Pacific Employers
Management Advisor
Celebrating 42 Years!
May 2006

Top of the News

Complaint Properly Handled

The 9th Circuit Court of Appeals recently found that an employer was not liable because it acted reasonably, under the circumstances, when responding to a sexual harassment complaint. The employer, a college, received a sexual harassment complaint from a student. The student claimed that the college failed to take appropriate corrective measures in response to her complaint. Further, the student claimed that the college unnecessarily delayed a hearing on her complaint in contravention of college policy.

The Court found that, because of the level of response and the amount of attention the college paid to the resolution of the student's complaint that the college was not liable for damages to the student. Although the college did not follow its own policy concerning formal hearings in response to sexual harassment complaints, the Court determined that the delay was merely careless or negligent, not a deliberate attempt to sabotage the student or the resolution of her complaint. The Court did emphasize that its holding in this case was based on the specifics of this particular case and the actions the college took. Further, according to the Court, such a delay with a different set of facts may have a different result. It is therefore important to review your sexual harassment complaint and investigation procedures and follow these procedures whenever such a complaint is received. *Oden v. Northern Marianas College*.

Employers should clearly record every action that they take in response to an employee's complaint. Promptly investigate and take suitable remedial action where appropriate. Document the entire complaint and investigation process. [PE]

Court Upholds Harrah's Makeup Policy

The 9th U.S. Circuit Court of Appeals has upheld a lower court's dismissal of a lawsuit alleging Harrah's Entertainment violated federal law by firing a bartender who refused to wear makeup.

In the most recent ruling, the 9th U.S. Circuit Court of Appeals agreed with the lower court and the panel that the employee failed to provide sufficient evidence that Harrah's appearance and grooming policy was more burdensome on women than on men.

Harrah's policy required women to wear some facial makeup but prohibited men from wearing any. The policy required men to maintain short hair while women could have long hair. The employee refused to comply with the policy, saying she found the makeup requirement offensive and interfered with her job.

She also argued that the policy was a form of sex stereotyping in violation of federal law. However, the U.S. Circuit Court of Appeals said she failed to provide any evidence to suggest Harrah's motivation was to stereotype female bartenders.

After the company fired her for refusing to comply, she filed a lawsuit, claiming the policy discriminated against women. However, a district court, the panel, and the appeals court en banc have ruled that the employee failed to provide sufficient evidence that the policy was any more burdensome for women than it was for men, which is a test the courts use for determining whether a grooming policy violates nondiscrimination law. [PE]

Child Labor Flyer Enclosed!

President's Report
~Dave Miller~

Gov. is Staying the Course in 2006

During a media event to observe the two-year anniversary of workers' comp reform bill SB 899 Governor Arnold Schwarzenegger told a throng of reporters, "I'm delighted that two years ago we reformed the system." In a prepared media statement the Governor said he "vows to fight efforts to rollback the savings."

Asked if the governor is telegraphing that he will veto any workers' comp bill that rolls back the reforms, a high level workers' comp advisor to the governor told Workers' Comp Executive "that's a pretty bold statement," with an emphatic nodding of the head.

The governor said he set out after he was elected to reform the California workers' comp system and enact "not a bogus reform, but a real reform." Citing the most recent figures, Schwarzenegger says rates have gone down 40 percent, 577,000 jobs have been created, and billions in new revenue has been realized thanks to SB 899.

Prior to the governor's event, Voters Injured at Work held its own media conference decrying the cuts in the permanent disability benefits and medical treatment saying that injured workers have been harmed. But the small businesses who flanked the governor say the reforms are helping their employees.

"If our employees were not happy, our litigation rate would not have gone down 66 percent. We're bringing people back to work much faster," says Nancy Axtell of PRIDE Industries.

The Governor says his appointees did an "incredible job" with the permanent disability schedule, and says in June his administration plans to go back and look at the reform to see how it's working.

"Some people are getting less because perhaps they were gaming the system before," he says.

