

Employment / ADA Access Law Alert!

Updates you need to know but in a millisecond...

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Thought of the Month

The definition of insanity is doing the same thing over and over again but expecting a different result.

EMPLOYMENT LAW

Top 10 New Years Resolutions for Employers

By: Catherine M. Corfee, Esq.



1. Ensure that all employees are properly classified as exempt from over-time or entitled to over-time. Mis-classifying employees who are entitled to over-time can result in a civil lawsuit for overtime going back 3 years, plus penalties!
2. Update your employment arbitration agreements for new employees. 2005 was a big year for the courts setting forth new interpretations and rulings regarding the enforce ability of such.
3. Ensure all supervisors and managers receive harassment training.
4. Complete your annual performance reviews, even with your star employees. Identify areas of improvement and suggest ideas for success.
5. Dust off and revise your handbook per current laws.
6. Investigate any and all allegations of harassment "promptly and thoroughly" as required by law.
7. Is your facility compliant with California and Federal ADA accessibility requirements for your disabled patrons/clients/customers? Corfee Stone can help.
8. Create your job descriptions, identifying the essential requirements of the job and be sure to identify the physical requirements. Under the law, a disabled employee must perform the essential functions of his/her

job or an alternative job to which he/she is qualified either with or without reasonable accommodations.

9. Remind employees not to use cell phones or computers for private matters at work, if you care about this.
10. Revise and update your employment applications. They can really help you if you are later sued!

Deducting Partial Days off from Accrued Vacation - Now OK

By: Catherine M. Corfee, Esq.



In Conley v. Pacific Gas and Electric, the court held it was lawful for the employer to deduct partial days off from an exempt employee (one who is not entitled to overtime). Employers may require the exempt employee to use his/her accrued vacation. However, the long standing prohibition against docking an exempt employee's pay for a absence of less than one day still exists. The new changes provides that if an exempt employee happens to have accrued vacation, than that may be charged to the partial absence. If the exempt employee lacks accrued vacation, no docking of his/her pay is permitted for that partial absence. A partial absence is when the employee needs/wants to be absent for four or more hours.

Congratulations!

Corfee Stone & Associates won a Motion to Quash a Subpoena for Medical Records and was awarded attorney's fees as sanctions against opposing counsel. Judges rarely issue sanctions.

Appellate Court Upholds \$2 Million Verdict in Sexual Orientation Harassment Case

By: Conor McElroy



In September, the California Appellate Court held that a state employee deserved nearly a \$2 million award for the harassment and retaliation he suffered from a security guard as a result of his sexual orientation. The plaintiff in Hope v. CYA (2005) 2005 Cal. App. LEXIS 1853, proved that continuous derogatory remarks by the co-worker/security guard were sufficiently severe and pervasive to support a harassment claim. The employee in this case was also subjected to a revocation of a promotion given to him, which co-workers said "wasn't right," and the denial of a merit increase since he complained to management about the harassment.

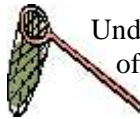
In this case, every time the employee complained to a supervisor, the complaint was dismissed and the supervisor did not follow up with anyone else in management regarding the complaint. Additionally, little to no investigation of the complaints were ever conducted. Because supervisor knowledge is imputed to the employer, the court held that the employer had actual knowledge of the harassment to support liability. The trial court by way of jury had awarded over \$900,000 in economic damages to the employee and \$1 million in non-economic damages, in addition to attorneys' fees and costs of suit. The appellate court upheld all of these awards.

The lesson to be learned is that employees placed in supervisory or management positions must be properly trained on the proper course of action to take if they witness harassment or if an employee complains to them of harassment. In Hope, an employee continually complained to supervisors of harassment from a co-worker. These supervisors just ignored or simply brushed off the complaints. The failure of the supervisor to take further action created liability for the employer.

It is also essential that every employer have an anti-discrimination and harassment policy in place, which includes a policy by which an employee can complain of any unreasonable conduct that he/she was subjected to. If you do not have such a policy in place, Corfee Stone & Associates can be of assistance in working with you to create one.

