

Areas of Practice

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## I.

### **LEGISLATIVE/ADMINISTRATIVE UPDATE**

#### **Department of Homeland Security Rescinds No-Match Rule**

On October 7, 2009, the Department of Homeland Security (“DHS”) issued a final rule rescinding a set of regulations and procedures for employers that receive employee “No-Match” letters from the Social Security Administration.

The No-Match Rule, which was promulgated in 2007 in an attempt to strengthen the enforcement of immigration laws, provided that the receipt of a “No-Match Letter” may be sufficient to notify an employer that an employee might not be eligible to work in the United States. Employers who complied with the outlined procedures when responding to such letters could receive favorable treatment from enforcement agencies in the court system.

The final rule was issued in August 2007, but was immediately challenged in federal court by the AFL-CIO and the U.S. Chamber of Commerce, among other entities. Although the No-Match Rule appears defunct, the U.S. Senate has added a provision to the DHS Appropriations Bill (S.1298) prohibiting the DHS from rescinding the rule. The House of Representatives, however, passed its own version of the bill (H.R. 2892) without this provision.

#### **U.S. Senate Considers Bill to Overturn *Gross v. FBL Financial Services, Inc.***

In *Gross v. FBL Fin. Servs., Inc.*, the United States Supreme Court ruled that an employee asserting an action under the Age Discrimination in Employment Act (“ADEA”) must prove that age was the “but-for” cause of the adverse employment action in question, not just a “motivating factor.” In doing so, the U.S. Supreme Court imposed a higher standard than that used to prove claims of race, sex, religious, national origin, or disability discrimination under federal Title VII (which requires only that the employee prove that discrimination was a “motivating factor” for the adverse employment action).

The Protecting Older Workers Against Discrimination Act (S. 1756) would overrule the *Gross* decision, and amend the ADEA to state that an employee establishes an unlawful employment practice by demonstrating by a preponderance

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of the evidence that age “was a motivating factor for the practice complained of, even if other factors also motivated the practice” or that “the practice complained of would not have occurred in the absence of” the plaintiff’s age.

### Legislature Expands Hate Crimes to Include Hanging of Nooses in the Workplace - AB 412 (Carter)

The current California law against hate crimes prohibits the display of certain symbols, such as swastikas or burning crosses, with the intent to terrorize persons. This new law amends section 11411 of the Penal Code to also prohibit hanging a noose on certain public and private property, including a place of employment.

The California Legislature stated that, “to a reasonable person, the display of a noose at a school, park, place of employment, or other public venue amounts to a direct and immediate threat of force that would intimidate persons based on racial characteristics.” The expanded law, which takes effect on January 1, 2010, prohibits any person from hanging a noose, knowing it to be a symbol representing a threat to life, on the property of a place of employment, for the purpose of terrorizing anyone who works there. A first conviction could lead to imprisonment and/or fines of up to \$5,000.

### Pending Federal Legislation Would Add Sexual Orientation and Gender Identity Discrimination to Title VII – (S. 1584, H.R. 2981, H.R. 3017)

California law prohibits discrimination in the workplace on the basis of sexual orientation and gender identity. Now, the United States Congress is considering expanding Title VII to prohibit the same. Known as the Employment Non-Discrimination Act of 2009, both the House and Senate have introduced legislation which would ban employment discrimination on the basis of actual or perceived sexual orientation or gender identity. The Act would not apply to religious organizations or the armed forces.

### President Obama Expands FMLA Exigency and Caregiver Leave Provisions

On October 28, 2009, President Obama signed into law the Fiscal Year 2010 National Defense Authorization Act (H.R. 2674). The new law expands the recently-enacted exigency and caregiver leave provisions for military families under the Family and Medical Leave Act of 1993 (“FMLA”).