The point was to fix a broken system and reinvigorate the market. The Governor is right to be delighted. Now he should stick to his guns. [PE]

If you think education is expensive - try ignorance. — Derek Bok

DISCRIMINATION CASES

Cracker Barrel Pays $2M Harassment Settlement

Cracker Barrel has agreed to pay $2 million to settle a lawsuit accusing the company of sexual harassment, racial harassment, and retaliation at three restaurants in Illinois.

Under the terms of the settlement with the U.S. Equal Employment Opportunity Commission, 51 current or former employees at the three Cracker Barrel restaurants in Bloomington, Mattoon, and Matteson will share in the $2 million settlement fund.

In addition, Cracker Barrel will be required to train all employees at the stores regarding harassment, to post a notice regarding the outcome of the lawsuit, and to periodically report any complaints it receives about sex or race discrimination to the EEOC.

In the lawsuit, the EEOC alleged that female workers were subjected to unwelcome and offensive sexual comments and touching from male co- workers and managers. The lawsuit alleged that management failed to take the women's complaints seriously.

"But this case wasn't just about sexual harassment it was also very clearly about race," says June Calhoun of the EEOC. "Black employees said that they experienced racially charged language in the workplace, including 'spear chucking porch monkey,' 'you people,' 'ghetto' and the 'n-word.' They said that the discrimination they experienced took other forms as well, including being required to wait on African American customers when white servers refused to do so, and being assigned to work in smoking sections." [PE]

New Dispute Resolution Program

Three major construction-industry unions in Northern California helped save employers $3 million on workers' compensation premiums last year in a new dispute resolution program for injured workers. This amount is over and above any savings the businesses may have gained from a drop in premiums due to state workers' compensation reform, and it is projected to grow to $3.2 million this year.

The dispute resolution program has been successful so far. The large pool of employers enjoy lower rates, and none of the 380 employee claims reported since its inception 18 months ago has landed in court. The program encourages injured workers, their employers and health care providers to work together to avoid costly lawsuits.

The California Chamber of Commerce, which seldom comes down on the same side as organized labor, expressed general support for the alternative dispute resolution programs as a means of speeding up workers' compensation claim settlements.

On average, employers expect to save $25,000 a year in lower premium costs. Some save as much as $300,000, and one Bay Area company saved more than $700,000. [PE]

"New Business Venture"

Recently, we at the Pipkin Detective Agency investigated a routine theft case which turned out to be much more. We received a call from our client indicating that a very expensive piece of equipment came up missing from their storage yard.

As usual, the client believed the theft to be an "inside job." After a brief investigation we confirmed our client's suspicions. The lock on the gate was compromised by bolt cutters, the equipment was conveniently parked out of view of the security cameras and the theft was completed on a "three day weekend," assuring the "crooks" plenty of get away time before the theft was discovered.

We then found that two employees had recently resigned for "opportunities at greener pastures." What we then stumbled on to was quite shocking to our client. The former Manager (convicted felon) and his trusty side kick had put together a great business plan. A) Steal the necessary equipment from the employer B) Steal all the supplies necessary to start the new business with out any start up costs and C) Steal the client's customer list and pricing information to under cut the "evil" former employer! As easy as ABC!

Yes, they were able to pull it off. The two crime partners had established a viable business that was too busy to accept any work from our undercover detectives who were posing as prospective clients.

After a brief review of sales, costs and customers, the client was livid and I don't blame him. This was a classic case of "rape" by theft of proprietary information. It's a terrible feeling to bring an employee into your business, train them, pay them, promote them and then find out they have started a business by stealing all of your ideas and property.

Within a few days we were able to put together a solid felony case on the perpetrators. At the time of arrest we found what our client was afraid of, customer lists, job bids, accounts receivable reports, suppliers information and the client's banking information! Were they planning a heist of the client's bank account? They wouldn't answer that question when we arrested them.

Our advice, Do Not Allow Access to Any of Your Proprietary Information to Any Employee! Be sure to shred All paper leaving the premises and have security codes on all accounts including your phone system and most importantly your bank account. Thanks for reading and we'll see you next month.

