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Daily Journal Names Michael Lawler Leading Employment Lawyer in California

The *Daily Journal* named M&C Employment practice group co-chair, Michael B. Lawler, a "Leading Employment Lawyer in California." Mr. Lawler's practice, which is focused on defending employers in civil litigation, was discussed in the July 14, 2010, *Daily Journal*, Labor & Employment supplement.

The *Daily Journal's* list honors attorney achievements for the top 50 lawyers in the field of employment law and the top five in labor law. In making their selection, *Daily Journal* editors considered how the attorney's work impacted the organization he or she is with, the client, the legal profession, and society.

Employment Law in Nevada: Recent Developments

Michael J. Nuñez

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Hiring only female prison guards for women's facility violated Title VII, where sexual abuse by male prison guards could be handled with nondiscriminatory methods.

Breiner v. Nev. Dep't of Corrections, ___ F.3d ___, 2010 WL 2681730 (9th Cir. 2010)

Male prison guards filed suit against the Nevada Department of Corrections (NDOC) to challenge NDOC's policy of not hiring men for position in the woman's correctional facility. The woman's correctional facility, which was run by a private company, CCA, at the time, had widespread problems of sexual abuse of inmates

by prison guards. Many of these instances of sexual abuse were sex-for-contraband, with guards providing inmates with drugs and alcohol, among other things. As a result of the Inspector General's report of these issues, CCA and NDOC terminated the contract and the state assumed control over the facility. NDOC's director determined that it was appropriate to staff the facility with women lieutenants in order to prevent ongoing sexual abuse. NDOC acknowledged that its policy of hiring only women for lieutenant positions was discriminatory on its face.

The Court of Appeals reversed the district court's holding that the gender restriction for the lieutenant position had a "de minimis" impact on Plaintiffs. In reaching this conclusion, the Court noted that the district court had misinterpreted Robinot v. Iranon, 145 F.3d 1109 (9th Cir. 1998), in which certain posts were restricted to female prison guards. The Robinot Court held that the gender restriction there was "de minimis" because only 6 out of 41 posts were restricted. The restriction tended to preclude prison guards from working during their preferred shifts, and not, as here, their ability to get a position that may have a detrimental effect on their career. Stated another way, in Robinot "a minor impact on a job assignment was too minimal to be actionable," while Plaintiffs here were refused employment on the basis of sex, clearly violating Title VII.

Moreover, the Court of Appeals reversed the district court's holding that NDOC's discrimination was allowable as a bona fide occupational qualification, stating that NDOC's theories "rel[y] on the kind of unproven and invidious stereotype the Congress sought to eliminate from employment decisions when it enacted Title VII." The Court of Appeals noted that NDOC had a variety of non-discriminatory methods for controlling prison guard sexual abuse such as utilizing background checks, promptly investigating allegations of misconduct; and employing severe discipline for misconduct.

Claims of Race Discrimination are not necessarily enough to sustain an action for intentional infliction of emotional distress or for negligent hiring and training by an employer

Colquhoun v. BHC Montevista Hosp., Inc., No. 2:10-cv-00144-RLH-PAL, 2010 WL 2346607 (D. Nev. 2010)

Plaintiff, an African-American woman, worked as an educator at Montevista Hospital. Plaintiff claims she was forced to resign due to a hostile work environment where she endured "disparaging remarks about [her] African American heritage," and was wrongfully accused of stealing equipment from Montevista. Plaintiff filed suit against Montevista, alleging discrimination under Title VII, discrimination under NRS 613.330, negligent infliction of emotional distress, intentional infliction of emotional distress, negligent hiring, negligent supervision, and negligent training.

The Court dismissed Plaintiff's intentional infliction of emotional distress claim, finding that Plaintiff had not provided facts indicating that Defendant's refusal of a "justified" pay raise, false accusation of Plaintiff of stealing, and making "racially derogatory comments," was intentionally extreme or outrageous conduct. The Court noted that even if the allegations of Defendant's discriminatory conduct was true, Plaintiff's claims are appropriate under federal and state anti-discrimination laws, and not "tort claims reserved for the m[o] st egregious behavior." The Court also dismissed Plaintiff's negligent infliction of emotional distress claim, noting that Plaintiff's complaint failed to allege any negligent conduct.

