

Areas of Practice

Business Litigation

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I.

JUDICIAL UPDATE

SUMMARY JUDGMENT OVERTURNED IN “REVERSE DISCRIMINATION” CLAIM

In *Noyes v. Kelly Services*, the (Federal) Ninth Circuit Court of Appeals addressed an employee’s burden to raise a triable issue of fact as to pretext in the context of “reverse discrimination” claims. The employee (“Employee”) alleged that she was denied a promotion on the ground that she was not a member of a small religious group, the Fellowship of Friends (“Fellowship”), and that employees who were Fellowship members generally received favorable treatment.

Employee worked in Kelly Services’ computer software and multi media department beginning in 1994. In 2001, she was passed over for a promotion to Software Development Manager. The individual in charge of filling the position was a Fellowship member. The promotion was ultimately given to another Fellowship member, even though he had worked for the employer for a shorter period of time than Employee, and had not earned an MBA, as Employee had.

In religious discrimination cases, the plaintiff bears the initial burden to establish a *prima facie* case of disparate treatment. If she succeeds, the burden then shifts to the employer to provide a legitimate, non-discriminatory reason for its decision. If the employer does so, the burden shifts back to the employee to submit evidence that establishes a triable issue of fact as to whether the employer’s proffered reason was a pretext for unlawful discrimination. In *Noyes*, the trial court granted the employer’s motion for summary judgment, finding that employer had offered a legitimate non-discriminatory reason for its action. Specifically, the position in question had first been offered to a non-Fellowship member. The employer also argued that the ultimate decision was made by a consensus of the entire management team, and not solely by the Fellowship member.

The Ninth Circuit Court of Appeals reversed, holding that Employee’s submitted evidence that she was more experienced and better qualified than the individual who obtained the promotion was sufficient to overcome summary judgment, and directed the matter to be reinstated.

COURT RULES THAT EVEN “SINGLE, ISOLATED DISCRIMINATORY COMMENTS” COULD BE ENOUGH TO DEFEAT SUMMARY JUDGMENT

Reid v. Goggle, Inc.: 52-year-old Brian Reid (“Employee”) was hired by Goggle, Inc. (“Google”) as Director of Operations and Director of Engineering.

When his employment was terminated two years later, Employee sued Google for, among other things, age discrimination. At the time he was discharged, Employee was told that he was not a “cultural fit” with Google. While employed at Google, Employee was told that his opinions and ideas were “obsolete,” and “too old to matter,” and that he was “slow,” “fuzzy,” “sluggish,” and “lethargic,” and that he “lacked energy,” and “did not display a sense of urgency.” Employee also alleged that co-workers referred to him as an “old man,” “old guy,” and “old fuddy duddy.”

To establish a cause of action for age discrimination, an employee must prove that: (1) he was a member of a protected class; (2) he was qualified for the position he sought, or was performing competently in the position he held; (3) he suffered some adverse employment action such as termination, demotion, or denial of an available job; and (4) some other circumstance suggesting discriminatory motive. Once the employee satisfies this burden, there is a presumption of discrimination, and the burden shifts to the employer to establish that its actions were motivated by legitimate, non-discriminatory reasons. Generally, a reason is “legitimate” if it is “facially unrelated to a prohibited bias, and which if true, would preclude a finding of discrimination.”

California and Federal courts have generally agreed that the issue of pretext does not address the correctness or desirability of the reasons offered for employment decisions. Rather, it addresses the issue of whether the employer “honestly believes in the reasons it offers.” The employee’s rebuttal obligation is not satisfied where the employee “simply shows the employer’s decision was wrong, mistaken or unwise.” The employee must establish such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s stated reasons for its actions that a reasonable fact finder could rationally find them unworthy of credence. If the employer meets this burden, the employee then must either show that the employer’s reasons are merely a pretext for discrimination or produce evidence of intentional discrimination. It should be noted that if an employer offers an innocent reason for its actions and there is no evidence to the contrary, the employer is entitled to summary judgment.

In *Reid*, the trial court granted Google’s summary judgment motion, finding that Google presented evidence to establish that it had legitimate non-discriminatory reasons for discharging Employee. The court added that employee did not submit evidence sufficient to raise an inference that Employee’s age was a motivating factor in the decision to terminate his employment.

