Pacific Employers
Management Advisor
Celebrating 42 Years!
August 2006

# Top of the News

## Fired or Not Fired?

**In a precedent setting Tulare County case, the California Supreme Court denied** an employee's disability retirement claim by a finding that he had not been fired from his job. After suffering from a work-related injury, **John Stephens** applied for disability retirement benefits through the County of Tulare and was denied such benefits because the Board of Retirement found that Mr. Stephens had not been dismissed from employment. Mr. Stephens claimed that he had been dismissed because his employer told him not to return to work until his doctor permitted him to perform the modified light duty assignment that was being held for him.

The Court found that there is no legal authority to find that an employer functionally or effectively terminates an employee by telling the employee to go out on sick leave until their medical condition improves sufficiently to enable a return to the job. Tulare County provided him with a modified light duty position consistent with the medical restrictions and it appeared that Mr. Stephens suffered additional injury. His employer had directed him to take leave, utilize any and all paid time off, and either wait until his injury improved or obtain additional medical authorization to return to work. At no time did his employer dismiss, or terminate, his employment. Indeed, Mr. Stephens remained on the payroll at all times. In summation the Court found that the County's attempts to accommodate Mr. Stephens were consistent with all legal requirements. *Stephens v. County of Tulare*

**Employers Should:**

Accommodate employees upon return to work consistent with their physician's instructions.

Maintain and document consistent communication with the employee or their health care provider, regarding the appropriateness of their job duties based upon any required or recommended accommodations. *(Remember to engage in the "Interactive Process")*

Ensure at all times employees can perform the essential functions of their job with or without reasonable accommodation, as recommended by their physician.

Provide employees time off, but keep them listed on the payroll in some category, while they are recovering from a Workers' Compensation injury. [PE]

***SHPT* (Sexual Harassment Prevention Training) *Flyer Enclosed!***

# President's Report

## ~Dave Miller~

### Wages' Gonna Rise

**The Sacramento Bee** recently reported "You know the California economy is in pretty good shape when the state is probably going to raise the minimum wage 15 percent -- and the business community barely raises a peep."

In the Bee article titled "Lowest Wage to Rise, and Few Object" it explains why the minimum wage increase is supported by Democrats and Republicans, unions and business groups.

The only sticking point seems to be the fact that most proposed legislation will have an indexing provision. Not only will the bills allow an immediate wage increase, but contain at least one other scheduled wage increase to bring it to at least one dollar, then they will require future periodic increases based on cost of living or other factors that take it out of everyone's control.

Gov. Arnold Schwarzenegger has asked the state's Industrial Welfare Commission (IWC) to institute a one-time $1-an-hour increase. The commission, which currently is authorized to raise the wage on its own, has started holding hearings on Schwarzenegger's request.

So, whether it is by legislation passed by the state lawmakers or by a new rule voted on by one of the government's administrative agencies, employers in California are going to see a wage increase of at least one dollar an hour.

**Areas Affected**

However, unlike the Bee headline, it is not only the lowest wage earners who are going to get a raise. Employers should be prepared for mandated wage increases across the board as the state minimum has an effect on numerous other wages and penalties. Areas affected by the Minimum Wage are:

- exempt-salaried employees,
- employees required to provide their own tools,
- commissioned employee wages,
- meals and lodging,
- sub-minimum wages,
- piece worker rates,
- collective bargaining overtime rates,
- learners' rates,
- reporting time pay,
- split shift differentials,
- break period penalties, and
- meal period penalties.

Beyond those wages and rates, you must also consider the domino effect when you raise the wages of the entry level employee. Every employee up the food chain is going to expect an increase. So get your checkbook ready because things based on the minimum wage are a gonna rise. [PE]

Inspiration exists, but it has to find you working. — Pablo Picasso

## Hostile Environment Sexual Harassment

### Second Circuit Affirms Case by Case Consideration of All Relevant Factors in Sexual Harassment Lawsuit

Reviving a female employee's claim for hostile environment sexual harassment, the U. S. Court of Appeals for the Second Circuit reversed summary judgment for the employer after an examination of all relevant factors taken together. A federal trial court had misapplied the legal standard and improperly considered the factors for proving hostile work environment harassment in isolation, rather than as a whole. Saying that judges are in no better position than juries to determine when conduct crosses the line of inappropriate behavior into actionable misconduct, a unanimous court found that "although the line is admittedly indistinct, its haziness counsels against summary judgment."

After the employee began dating a co-worker, a company vice president allegedly started making inappropriate and offensive comments that the employee was "sleeping with the wrong employee" if she wanted to get a raise in the amount she had requested. Other inappropriate comments and behavior allegedly occurred at a company holiday party and for five months afterwards. Although the employee had made repeated complaints to the company president and her department supervisor, she resisted putting them in writing, citing her fear of retaliatory conduct. Although a physical barrier was installed between the work areas of the employee and the vice president, and although her supervisor again reported the conduct to the president, the employee resigned after her supervisor told her she could no longer report to him.

