KAMER ZUCKER & ABBOTT
ATTORNEYS AT LAW

EMPLOYER REPORT

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ARE YOU READY FOR THE LABOR COMMISSIONER'S CRACKDOWN?

In a recent newspaper article, Nevada Labor Commissioner Terry Johnson promised quicker action on wage complaints filed with the Nevada Labor Commission. The Labor Commissioner is empowered by the Nevada Legislature to enforce certain of the state's wage and hour laws related to persons working in the private sector. The Labor Commission's jurisdiction includes hours of service, working conditions, and compensation. Under Commissioner Johnson's supervision, the Labor Commission has reduced the backlog of 2,700 wage payment complaints to 984 as of August 1, 2001. Additionally, the Labor Commission is beginning to use its authority to impose penalties on employers who do not pay employees as required by the state's wage and hour laws. Thus, given the Labor Commissioner's more aggressive approach, employers should make sure they understand the key components of Nevada's wage and hour laws.

MINIMUM WAGE - Currently $5.15 per hour.

OVERTIME - Unless otherwise exempted, employees are entitled to time and one-half of their regular wage rate for more than 40 hours worked in any scheduled workweek or more than 8 hours in any workday (unless the employee's regular hourly rate is more than $7.73).

WAGE DEDUCTIONS - Only if required by federal and state law, or unless the employee specifically consents in writing *and* it accrues to the benefit of the employee.

PAYMENT UPON TERMINATION - Immediately due and payable, with a 3 day grace period before penalties are imposed.

PAYMENT AFTER RESIGNATION - Payable on the date the employee would have been regularly paid or within 7 days, whichever is earlier.

For more information and answers to frequently asked questions, visit the Labor Commissioner's website at: http://labor.state.nv.us/.

DISCLOSURE OF FMLA LEAVE ELIGIBILITY CALCULATIONS EMPHASIZED

Penny Bachelder filed suit against America West Airlines, her employer, under the Family and Medical Leave Act ("FMLA") after she was terminated in April 1996 for poor attendance and performance deficiencies.

Bachelder had utilized five (5) weeks of FMLA leave in 1994 and three (3) months of leave in 1995. In January 1996, she was directed to improve her attendance. Thereafter, she was absent from work for a total of three (3) weeks in February 1996. Although she presented two doctor's excuses for these absences, America West determined that she was not entitled to any further FMLA leave pursuant to its rolling 12-month calculation method. When Bachelder missed work again on April 9, 1996, she was discharged.

Bachelder alleged that her February 1996 absences were protected by the FMLA and that she was improperly terminated based upon those protected absences. The trial court determined that none of Bachelder's 1996 absences were protected by the FMLA, accepting America West's calculations of her leave entitlement pursuant to its rolling 12-month period.

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Accordingly, it entered judgment for America West, from which Bachelder appealed.

The Ninth Circuit Court of Appeals reversed the lower court, finding Bachelder's 1996 absences were covered by the FMLA. The Court held that an employer must notify its employees of the calculation method it chooses for determining FMLA entitlement. It found that America West's statement to its employees that they "are entitled to up to twelve calendar weeks of unpaid [FMLA] leave within any twelve month period" did not provide sufficient notice that a rolling 12-month period would be used to determine leave entitlement. As such, the Court determined that America West was obligated to apply to Bachelder's February 1996 absences the calculation method which was most favorable to her.

Using the more favorable calendar year method, the Court determined that Bachelder's February 1996 absences were protected by the FMLA. The Court then considered whether her termination was unlawfully based upon those absences. The Court found that under the FMLA the issue is whether the employer's decision "interfered" with an employee's exercise of her rights. Accordingly, a less stringent standard of proof is used and a plaintiff must only prove that her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her. Because America West terminated Bachelder at least partially due to her absences in February, the Ninth Circuit determined that Bachelder had clearly satisfied her burden of proof.

This case is an important reminder to all FMLA-covered employers to ensure that their FMLA policies clearly put employees on notice of how leave eligibility will be measured. (*Bachelder v. America West Airlines, Inc.*, No. 99-17548 (9th Cir. 8/8/01)).

TITLE VII PROTECTS MALE EMPLOYEES CONSIDERED EFFEMINATE BY CO-WORKERS

The Ninth Circuit Court of Appeals issued a decision in July holding that Title VII protects male employees who are harassed for possessing perceived effeminate characteristics.