**Qualifying Exigency Leave:** Qualifying Exigency Leave is a new type of FMLA leave through which the employee may take time off to administer various non-medical exigencies arising out of the fact that the employee’s spouse, son, daughter, or parent is on active duty or on call to active duty status. This leave is subject to the usual maximum of 12 weeks of total FMLA leave to be taken per year. The regulations list eight types of “qualifying exigencies” which may qualify for this type of FMLA leave:

- *Short-notice deployment:* Leave to address any issue that arises from an impending call or order to active duty in support of a contingency operation seven days or less prior to the date of deployment;

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- *Military events and related activities:* Leave to attend any military ceremony, program, or event related to the active duty or call to active duty status or to attend certain family support or assistance programs and informational briefings;
- *Childcare and school activities:* Leave to arrange or provide for childcare or school-related activities;
- *Financial and legal arrangements:* Leave to make or update various financial or legal arrangements;
- *Counseling:* Leave to attend counseling (by someone other than a health care provider) when necessary as a result of the active duty or call to active duty status;
- *Rest and recuperation:* Leave to spend time with a covered military member who is on short-term, temporary, rest-and-recuperation leave during the period of deployment (up to five days);
- *Post-deployment activities:* Leave to attend arrival ceremonies (including funeral or memorial services), reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following active duty status; and
- *Additional activities:* Leave to address other events arising from military duty agreed upon between employer and employee.

**H.R. 2647** expands the exigency leave benefits to include family members of active duty service members. Under current law, only family members of National Guard and Reservists are eligible for exigency leave.

Military Caregiver Leave: This leave provides medical-oriented leave for those employees caring for family members with serious injuries or illnesses incurred in military duty. An eligible employee is entitled to 26 workweeks of leave to care for a covered service member in a “single 12-month period,” regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons. The employee is entitled in that period to no more than 12 weeks of leave for any of the other type of FMLA leaves.

**H.R. 2647** expands the caregiver leave provision to include veterans who are undergoing medical treatment, recuperation or therapy for serious injury or illness that occurred any time during the five years preceding the date of treatment.

### Revised “Equal Employment Opportunity is Law” Poster

The U.S. Equal Employment Opportunity Commission has revised its “Equal Employment Opportunity is the Law” poster. This new version reflects current federal employment discrimination law (including the Americans with Disabilities Act Amendments Act of 2008). The poster was also revised to add information about the Genetic Information Nondiscrimination Act of 2008, which is effective November 21, 2009. The revised poster also includes updates from the Department of Labor.

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There are several ways for employers to comply with the law:

First, employers may print the supplement from the website <http://eeoc.gov/posterform.html> and post it alongside the EEOC's September 2002 "EEO is the Law" poster or the Office of Federal Contract Compliance Program's August 2008 "EEO is the Law" poster.

Second, employers may print and post the November 2009 "EEO is the Law" poster supplement from <http://eeoc.gov/posterform.html>.

Third, employers may order a new poster through the EEOC Clearinghouse at P.O. Box 541; Annapolis Junction, MD 20701.

Additional information may be found at <http://eeoc.gov>.

## II.

### JUDICIAL UPDATE

#### All Circumstances Will Be Considered in a Retaliation Case, Not Only Those Which the Employee Specifically Complained About

In *Equal Employment Opportunity Commission v. Go Daddy Software, Inc.*, the EEOC filed a Title VII action alleging discrimination and retaliation on behalf of a Muslim employee whose employment had been terminated. After hearing conflicting testimony, a jury found that Go Daddy ("the Employer") retaliated against the employee for complaining of discrimination and awarded over \$300,000 in damages.

On appeal, the Employer argued to the appellate court that there was insufficient evidence the employee engaged in any protected activity, and even if he did engage in protected activity, there was insufficient evidence of a causal connection between that activity and his termination. The Employer argued that the employee had only complained on one or two occasions about "offhand comments" and "isolated incidents," which was not a legally cognizable protected activity.

The Ninth Circuit rejected the Employer's argument, stating that an employee need not complain about every comment to which he is subjected to believe he is reporting a Title VII violation. Although the employee did not report to human resources every alleged comment about his race, national origin, or religion, those alleged comments were still relevant. Even alleged discriminatory comments that the employee did not report to human resources were evidence which supported the finding that he was reasonable in believing he had been discriminated against.

#### Reasonable Accommodation Compliance

In *A.M. v. Albertson's*, A.M. was a cashier at an Albertson's grocery store. After receiving treatment for cancer, A.M. constantly needed to drink water.

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Albertson's permitted A.M. to have water at her cash register, even though it was against company policy. As a natural result, A.M. had to frequently urinate. Albertson's advised A.M. that she could call her supervisor when she needed to use the restroom and she would absolutely be covered.

On one occasion, however, the plan Albertson's instituted broke down because the supervisor was the only person who could cover A.M.'s work and she was unloading a truck. Therefore, A.M. had an accident at her cashier station.