The employee subsequently sued the employer for, among other things, hostile environment harassment under Title VII of the Civil Rights Act of 1964 and the New York State Human Rights Law. On the employer's motion for summary judgment, the trial court found that a reasonable juror could not conclude that the employee's claim rose to the level of unlawful conduct and dismissed it. Characterizing the offending conduct as "occasional touching, rude comments, and hostile stares," the trial court compared this with other relevant Second Circuit decisions and concluded the conduct was not sufficiently severe or persuasive to be unlawful.

The U. S. Court of Appeals for the Second Circuit, however, found that the trial court had improperly applied the test for determining whether the offending conduct was sufficiently severe or pervasive under the U. S. Supreme Court's ruling in Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993), which recognized sexual harassment as a form of unlawful sex discrimination for the first time. The trial also had misunderstood the standard for summary judgment in the Second Circuit. "There are, of course, cases in which it is clear to both the trial court and the reviewing court that after assessing the frequency of the misbehavior measured in light of its seriousness, the facts cannot, as a matter of law, be the basis of a successful hostile work environment claim," the court explained. However, the trial court in this case appeared to have examined "each factor from Harris in isolation" and concluded that the individual actions did not rise to the level of seriousness to be unlawful.

The Second Circuit explained that in Harris, the Supreme Court made a list of factors for analyzing hostile environment cases, including frequency and severity of the alleged misconduct, whether it was physically threatening or humiliating, and whether it unreasonably interfered with job performance, among others. These factors are to be used as a guide in a factual determination, the Second Circuit court said. Prior decisions of the court do not establish a baseline that plaintiffs must reach to prevail. "On a motion for summary judgment, the question for the court is whether a reasonable factfinder could conclude, considering all the circumstances, that 'the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse.' " Accordingly, the court said that each case must be examined on the basis of all relevant factors in determining whether a reasonable juror could find the work environment to be sufficiently objectively hostile to support a claim for sexual harassment. *Schiano v. Quality Payroll Sys. Inc.* [PE]

## End of Job Means "Your Fired!"

**When Amanza Smith sat on a stage in Los Angeles having her hair tweaked** by stylists promoting products by L'Oreal USA Inc., her one-day job became the foundation for a broadening of California law governing when employers have to pay "discharged" employees.

In a unanimous opinion Monday, the California Supreme Court ruled that "discharge" doesn't just mean being fired or laid off.

Ms. Smith was told she'd get $500 for her day as a "hair model." But when she had not been paid weeks later, she sued.

"The public policy in favor of full and prompt payment of an employee's earned wages is fundamental and well established," the Supreme Court says.

When an employee is fired or laid off, they must be handed a check for wages earned but not paid up to that point under state law.

But what of a position that in Ms. Smith's case was literally a day job?

The court says when the day of work ended, and thus the job, payment was required then and there.

The court agreed with Ms. Smith's argument that the element of being "discharged" is met "when the employment relationship is terminated upon completion of the specified employment."

"The very nature of an employer-employee relationship supports a more inclusive construction, particularly as to cases where an employer hires an employee for a specific job assignment, for generally it is up to the employer, not the employee, to direct how the assignment is to be executed and to determine when it has been completed," the ruling says.

"Accordingly, we conclude an employer effectuates a discharge … not only when it fires an employee, but also when it releases an employee upon the employee's completion of the particular job assignment or time duration for which he or she was hired," the court says. [PE]

Breaking News by E-Mail?
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News by E-Mail!

***SHPT*** **(Sexual Harassment Prevention Training)** ***Flyer Enclosed!***

## Human Resources Question with Candice Weaver

## The Month's Best Question

### Dress Code Discrimination

**Q: "May we have different appearance rules for men and women in our restaurant?"**

**A: Yes. The Ninth Circuit Court of Appeals has issued its final decision on** Jespersen v. Harrah's Operating Company, Inc., and found that corporate appearance and grooming standards can impose different requirements on male and female employees.

### Grooming Is No Burden

In February 2000, **Harrah's** revised its appearance and grooming policy covering all bartenders, male and female. Male bartenders could no longer wear their hair below the top of their shirt collars or use colored nail polish. Female bartenders must wear their hair down at all times and must wear clear, white, pink or red nail polish. Female bartenders' hair must be teased, curled or styled every work day, they must wear stockings and, finally, they must wear and apply makeup (face powder, blush and mascara) and lip color at all times. Finally, both sexes could wear "tasteful and simple" jewelry if they wished.

The remainder of Harrah's appearance and grooming policy required what was, for the most part, a unisex uniform. All bartenders, male or female, had to wear black pants, white shirts, bow ties and comfortable black shoes with rubber (nonskid) soles.

A female employee objected only to the makeup requirement, not the nail polish, hairstyle or stocking requirements that also applied only to female bartenders.