Safety Net for Corporate Officers and Directors

By: Conor McElroy, Law Clerk



Under California Law, corporate directors and officers can not be held liable as individuals for violations of wage and hour laws. This issue was first raised in our August, 2005 newsletter when we were awaiting the decision of the California Supreme Court. Now the Court has spoken, and ruled in Reynolds v. Bement (2005) 36 Cal. 4th 1075, that as to wage and hour claims, the word employer does not include agents of the company. Thus, a corporate director or the President of a company is free from personal liability even though they may be the person making all of the wage and hour decisions, including classifying exempt employees with respect to overtime.

This ruling, of course, does not remove a company from liability, and as we all know, the well-being of the company is usually directly linked to the well-being of its officers. While no longer having to risk personal assets for a wage and hour decision, a prudent employer will always consult with an attorney prior to making any questionable wage and hour decisions or classifying any employee as exempt from the strict overtime requirements.

Interference With Prospective Economic Damage

By Catherine Corfee, ESQ.

Watch Out: When Hiring Employees From a Competitor

In the recent case of Reeves v. Hanlon, 33 Cal. 4th 1140 (2004), the court considered to what degree an employer will be held liable for hiring employees from a competitor by using unfair and/or deceptive methods. In that case, an employer was held liable for intentional interference with an at will employment relationship of a competitor. The employer, interfered with a prospective economic advantage of the competitor. That sounds like a mouthful, but basically luring away good employees could affect a competitor's pocketbook. The luring employer's defendants were attorney's at a law firm (surprised?). They abruptly resigned without notice, left no status reports about the cases, deleted the computer files and misappropriated confidential information. They also cultivated employee discontent. Then, after the defendant's resigned, they made job offers to the former employers employees. The court held that the luring of employers violated the Uniform Trade Secret Act ("USTA"). While employees can announce the change of their employment, even to prior clients, the court held that they had gone too far.

This case was particularly egregious because the defendants were attorneys at a law firm and destroyed information about clients and cases of whom they then tried to lure away in addition to trying to lure away the employer's employees.



ADA UPDATE

Local Judge Sides With Defendant On Damages Claim In a Disability Access Case

By Zachary Best, Esq



Judge Morrison England, Jr., a U.S. Federal Judge for the Eastern District of California, issued an unpublished ruling siding with a defendant in a disability access case. The disabled ADA plaintiff prevailed, but only received \$1000 in damages.

The case of Springmeyer v. Denny's Inc., Eastern District Case No. S 03-1816 involved a situation where a plaintiff successfully sued a defendant over access to a restaurant. When it came time to assess the damages, the Court was faced with a quandary. As is commonly done, the plaintiff sued under the California Disabled Persons Act (DPA) as well as the Unruh Act, which prohibits discrimination generally. The DPA and the Unruh Act have different amounts of statutory damages. Under the DPA, the plaintiff is entitled to a minimum of \$1,000 in statutory damages. Counseling, under the Unruh Act, the plaintiff is entitled to only \$4,000. However, the law does not allow a plaintiff to recover statutory damages under *both* the DPA and the Unruh Act. Obviously, the plaintiff argued that he should be entitled to the \$4,000 statutory damages, while the defendant argued that he should only receive \$1,000. The Court resolved the question by examining the legislative history behind the two Acts.

The Court explained that the Unruh Act was a more general type of law that prohibited many forms of discrimination (race, gender, etc.), while the DPA was designed specifically to aid persons with disabilities. The Court next found that the Unruh Act was designed to remedy *intentional* acts of discrimination, while the DPA was designed to remedy both intentional and unintentional acts. The Court found that there was no evidence that the defendant restaurant engaged in any intentional acts of discrimination, so therefore the Court ruled that the \$1,000 DPA damages provision should apply.

While this decision carries no direct value as a precedent because it was issued by a trial court and not by an appellate court, it is still a victory for defendants in disability access cases because it shows that more and more judges are coming to the aid of defendants in these sorts of cases. Bravo to the Eastern District court for applying some common sense to the often confusing world of disability access laws!