According to the California Court of Appeal, that single failure of the supervisor sufficed to be a "denial" of a reasonable accommodation. The appellate court upheld a jury verdict of \$200,000 for that one incident.

### Mixed Motive Defense in California Fair Employment & Housing Act Cases

In California, the mixed motive is important and applicable. A California Court of Appeal recently held in *Harris v. Santa Monica*, that the trial court prejudiced the city of Santa Monica by refusing to instruct the jury that even if discrimination played a role in the decision to terminate the employee's employment, the City of Santa Monica was entitled to a verdict in its favor if it would have made the same decision regardless of the alleged discrimination.

It is important to compare the *Harris* decision to the U.S. Supreme Court's decision in *Gross v. FBL Fin. Servs., Inc.* (See Pettit Kohn Ingrassia & Lutz's July 2009 Employment Law Update). *Gross* limited "mixed motive" cases under federal law. Specifically, the Supreme Court determined that there is no need for the mixed motive defense in age discrimination cases under the federal Age Discrimination in Employment Act ("ADEA") cases. Rather, in ADEA cases, employees must prove "but-for" causation, so the employer need not prove it would have made the same decision with or without additional discriminatory motivation. The mixed motive defense remains viable in discrimination cases asserted pursuant to Title VII.

*Harris* is also important because it explains that an employer's decision cannot be challenged for being "unwise" or "factually incorrect" if it is not motivated by discrimination. *Harris* also revives the former California jury instructions on mixed motive cases, as the recently drafted Judicial Council of California Civil Jury Instructions do not provide a mixed motive instruction.

### Employee's Claims of Harassment, Discrimination and Retaliation Reinstated After Trial Court Committed Manifest Error in Granting Summary Judgment

In employment cases, employers frequently use motions for summary judgment or summary adjudication to dispose of some or all of the plaintiff's claims before trial. *Nazir v. United Airlines* discusses the summary judgment procedure, noting that it has recently been criticized, especially in employment cases. Observing that this case is "the poster child for such criticism," the *Nazir* court stated: "We take no position on this criticism, but do observe that many employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment, however liberalized it may be."

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In *Nazir v. United Airlines*, plaintiff Nazir, a practicing Muslim of Pakistani ancestry, worked for United Airlines for over 16 years. During that time he was called names such as “sand flea,” “rag head,” and “camel jockey,” and was the victim of numerous other incidents such as having flyers depicting Saddam Hussein slipped under his office door. Nazir repeatedly complained to his supervisor and to the human resources department about harassment based on his color, religion and national origin. Nazir eventually took a medical leave of absence due to the treatment he received from his coworkers. Prior to his return from leave he was asked to voluntarily demote himself. After he returned to work, the incidents continued. It was at this time that he received his first unfavorable performance review. His office was vandalized, and he continued to complain. Three weeks later he was fired.

The company said it fired Nazir because of an incident in which he made offensive comments to a janitorial contractor, grabbed her arm, and slammed it against a table. This incident was cited heavily in the trial judge’s decision granting summary judgment for the employer.

The appellate court did look at the entire record, and noted that the company had conducted a brief and less-than-thorough investigation of the allegations upon which it based Nazir’s discharge, and ignored witnesses supporting Nazir, including the female contractor’s own testimony that she and Nazir had been joking. Those leading the investigation were biased against Nazir, and the company never conducted interviews of individuals who may have had information about what happened. An investigation such as this, the court stated, could be evidence of pretext.

The court concluded that questions of fact existed as to whether the reason given for Nazir’s firing was a pretext for discrimination and retaliation. The purported assault was inadequately investigated, and the same supervisor’s involvement in both Nazir’s promotion and his termination created only an inference of nondiscriminatory intent which Nazir’s evidence overcame. Also, looking at Nazir’s evidence in the light most favorable to him, the court said there was most certainly a triable issue of fact as to harassment.

Time will tell if this opinion signifies a growing reluctance to grant summary judgment and summary adjudication in employment cases.

*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, Robert Hudock, Tyler Theobald, Jenna Leyton, Andrea Kaplan, Vanessa Maync or Christine Mueller at (858) 755-8500 or Eric DeWames or Mark Bloom at (310) 417-1137. For access to previous updates and reports, please go to <http://www.pettitkohn.com/EmployLabor.html>.*

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