employment brief

Legal Developments Affecting Employers
Murchison & Cumming, LLP Management Advisors

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The Supreme Court Administers Another Body-Blow to Employers: *Sullivan vs. Oracle*

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It is a branding gaining currency throughout the nation: California is reflexively hostile to employers who still have the guts and the economic wherewithal to transact business in the state.

On June 30, 2011, the California Supreme Court embellished that reputation with its opinion in *Sullivan vs. Oracle Corporation*. In *Sullivan*, the justices concluded that non-California resident employees asked by Oracle to work in the Golden State for limited periods of time are entitled to avail themselves of the generous protections afforded by California's overtime regulations. The analytical ease with which the court arrived at this conclusion finds expression in its cautionary statement that, *"That California would choose to regulate all nonexempt overtime work within its borders without regard to the employee's residence is neither improper nor capricious."*

> **The three instructors were assigned to work in California for various periods of time: from 110 days to 20 days.**

The facts giving rise to this ruling are straightforward. Plaintiffs were employed by Oracle (a California corporation) as "instructors" who were tasked to train Oracle customers in the use of its products. Two of the plaintiffs were residents of Colorado, while the third plaintiff resided in Arizona. The three instructors were assigned to work in California for various periods of time: from 110 days to 20 days. All joined as representative plaintiffs in a class action claiming that they were entitled under California law to overtime compensation

because they regularly worked more than eight hours a day and/or more than 40 hours in a work week.

Oracle did not contest the fact that its non-resident California employees occasionally worked in excess of eight hours in a day or more than 40 hours in a week in the state. Instead, Oracle argued that, *"California's overtime law [ ] excludes nonresidents."* In support of this effort, Oracle tried to convince the court that its previous opinion in *Tidewater Marine Western, Inc. vs. Bradshaw* (1996) 14 Cal.4th 557 should be read to hold that laws governing overtime in the states in which the plaintiffs actually resided regulated entitlements to overtime payments. The court in *Sullivan* quickly dispatched this argument: *"Nothing in Tidewater suggests a nonresident employee, especially a nonresident employee of a California employer such as Oracle, can enter the state for entire days or weeks without the protection of California law."*

Oracle's more sophisticated argument was anchored to the Constitution's Commerce Clause. The tech giant's attorneys contended that requiring interstate employers to comply with unique wage and hour laws existing in every state in which their non-resident, non-exempt employees might occasionally work amounted to an undue burden on interstate commerce.

For example, Oracle argued that it should not be burdened with having to comply with idiosyncratic state regulations governing the content of wage statements or prescribing how vacation time should be applied each time one of its employees was temporarily assigned to work in a state in which she/he does not live. The court did not believe it necessary to answer these questions head on. Instead, it punted, stating that just because Oracle was obligated to abide by California's overtime laws did not automatically mean that Oracle had to abide by *"other technical aspects of California wage law."* Justice Werdegar simply penned *". . . this assumption is of doubtful validity."*

In concluding her opinion, Justice Werdegar overruled Oracle's final contention that the laws of the states in which the plaintiffs resided should control entitlement to overtime wages. *"Colorado and Arizona have expressed no interest in disabling their residents from receiving the full protection of California overtime law."*

The actual holding of the court's opinion in *Sullivan vs. Oracle* is admittedly limited -- for now. Only citizens hailing from the Grand Canyon State or the Centennial State who work in California on an itinerant basis must be paid overtime wages in compliance with *California Labor Code* sections 510 and 1194. But the implications of the opinion are potentially far ranging. For example:

1. What wage and hour laws are applicable to non-resident employees who are assigned to work in the Golden State? Does the employer have to pay an extra hour of wages under *California Labor Code* section 226.7 if these employees are not given duty free meal or rest breaks? Must wage statements comply with the content requirements set forth in *California Labor Code* section 226 et. seq.?

2. Are citizens of states other than Arizona and Colorado entitled to payment of overtime wages mandated by California law?

