNDER THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

As military deployments for reservists and members of the National Guard lengthen, it is important to keep in mind the following:

USERRA provides that an employee, who is absent from employment by reason of service in the "uniformed services," is entitled to the reemployment rights and benefits provided for under USERRA so long as the military leave does not exceed five

years. However, there are many exceptions to the "five year" rule. Below is a general overview of the exceptions:

- Service that is required, beyond five years, to complete an initial period of obligated service;
- Where the employee is unable to obtain orders releasing him or her from a period of service before the expiration of the five year period and such inability was not the employee's fault;
- The employee is required to undergo additional training requirements, as determined and certified by the Secretary of State;
- The employee is ordered to or retained on active duty for various reasons as a result of his or her position as a member of the Coast Guard;
- The employee is ordered to or retained on active duty (other than for training) under any provision of law because of war or national emergency as declared by the President or the Congress;
- The employee is ordered to active duty (other than for training) in support of an operational mission for which personnel have been ordered under active duty;
- The employee is ordered to active duty in support of a critical mission or requirement of the uniformed services; or
- The employee is called into Federal service as a member of the National Guard.

Many of the current military deployments in Iraq and Afghanistan are likely to fall within one or more of these exceptions. For a more in depth analysis of the exceptions to the five year rule, or if you have any questions related to an employee's uniformed service leave, please contact your attorney. (Full citation: 38 U.S.C. § 4312.)

SUPREME COURT FURTHER CLEARS THE PATHWAY TO COURT FOR DISCRIMINATION PLAINTIFFS

The Supreme Court of the United States recently held, in a unanimous decision in *Desert Palace Inc. v. Costa*, that employees are not required to present "direct evidence" of discrimination in order to succeed on discrimination claims. Both plaintiff and defense lawyers agree that this decision will make it easier for plaintiffs to get their cases before a jury, and harder for employers to obtain early dismissal of questionable claims.

Facts of the Case:

Catharine Costa worked for Caesar's Palace Hotel & Casino in Las Vegas, Nevada as a warehouse worker and heavy equipment operator. She was the only woman in this job and in her local Teamsters bargaining unit. She filed a lawsuit against her employer alleging gender discrimination and sexual harassment. Costa claimed that: (1) she was singled out for "intense stalking" by one of her supervisors; (2) she received harsher discipline than men for the same conduct; (3) she was treated less favorably than men in the assignment of overtime; and (4) supervisors repeatedly "stacked" her disciplinary record and frequently used or tolerated sex-based slurs against her. A jury ruled for Costa and Caesar's appealed.

On appeal, Caesar's argued that when there are mixed motives for firing someone (e.g. both lawful and discriminatory reasons), the employee must present some direct evidence – that is, evidence based on personal knowledge or observation that proves a fact without inference or presumption – to prove that the employer's motive was discriminatory. Cesar's pointed out that all Costa had was indirect, or circumstantial, evidence that she was treated differently than male employees. The Court of Appeals upheld the jury's verdict and found that Costa was not required to present any direct evidence simply because her employer had a mixed motive for her termination.

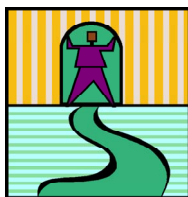
The Supreme Court's Decision:

The United States Supreme Court agreed with the appellate court. The Court found that an employer is liable for discrimination when an employee demonstrates an illegal motive resulted in an adverse employment decision even if other

legitimate factors may have contributed to an employer's decision.

Moving Forward:

Consistently and thoroughly document your reasons for disciplining and/or terminating employees. More importantly, make sure that your managers are trained and understand that employment decisions cannot be based on any protected category. Remember, even if there is *some* circumstantial evidence that one of the protected categories *may* have been a factor in your decision, that is now enough to allow a plaintiff's discrimination claim to reach a jury, even if your employment decision was also motivated by some lawful factor(s).



As a reminder, in California protected categories include:

- Race;
- Religious creed;
- Color;
- National origin;
- Ancestry;
- Physical or mental disability;
- Medical condition;
- Marital status;
- Sex;
- Sexual orientation;
- Age;
- Pregnancy, childbirth, or related medical conditions of any female employee;
- Political affiliation; and
- Whistleblower status.

Full case citation: *Desert Palace Inc., dba Caesar's Palace Hotel & Casino v. Catharine F. Costa*, 123 S.Ct. 2148 (2003).