Victorious Defendants In Disability Lawsuits Are Entitled To Attorney's Fees Under California Law

By Zachary Best, ESQ



Certain areas of the law allow a party who wins a lawsuit to recover their attorney's fees. Two such area of law are the Federal Americans with Disabilities Act (ADA) and its California counterpart, the California Disabled Persons Act (DPA). Plaintiffs who file Federal ADA lawsuits commonly add allegations of violations of the DPA to their suit. Both the ADA and the DPA allow for attorneys fees to the party who prevails. There are different standards that a plaintiff and a defendant/business must meet in order to recover attorney's fees. It is much harder for public accommodations to meet their standard, while easier for plaintiffs. What's the difference? Under the ADA, the Courts have decided that when a "defendant" wins an ADA suit, it can only recover its fees if it can prove that the plaintiff's case was completely frivolous and unreasonable. This is a much higher standard than for a prevailing plaintiff to win. Under the ADA, a plaintiff simply has to prove that he obtained a judgement, consent decree or enforceable settlement agreement.

There is another difference between the ADA and DPA. For a defendant to recover attorney fees under the ADA, the court has "discretion" and can deny them. However, under the California Disabled Person's Act, the court "shall" and must award them.

In Goodell v. Ralphs Grocery (2002) 207 F.Supp 1124. the disabled plaintiff claimed that the parking lot outside of the defendant's grocery store had access barriers under the ADA and DPA. When the plaintiff was unable to prove who owned or controlled the parking lot, the Court ruled in favor of the defendant. The Defendant did not own/control the parking lot. The Defendant filed a motion for attorney's fees.

The Court held that under the ADA standard, it did not believe that this particular case met the stringent requirements of being completely frivolous and unreasonable. Therefore, attorney's fees were denied to the defendant despite the fact that they won the case. However, the Court held that under the DPA, California's use of the phrase "the prevailing party...shall be entitled to attorneys fees" indicated the State intended for the mandatory award of attorneys fees to a prevailing party who requests them. The plaintiff argued that this was an inconsistent and unfair approach. Why should the plaintiff have to pay the defendant's fees when he lost his DPA claim and not when he lost his ADA claim? The Court was quite unsympathetic to the unfairness argument, instead cautioning future plaintiffs that if they file violations of both Federal and State disability laws, they run the risk of paying mandatory attorney's fees if they lose the State claim. We thank the court for this proper interpretation.



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CAUTION

January 1, 2006 was the deadline for companies with 50 or more employees to complete the Mandated Sexual Harassment Training. To avoid potential fines, contact us today to schedule your training. Since supervisors can bind a company for failure to stop, prevent, and/or investigate and remediate any harassment, supervisors should generally be trained even if not required. The cost is \$500 for a 2 hour training or 1 hour for \$250. This includes comprehensive and easy to follow handouts and certificates of completion. Please call for further details. 916-487-5441.

This document is not intended to provide express or implied legal advice and should not be relied on for such.



How Do You Know If Your Employee Is Disabled to Determine Whether or Not You Need to Accommodate Him?

Corfee Stone & Associates understands you are not a doctor. Yet several workplace issues arise when a person is injured on the job, outside of work, needs surgery, or needs to be off work for a medical reason, etc. As an employer you have a right to confirm whether or not someone is disabled. To fulfill legal obligations under Federal and State laws, family leave acts and workers compensation laws, we have developed excellent comprehensive forms to give your employee's physician and to help you when the time arrives.



Announcements



Did you Corfee Stone & Associates practices employment litigation, wage-and-hour law, employment agreements, administrative hearings, human resource support, state and federal OSHA, policies and manuals, severance agreements, trade secret agreements, defamation, employee & manager training, appeals and civil writs, and Americans with Disability Act.



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- ✓ Carmichael Chamber of Commerce
- ✓ Sacramento Metro Chamber
- ✓ Rotary Club of Sacramento