The Court of Appeals, however, found that while Google had established a legitimate, non-discriminatory reason for the discharge (the elimination of his position), summary judgment was inappropriate. As a preliminary matter, Employee offered statistical evidence that demonstrated that younger executives received significantly higher performance ratings and bonuses than their older counterparts. In fact, the evidence revealed a 29 percent decrease in bonus awards for every 10 year increase in age. The court also considered the various age-related comments and remarks set forth above, and concluded that Employee had presented enough evidence to raise a triable issue of fact as to whether or not Google’s stated reasons for employer’s discharge were pretextual. In doing so, the court specifically rejected previous holdings that stated that a “single, isolated discriminatory comment” and “stray remarks” are insufficient to support a denial of summary judgment.

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FEDERAL DISTRICT COURT SUSPENDS “NO-MATCH” LETTER PROGRAM

On October 10, 2007, U.S. District Court Judge Charles Breyer (brother of U.S. Supreme Court Justice Stephen Breyer) issued an injunction barring enforcement of the Department of Homeland Security regulation concerning the issuance of federal “no match” letters. The regulation would have required employers to fire workers when they could not confirm a valid social security number within 90 days of receipt of a “no-match” letter. Judge Breyer opined that the regulation was likely to impose unnecessary hardships upon both innocent workers and employers. The injunction prohibits enforcement of the regulation while a civil lawsuit challenging the regulation (filed by the AFL-CIO and the ACLU in August, 2007) proceeds.

II.

LEGISLATIVE UPDATE

HEALTHCARE LEGISLATION

Governor Schwarzenegger has vetoed **AB 8 (Nunez)** which would have imposed a 7.5 percent payroll tax on California employers to fund a government-run universal healthcare program. The Governor has, however, introduced his own healthcare proposal (titled the Healthcare Security and Cost Reduction Act) which would provide healthcare insurance for all employees. Under the Governor’s newest proposal, employers would pay a sliding scale payroll tax from zero to four percent, depending upon the number of employees and the total payroll of the business. Under the proposal, employers who offer healthcare coverage to their employees would be exempt from the payroll tax.

LEAVE FOR SPOUSES OF MILITARY MEMBERS ENACTED

On October 9, 2007, Governor Schwarzenegger approved and enacted **AB 392** which requires employers with more than 25 employees to allow spouses of certain members of the Armed Forces to take up to 10 days of unpaid leave when the employee’s spouse is on military leave. Under the legislation, which went into effect on October 9, leave is provided to spouses of: 1) members of the Armed Forces of the United States who have been deployed during a period of military conflict in areas designated as a “combat theater” or “combat zone” by the President of the United States; 2) members of the National Guard who have been deployed during a period of military conflict; and 3) members of the Reserves who have been deployed during a period of military conflict.

To be eligible for this leave, the employee must work for the employer for an average of 20 or more hours per week. The employee must also:

1. Provide the employer with notice of his or her intention to take the leave within two business days of receiving official notice that the spouse will be on leave from deployment; and
2. Submit written documentation to the employer certifying that the spouse will be on leave from deployment during the time for which the leave is requested.

Employers may not retaliate against employees for requesting or taking leave provided for in the statute.

OTHER LEGISLATION VETOED

SB 622: Governor Schwarzenegger vetoed legislation that would have imposed \$10,000 to \$25,000 penalties against employers for “willfully” misclassifying employees as independent contractors.

The Governor also vetoed **SB 836** which would have added "family status" as a protected class under the California Fair Employment & Housing Act, and would have prevented employers from taking adverse employment actions against employees based upon their need to devote time to the obtaining custody of, and/or caring for children and foster children.

This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, or Cara Patton at (858) 755-8500 or Eric DeWames at (310) 417-1136.

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Pettit Kohn Ingrassia & Lutz PC Employment Law Symposium

REGISTER TODAY

**Wednesday, November 7, 2007
San Diego Marriott Mission Valley
8757 Rio San Diego Drive, San Diego CA 92108**

Join our team of employment law attorneys as we address the changes in employment law over the past year.

Who should attend: Business Owners, Executives, Human Resource Professionals, Managers and Supervisors.

Morning Program: 8:30 am – 12:30 pm

A half-day seminar providing you with the information you need to navigate through difficult employment situations easily and effectively:

**Wage & Hour Issues
Discrimination & Harassment
Retaliation
Leaves of Absence**

(Morning sessions @ \$100/per person, \$115 after November 2, 2007. Morning session attendees may attend the afternoon Sexual Harassment session for free)

Afternoon Program: 2:00 pm – 4:30 pm

Our afternoon session features Tom Ingrassia as he presents his highly acclaimed **Sexual Harassment Prevention Training** for supervisors and managers.

(Afternoon session only @ \$60/per person, \$75 after November 2, 2007)

Attached is our registration form for our Employment Law Symposium with more details. We look forward to seeing you there!

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