Harrah's offered her a transfer to a position that did not require makeup. She refused and was terminated. The ACLU took her case which is now in its sixth year. The Court held there was no evidence that Harrah's overall appearance and grooming policy imposed unequal burdens on women. The Court followed prior Ninth Circuit precedents holding an appearance standard "that imposes different but essentially equal burdens on men and women" is not disparate treatment under Title VII. California law requires that you not require women to wear dresses. [PE]

## Employment Seminars

**Sponsored by the Small Business Development Center** (SBDC) and the **Workforce Investment Board** at 10:00 am on the 3rd Thursday monthly at 4025 West Noble Avenue, Suite A, Visalia. We ask that you RSVP to the Small Business Development Center at - 559 625-3051 or Fax - 559 625-3053.

*NO SEMINAR IN AUGUST*

### 2006 Seminar Schedule

#### Sexual Harassment Prevention Training

**The Visalia Chamber of Commerce**, in cooperation with **Pacific Employers,** on **September 20th, 8:00am—10:30am,** at the Lamp Liter Inn in Visalia, twill present the state mandated **Supervisors' Sexual Harassment Prevention Training Seminar & Workshop** with full breakfast. Registration flyer enclosed.

Call the Visalia Chamber - 734-5876 for reservations.
$25 for Pacific Employers and Chamber members
Certificate – Forms – Guides – Full Breakfast

- **Posters, Signs, Forms, Handouts, Fliers -** With all the new laws out there, what posters, flyers and handouts does an Employer Need?
  *Thursday, September 21st, 10am - 11:30am*
- **Guest Speaker Seminar - Judge Gary L. Paden** will be our presenter in October. He will bring us valuable information on Business Ethics and what an employer should do in order to avoid court action.
  Thursday, October *19th, 10am - 11:30am*
- **Progressive Discipline & Effective Termination -** In the last seminar of the year we discuss the steps to take before discharging an employee to avert a lawsuit! We examine how to set up a progressive instruction, correction, punishment and termination program.
  *Thursday, November 16th, 10am - 11:30am*

These morning seminars are free of charge and include refreshments and handouts.

**Dinner for 2 at the *Vintage Press*?** ***That's right!*** When a business that you recommend joins Pacific Employers, we treat you to an unlimited dinner for two at the *Vintage Press*. Phone us at 733-4256 or Toll Free 800 331-2592.

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Articles in this Newsletter have been extracted from a variety of technical sources and are presented solely as matters of general interest to employers. They are not intended to serve as legal opinions, and should not be deemed a substitute for the advice of proper counsel in appropriate situations.

## TESTING OF DRIVERS OF SCHOOL VEHICLES

**Those employees who are drivers of "school transportation vehicles"** (other than school bus drivers, who already are covered by the U.S. Department of Transportation's (DOT) Federal Motor Carrier Safety Administration's drug and alcohol testing regulations) who are employed to drive such vehicles, and who are not otherwise required to participate in a DOT-testing program for controlled substances and alcohol, must be subject to testing consistent with these requirements applicable to school bus drivers under Title 49 of the DOT regulations.

The apparent intent is to close a loophole concerning school vehicle operators who were not covered by the DOT regulations. [PE]

## Sexual Harassment Still a Major Concern

In the Equal Employment Opportunity Commission's (EEOC) fiscal year 2005, there were more than 13,000 complaints of sexual harassment filed with the EEOC and with state and local fair employment practice agencies.

The attorney firm of Jackson Lewis' Workplace Survey for 2005 reported there had been sexual harassment complaints filed against more than 50% of the responding organizations.

Clearly, the prevention of sexual harassment in the workplace continues to be a concern for employers, despite the fact that in the same survey, nearly 90% of the respondents said their companies conduct harassment prevention training for supervisors and managers.

Pacific Employers conducts Harassment Prevention Training, provides employee policy review and advice, and works with employers to respond to charges of harassment and other forms of discrimination. [PE]

## FREE & UNLIMITED CONSULTATION?

*Yes FREE! A benefit of Pacific Employers' Membership is Free, Unlimited, direct, phone consultation on labor, safety or personnel question on the Pacific Employers' Helpline at:* **(559) 733-4256 or Toll Free (800) 331-2592.**

## Attendance Is Essential Job Function

A federal appeals court has dismissed a disability bias claim filed by GlaxoSmithKline employee James Schierhoff, who was terminated after missing 172 workdays over less than two years. According to the court, Schierhoff couldn't demonstrate that he could perform the essential functions of his job as a packaging mechanic because *"an employee who cannot attend work cannot perform the essential functions of his job. This is true even when the absences are with the employer's permission."* The court noted that the employer had made efforts, as required by the Americans with Disabilities Act, to accommodate Schierhoff's personal absences. *Schierhoff v. GlaxoSmithKline Consumer Healthcare L.P.* [PE]