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Human Resources Question with Candice Weaver

The Month's Best Question

Do Small Employers Need to Do Sex Harassment Training?

Q: "We have fewer than 50 employees, are we still required to do some sex harassment training? And what about regular employees?"

A: Yes. All employers have duties beyond the 2 hour Sexual Harassment Prevention Training mandated by AB 1825.

The Laws Require Training

Some of the most basic training requirements for employers are listed by the U.S. Equal Employment Opportunity Commission (EEOC) and California Department of Fair Employment & Housing (DFEH) where they require all employees, including supervisors, to be trained in the basics of sexual harassment, i.e. - that it is illegal, how to recognize it, how to report it. The management side has always had a greater responsibility in stopping harassment when observed and investigating when reported. Therefore, employers also have a greater liability when they do not seek to stop all such activity.

The new requirements established under Assembly Bill 1825, that requires all supervisors of firms with 50 or more employees to be provided with 2 hours of sexual harassment prevention training, tends to send the wrong message to employers regarding their other obligations:

- All employees need to be trained, and,
- All supervisors need to be trained.

Employers with less than 50 employees must still provide employee and supervisor training. For smaller employers, the only less burdensome provisions of the training requirement is that those with less than 50 employees are not required to provide two full hours of training every two years for supervisors.

All employers need to rethink their strategy for their regular employees as they need to be made aware of what constitutes illegal harassment in the workplace and to call attention to it when it first appears so that management can eradicate that type of behavior from the workplace. [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.

2006 Seminar Schedule

♦ **Leaves -** Federal & California Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Compensation, etc.; What are the Pitfalls & How do you handle them? We will discuss implementing them all.
Thursday, May 18th, 10am - 11:30am

♦ **Exempt Status -** Salary? From what are they Exempt? Does a Title make them Exempt? Do specific Duties make them Exempt? What makes/keeps them Exempt?
Thursday, June 15th, 10am - 11:30am

♦ **Hiring & "At-Will" Employment -** From the Employment Application to the I-9 Form, we cover hiring. We also discuss maintaining an employee policy that protects you from the "For-Cause" Trap!
Thursday, July 20th, 10am - 11:30am

♦ **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 -** Annually we bring you a speaker for a timely discussion of labor relations, HR and safety issues of interest to the employer.
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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FEDS DROP ENFORCEMENT TACTIC!

Immigration-enforcement officials say they will abandon the practice of luring undocumented workers to an immigration sting by advertising it as a mandatory OSHA meeting, the New York Times reports.

Both federal and state labor officials criticized immigration investigators last year for using a safety meeting ruse to arrest some undocumented North Carolina construction workers. Immigration Customs and Enforcement agents had set up an immigration sting by posting fliers for a mandatory safety meeting at Seymour Johnson Air Force Base in Goldsboro, North Carolina .

In a letter to the United Food and Commercial Workers union this month, an Immigration Customs and Enforcement official wrote that the agency would no longer use the tactic, according to the newspaper. [PE]

FREE & UNLIMITED CONSULTATION?

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

HIGH DEDUCTIBLES UP

More big U.S. employers are building high deductibles into their workers' health plan options, but many of these companies do not see such programs as a silver bullet for slowing the rise of medical costs.

About 30% of large and mid-size corporations this year are offering the plans, which typically include a high deductible coupled with a tax-favored savings account to pay for health costs, according to a recent study. That compares with 7% of companies polled in 2004.

Plan proponents, including big companies and health insurers, call the new options "consumer directed" because they say patients' increased responsibility for spending gives them more control over their care.

Simply requiring employees to shoulder more of the costs bears little relation to whether a company has a handle on medical expenses, the study said.

Instead, companies keeping cost increases down are more likely to adopt quality controls, such as paying more to providers that meet certain criteria.

About 60% of companies polled said they expected the new plans to be somewhat effective in controlling cost increases. [PE]