

**MAY 2007 EMPLOYMENT LAW UPDATE**

**I.**

**LEGISLATIVE/ADMINISTRATIVE UPDATE**

House Approves Ban on Workplace Genetic Discrimination

On April 25, 2007, the United States House of Representatives approved the “Genetic Information Non-Discrimination Act” (H.R. 493), which would prohibit employers from using genetic information or test results when making decisions involving employment and health benefits. The bill would also prevent group health plans and healthcare insurers from using genetic information to set premiums, and would bar insurance carriers from requiring plan participants to submit to genetic tests.

The bill passed by a 420-3 majority in the House of Representatives. Given that the Senate has twice before passed similar bills, and President Bush has indicated his support for the bill, it is likely that the bill will, in some form, be enacted.

In California, genetic characteristics, such as genes, chromosomes or inherited characteristics that are known to be a cause of a disease or disorder or are associated with a statistically increased risk of developing a disease or disorder, are already protected by the California Fair Employment and Housing Act.

Harassment Training Proposed Regulations

The California Fair Employment and Housing Commission (“FEHC”) has adopted proposed training regulations which interpret California Government Code section 12950.1. Section 12950.1 requires sexual harassment training for supervisors of employers with 50 or more employees.

The regulations include the following provisions:

- “Effective interactive training” includes: classroom training; e-learning; webinar; and the use of audio, video or computer technology in conjunction with classroom, webinar and/or e-learning training.

- For any training method, the instruction shall include “questions that assess learning, skill-building activities that assess the supervisor’s application and understanding of content learned, and numerous hypothetical scenarios about harassment, each with one or more discussion questions so that supervisors remain engaged in the training.”
- A trainer includes: an attorney admitted to practice for two or more years and whose practice includes employment law; human resource professionals with two or more years of practical experience; and professors or instructors in law schools, colleges or universities with the requisite training and experience.

The FEHC will now submit its recommendations to the Office of Administrative Law (“OAL”) to review. Then, the OAL has 30 days to review and approve the regulations or disapprove them and require further changes. Upon approval, the OAL forwards the regulations to the California Secretary of State and the regulations become effective 30 days later.

## II.

### **JUDICIAL UPDATE**

#### **Court of Appeal Dismisses Retaliation Claim**

In *Malais v. Los Angeles City Fire Department*, the California’s Court of Appeal for the Second District upheld a Los Angeles trial court’s dismissal of Gregory Malais’ (“Employee”) claims for disability discrimination and retaliation. Employee was a long-term member of the Los Angeles City Fire Department (“the Department”) who was promoted to a Captain II position in 2000. In 2002, he was injured in a work-related accident which resulted in the amputation of his right leg below the knee. In October 2003, Employee returned to work as a full-time Captain II assigned to In-Service Training, a position designated as a “special duty assignment.”

Captain IIs may be assigned to at least two position classes: special duty and platoon duty. Both classes receive equal pay and possess equal promotional opportunities. (In fact, Employee received at least one promotion following his return to work.) Both classes also provide opportunities for significant overtime pay. Employee, however, desired to be assigned only to platoon duty because he preferred firefighting, the platoon work schedule, and the atmosphere of working as part of a team of firefighters as opposed to the typical office work environment associated with special duty assignments. The Department refused to assign Employee to platoon duty because it believed there was an unacceptable risk to Employee, other firefighters, and the public from his working platoon duty with a prosthetic leg. Employee alleged that his assignment to a special duty position constituted an “adverse employment action.”

As set forth by the California Supreme Court in *Yanowitz v. L’Oreal USA, Inc.*, an “adverse employment action” consists of “discrimination regarding compensation, terms,

conditions, or privileges of employment *and* disparate treatment in employment, specifically requiring people to work in a discriminatory, hostile or abuse environment.” The Court added that the phrase “terms, conditions, or privileges” of employment must be “interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that [the Fair Employment and Housing Act] was intended to provide.” The Supreme Court concluded that “adverse treatment that is reasonably likely to impair a reasonable employee’s job performance or prospects for advancement or promotion falls within the reach of the anti-discrimination provisions of [the Fair Employment and Housing Act].” A change in working conditions that is “merely contrary to the employee’s interests or not to the employee’s liking” is insufficient, however, to create liability for harassment and/or retaliation.

In *Malais*, the Court of Appeal confirmed that even though Employee would have preferred a different assignment, he did not suffer any adverse employment action. The court noted that Employee continued to receive promotions after his injury, and had equal opportunities for promotional advancement. Although Employee claimed that he earned less overtime in his special duty assignment than he would had while on platoon duty, it was undisputed that the special duty assignment included substantial overtime opportunities which Employee did not maximize because he did not enjoy the work as much as that involved in platoon duty. Finally, the court found that there was no evidence that Employee suffered from a hostile work environment.

Thus, even in light of the broad definition of “adverse employment action” set forth in *Yanowitz*, for discrimination or retaliation to be actionable, an employee must establish objective evidence that his or her employment has been affected. The fact that he or she does not like a new assignment or transfer is not, by itself, enough to establish retaliation or discrimination.

*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, Hilary Vrem or Cara Patton at (858) 755-8500 or Eric DeWames at (310) 417-1136.*