Plaintiff also argued that Defendant was liable for negligent hiring, supervision and training solely on the basis that its employees treated Plaintiff in a discriminatory manner. The Court flatly rejected this argument stating that wrongful acts of an employee "does not in and of itself give rise" to these claims, rather, Plaintiff must allege specific facts of how the employer violated its duty to Plaintiff.

New Guidance from the DOL for Lactation Accommodation, and Comparable California Law

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Tucked into the "health care reform bill" passed earlier this year, was an amendment to the Fair Labor Standards Act ("FLSA"), requiring employers to provide nursing mothers with adequate time to express breast milk. In July, the U.S. Department of Labor ("DOL") issued Fact Sheet #73 to provide guidance to employers. California employers have had to provide such accommodation since similar state laws were passed in 2002. The amendment to the FLSA imposes new obligations on employers in states such as Nevada which have not had similar requirements.

Here is a synopsis of the general requirements. Employers are advised to seek assistance of counsel in situations which are not easily accommodated.

Coverage of the laws:

California's law applies to all employers, regardless of size. Under FLSA, employers with fewer than 50 employees company-wide are exempt if compliance "would impose an undue hardship," as determined by the difficulty or expense of compliance compared to the employer's resources. California provides an exemption to compliance, "if to do so would seriously disrupt the operations of the employer." The burden of proving an inability to comply will rest with the employer.

California's law also applies to all employees, while the FLSA applies only to non-exempt (hourly) workers.

Location of breaks:

Under both laws, the employee must be provided with a location which is private. The FLSA may demand more of employers than does California. Under the FLSA, a bathroom is not a permissible location to designate for expressing, while in California the employer may not relegate a woman to a "toilet stall." Further, FLSA requires that the space be "functional as a space for expressing milk," which the Department of Health and Human Services has suggested calls for a chair and small table or shelf for a breast pump. The place where the employee works would be adequate if it can be made free from intrusion. A space temporarily created for the purpose would be sufficient so long as it is available when needed by the nursing mother.

Privacy:

In June 2008, the California Labor Commissioner imposed penalties in the amount of $4,000 against an employer who failed to provide a space with adequate privacy to an employee. The Labor Commissioner's press release announcing the enforcement states, "Initially the room that was provided was computer server room with security cameras. This offered an inadequate level of privacy needed to perform the milk expressing process."

Time and Duration of Breaks:

California permits an employer to require break time for expressing to run concurrently with authorized rest break time, which in California amounts to a net of 10 minutes for each four hours of work (or major fraction of four hours). Employee time spent on lactation breaks beyond that must be provided if needed by the employee, but they need not be compensated. However, any time spent by the employee getting to the designated break area would not be considered part of the net 10 minutes.

The FLSA provides less clarity. Since the FLSA does not require that an employer provide paid rest breaks, time spent on a lactation break may not need to be paid if the employer does not otherwise have a paid break policy. The DOL Fact Sheet states that the employer must provide "a reasonable amount of break time to express milk as frequently as needed by the nursing mother. The frequency of breaks needed to express milk as well as the duration of each break will likely vary."

How Long Accomodation is Required:

California does not state the length of time that a woman must be afforded this accommodation, stating only that the accommodation must be made for an employee "desiring to express breast milk for the employee's infant child." The FLSA, on the other hand, applies for one year after the child's birth."

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Enforcement:

Penalties may be imposed under Labor Code 1033 in the amount of $100 for each violation, with no maximum specified in the statute.

The FLSA does not yet provide for penalties for failure to accommodate lactating mothers. This suggests the remedy for an employee in a state without an equivalent law, such as Nevada, would be an action for enforcement to a state or federal agency.

Essential Steps for an Employer:

Working through the requirements and logistics for each returning employee would be the employer's best practice under both California law and the FLSA. Employers should ensure that any woman returning from a pregnancy leave has been informed of her right to lactation accommodation, that consideration of logistics has been given for each returning employee, and that the employee's manager thoroughly understands and supports the company's obligations for the accommodation.

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