An abundant crop of wage and hour cases await interstate employers who deign to send out-of-state, non-exempt residents into the Golden State to work on an occasional basis. While this development bodes well for the state's legal industry, it similarly telegraphs to employers that they do business in California at their own risk.

Who's Afraid of the Big Bad Wolf?

Recognizing a Bully in the Workplace

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For a period of three months, every time a staff member passed the manager's office he would mutter insults and swear words such as "idiot," "you're disgusting" and "bastard" just loud enough that the manager might hear the insult. The conduct was not directed at the manager because of his race, ethnicity, age or any other personal characteristic which might be protected

under state or federal law. Nonetheless, the staff member's disrespect became a source of dread for the manager.

Does this behavior constitute bullying in the workplace?

> **The common theme in bullying behavior is a desire for the bully to exert power and control over others.**

The answer is yes. This behavior is considered to be a case of overt, persistent and offensive bullying. It doesn't matter that it was the subordinate acting in a hostile manner toward the manager. The behavior undermined the manager's authority and morale through constant humiliation. Bullying is seen as something that someone repeatedly does or says to another to gain power and dominance.

While there still is no legal definition of "bullying," this kind of conduct is not independently actionable, though if the bully and his or her target are different sexes, races, religions or ages, or if the target has a disability or any unique characteristics, it will surely be evidence of harassment based on a protected characteristic.

Bullying can have a serious impact on a workplace. For the targeted employee it can become a place of fear. For the employer it can become a place of less productivity and claims risk. An employee who feels continually disregarded, disrespected or intimidated is prone to view their workplace as a "hostile environment," raising the risk of disability and worker's compensation claims or lawsuits under harassment and discrimination theories.

The common theme in bullying behavior is a desire for the bully to exert power and control over others. Strict management or some kind of personality conflict will usually not be enough to support a claim of bullying. While blunt and brusque management styles may cause unhappiness and resentment, they do not constitute bullying. Telling an employee that "if she is not prepared to discuss her work, she might as well pack up and go" does not constitute bullying.

Once an employer is aware of the existence of behavior by one employee which intimidates another, it must take steps to correct the behavior and/or situation. The employer must investigate the allegations and attempt to resolve the issues. The employer may conclude as a result of the investigation that some form of discipline, or even dismissal, is needed. The employer must be able to justify its action taken against the bully.

> While the employer is obligated to act to protect staff from bullying behavior, it is also obligated to follow proper procedures in dealing with the alleged bully.

As employers, we want to eliminate bullies from our organizations. We want to diminish the risk of bullying behavior rising to the level of Hostile Work Environment. This can be done by establishing Anti-Bullying policies in handbooks. It can be done by establishing reporting, investigation and mediation processes. It can also be done by training employees to ensure that everyone is aware of their own responsibility to conduct themselves in a professional, civil and businesslike manner.

M&C and ACCA-SoCal Present Employment Roundtable

M&C and the Association of Corporate Counsel's Southern California Chapter partnered in support of educating members about recent developments in employment law by presenting a roundtable for in-house counsel. The roundtable was held on May 25 and 26, 2011 in Orange County and Los Angeles, respectively.

M&C Employment Partners William D. Naeve and Pamela J. Marantz addressed "Stray Remarks and Bullying in the Workplace," examining the nuts and bolts behind these rising workplace claims while providing information on risk assessment and protection.

To learn more about educational seminars and trainings offered by the Employment Law practice group, please contact Michael B. Lawler at *mlawler@murchisonlaw.com.*

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H.R. TIPS

When can employees "make-up" their time?

Q: Can I allow my employees to work make-up time without paying them overtime when they are working more than eight hours?

A: Employees sometimes ask to leave early one day for personal reasons and then make up that time. You can allow this without paying overtime for the longer day under certain conditions:

1. The missed time must be made up within the same workweek.
2. The employee may work no more than 11 hours on the make-up day.
3. The employee has provided a signed written request each time he wants to work make-up time.
4. The employer cannot solicit or encourage employees to request make-up time.

Tip: Create a form for employee make-up time requests.

These rules are found in Labor Code §513.

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