**SCRIPPS HEALTH V. SUPERIOR COURT (REYNOLDS)
(109 CAL.APP.4TH 529)**



Are you a company that maintains confidential records or reports pertaining to job-related complaints or incidents? Would you like to know how to preserve the confidentiality of information in those records or reports if ever involved in litigation? Well, pay close attention to the Court of Appeal's recent holding in *Scripps v. Superior Court (Reynolds)*. The Court outlined the specific criteria used in determining whether the production of confidential records or reports is necessary.

The Case:

In a wrongful death action, plaintiffs sought discovery from defendant hospital of five "occurrence reports" regarding the underlying incident. The hospital objected based upon the attorney-client privilege and the hospital peer review privilege set forth in the California Evidence Code.

In response to a motion to compel production of the reports, the hospital argued against their production by making the following points: 1) the documents were marked "confidential;" 2) they were prepared at the direction of the hospital's legal department; 3) the reports were used by the hospital's attorneys to assess internal risks and create claims profiles; and 4) access to the reports was limited to risk managers, in-house or outside counsel, and third party claims administrators. Other departments did not have access to the reports. If information contained in the reports was needed by another department, it was extracted from the document(s) and circulated in another format.

The trial court rejected the hospital's arguments. It found that the reports primarily contained "observational information" and not "opinion." Based on this finding, the court held that the documents were not protected by the attorney-client privilege and ordered that they be produced.

The Court of Appeal reversed the trial court's order. It found that the dominant purpose of the reports was for attorney review in order for the hospital to participate in a self-insurance plan. Therefore, the reports were protected under the attorney-client privilege. The appellate court further explained that the trial court's distinction between "observational" and "opinion" information for purposes of privilege analysis was an incorrect statement of law.

What Does This Mean for Employers?

The existence and maintenance of the attorney-client privilege regarding a company's internal incident reports depends more upon the intended and actual use of a document than upon its content. The existence of privilege "is determined by the employer's purpose in requiring the report." If there is more than one purpose, "the dominant purpose will control." Accordingly, if a reporting form is primarily used to communicate with in-house attorneys, claims personnel, or outside counsel, and is otherwise kept confidential, the privilege should be preserved. To ensure this preservation, internal reports and incident forms should always be forwarded to the Legal Department or risk manager once they are completed. The department which received the complaint and generated the report should not maintain a copy of it.



It is important to note that if copies of the reporting form are kept in the department where the complaint originated, a stronger argument can be asserted that the primary purpose of the reports is not communication with attorneys, but rather customer service, administration, or some other similar purpose. This is true whether the documents are labeled "confidential" or not. In addition, if the documents are maintained in the department where the complaint was initiated, there is a greater likelihood that the information in the report will be disclosed to non-legal personnel, thus potentially destroying the attorney-client privilege.

So, to ensure the protection of the privilege, you should limit access to the reports to the Legal Department and to risk management personnel who communicate with a liability carrier. This will help avoid the compelled production of confidential incident reports when litigation arises.



FEHA – WHAT'S TO COME?

May employers may be held liable under the Fair Employment and Housing Act (FEHA) for harassment by third parties (e.g. the employer's clients, customers, or vendors)?

Two recent California Court of Appeal cases say "No," but that might change if the Legislature has its way. AB 76, the Corbett Bill, would amend the FEHA to include in its prohibitions a provision that would prohibit harassment of an employee in the workplace by a person other than an employee, agent, or supervisor of the employer. Opponents of the measure, including the California Chamber of Commerce, argue that the passage of AB 76 would unfairly change a basic principle underlying current California employee harassment law – that employers can only be held liable for harassment of their employees by persons within the employer's control.

This bill passed on a 51-to-26 vote on September 5, 2003, and has been sent to Governor Davis for signature. Even if the Governor vetoes the bill, the California Supreme Court has granted review of the two appellate decisions noted above, so will itself be weighing in on the matter. Stay tuned.

It is also important to keep in mind that under federal law employers are liable for harassment by third parties where they know about the harassment and fail to take appropriate action to protect their employees. Therefore, it is vital to investigate and promptly respond to any claim of harassment by a third party brought forward by your employees.

NEW FACES IN THE G&R EMPLOYMENT GROUP!

Introducing...



Laura Giuliani

Laura Giuliani recently joined Gordon & Rees, LLP's employment group in the San Francisco office. Ms. Giuliani focuses her practice on defending employers against claims for discrimination, harassment, and wrongful termination in both state and federal courts. Ms. Giuliani has extensive experience handling sexual harassment matters. She also assists clients with internal investigations into complaints of discrimination, harassment, and retaliation. Prior to joining Gordon & Rees, Ms. Giuliani was associated with a prominent national labor and employment firm.



Andrew McNaught

Andrew McNaught also recently joined the employment group at Gordon & Rees in the San Francisco office. Mr. McNaught regularly defends employers and supervisors against claims of discrimination, retaliation, and sexual harassment in state and federal courts. Mr. McNaught has counseled clients regarding a broad range of employment issues. He has also represented management in labor disputes and union organizing campaigns before federal and state administrative agencies. In addition to his labor and employment practice, Mr. McNaught has also litigated intellectual property disputes and commercial and contract actions.



Joseph Sbuttoni

Joseph Sbuttoni recently joined Gordon & Rees' San Diego office, where he practices in the employment group. He advises and represents employers on labor and employment matters including contract negotiations, arbitrations, NLRB Representation-Case and Unfair Labor Practice Matters, workplace violence, and wage and hour issues and associated litigation. Mr. Sbuttoni brings a wealth of labor law experience to Gordon & Rees. Prior to joining the firm, he spent five years with the National Labor Relations Board where he was a trial specialist responsible for investigating, prosecuting and settling Unfair Labor Practice charges filed with the NLRB.

To obtain additional copies of *Employment...Matters!*, to enroll others or to recommend colleagues as subscribers to future issues of *Employment...Matters!*, please e-mail Susan Roe at sroe@gordonrees.com.

THE EMPLOYMENT LAW GROUP AT GORDON & REES IS:

San Francisco

Michael T. Lucey
Chair, Employment Law Group
415-576-1125

mlucey@gordonrees.com

Fletcher C. Alford
415-875-3128

falford@gordonrees.com

Jewel Kolling Basse
415-875-3117

jbasse@gordonrees.com

Ronald F. Berestka, Jr.
415-875-3109

rberestka@gordonrees.com

Stephanie B. Bradshaw
415-875-3139

sbradshaw@gordonrees.com

Michael D. Bruno
415-875-3126

mbruno@gordonrees.com

Laura E. Giuliani
415-875-3315

lgiliani@gordonrees.com

Joanna H. Koo
415-875-3157

jkoo@gordonrees.com

Michael A. Laursen
415-875-3182

mlaursen@gordonrees.com

Brian P. Maschler
415-875-3127

bmashler@gordonrees.com

Andrew M. McNaught
415-875-3170

amcnaught@gordonrees.com

San Francisco, cont'd

Glen R. Powell
415-875-3144

gpowell@gordonrees.com

Greta W. Schnetzler
415-875-3112

gschnetzler@gordonrees.com

Larry E. Wollert, II
415-875-3348

lwollert@gordonrees.com

San Diego

Jonathan Andrews
619-230-7744

jandrews@gordonrees.com

Margaret Bell
619-230-7747

mbell@gordonrees.com

Jennifer Sarkozy Branch
619-230-7709

jbranch@gordonrees.com

Russell Brown
619-230-7745

rbrown@gordonrees.com

Jan K. Buddingh
619-230-7721

jbuddingh@gordonrees.com

Christopher B. Cato
619-230-7737

ccato@gordonrees.com

Cynthia L. D'Ambrosio
619-230-7741

cdambrosio@gordonrees.com

San Diego, cont'd

Jason R. Dawson
619-230-7796

jdawson@gordonrees.com

Truth A. Fisher
619-230-7707

tfisher@gordonrees.com

Jim McMullen
619-230-7746

jmcmullen@gordonrees.com

Mark A. Saxon
619-230-7793

msaxon@gordonrees.com

Joseph Sbuttoni
619-230-7750

jsbuttoni@gordonrees.com

Linda J. Sinclair
619-230-7704

lsinclair@gordonrees.com

Los Angeles

Ted Armbrister
213-576-5008

tarmbrister@gordonrees.com

Chris Hawk
213-576-5009

chawk@gordonrees.com

Steve Ronk
213-576-5007

sronk@gordonrees.com

Sacramento

Catherine L. Manske
916-565-2904

cmanske@gordonrees.com

**Employment Law Group
Gordon & Rees, LLP
Embarcadero Center West
275 Battery Street, Suite 2000
San Francisco, CA 94111**