Antonio Sanchez filed suit against Azteca Restaurant Enterprise, Inc. alleging sexual harassment and retaliation in violation of Title VII. Sanchez worked for Azteca from October 1991 to July 1995. While Sanchez worked in two Azteca locations, co-workers regarded Sanchez as effeminate and subjected him "to a relentless campaign of insults, name-calling, and vulgarities." Specific remarks made by male co-workers included references to Sanchez as "she" and "her," and mocking Sanchez for walking and carrying his tray "like a woman." Co-workers made such remarks at least once a week and often several times a day.

Relying principally on two earlier Supreme Court cases, *Oncale v. Sundowner Offshore Services* and *Price Waterhouse v. Hopkins, Inc.*, the Ninth Circuit held that Title VII entitled Sanchez to relief because his co-workers harassed him for failing to conform to a male stereotype.

Although Azteca had a policy prohibiting sexual harassment and provided sexual harassment awareness training to its employees, the Ninth Circuit found that its response to Sanchez's complaints was less than adequate.

Specifically, Sanchez had complained to the general manager, the assistant manager, and the human resources director about "being called names." In response, Azteca never spoke to the alleged perpetrators or otherwise investigated the matter. Instead, Sanchez was told that he should report any further incidents and that the company would conduct "spot checks" to ensure that the problem had stopped. In actuality, only one such "spot check" occurred.

One of the more disturbing aspects of this case was the Ninth Circuit's willingness to completely overlook the evidence showing that Sanchez engaged in horseplay with his male co-workers, the very same individuals he accused of harassing him. As most employers know, sexual harassment must be unwelcome in order to be legally actionable. A common defense for employers in such cases is to show that the alleged victim actually "welcomed" the harassment by participating in similar conduct which forms the basis for his complaint.

Although the Ninth Circuit acknowledged that Sanchez had engaged in horseplay with his co-workers, it chose not to hold him accountable for that behavior. Instead, the court merely referred to those actions as "male bonding" and practically praised Sanchez for being able to draw a distinction between horseplay and harassment.

This case again reinforces the vigilance which employers need to have in responding to all types of harassment complaints, no matter how trivial they may at first appear. (*Nichols v. Aztec Restaurant Enterprises, Inc.,* 256 F.3d 864 (9th Cir. 7/16/01)).

NINTH CIRCUIT REINSTATES TITLE VII CLAIMS OF EMPLOYEE RAPED BY CLIENT

The Ninth Circuit recently reinstated an employee's Title VII sexual harassment and retaliation claims where the employee had been the victim of a series of rapes committed by one of her employer's clients.

The plaintiff, Maureen Little, was employed as a sales representative by her employer, Windermere Relocation, Inc. On one particularly lucrative potential account, the employer's President encouraged Little to "do whatever it takes to get this account." Little arranged a dinner meeting with the prospective client, after which she became ill and passed out. When she later awoke, the client was in the process of raping her. Although Little attempted to fight him off, the client overpowered her, took her back to his apartment and subsequently raped her two more times.

Little was afraid to tell her employer about the rape, particularly because of the President's interest in obtaining the account. Little did, however, report the rape to another employee who advised her against telling management, fearing repercussions. Little later discussed the rape with the individual designated to receive complaints under the employer's anti-harassment policy. Although she received a sympathetic response, Little was told it would be best to "put it behind her." Little was not encouraged to go to the police, nor did the employer undertake any investigation of the matter.

Because of the President's continued questioning of her as to the status of the account, Little finally reported the rape to her immediate supervisor who advised Little to immediately tell the President. Upon doing so, the President said he did not want to hear about it, and informed Little that her salary was being restructured immediately. When Little protested the pay reduction, the President terminated her. Little then sued, asserting Title VII and state law claims.

In reversing the lower court's grant of summary judgment in favor of the employer, the Ninth Circuit first found that Little's work environment extended beyond the physical confines of the office because her position required meetings with clients. The Court also stated that the rape was sufficiently severe, standing on its own, to constitute sexual harassment.

Further, the Court stated that employer liability for harassment committed by non-employees focuses upon whether the conduct has been ratified by the employer through its failure to take corrective action. In allowing Little to present her case to a jury, the Ninth Circuit noted that the employer did not take any type of corrective action in response to her complaint.

In also reinstating Little's retaliation claim, the Court remarked that Little suffered adverse employment action "within minutes of her reporting the rape" to the President, with such close timing enabling an inference of retaliation.

Employers should take note of this case to remember that they can be just as liable for harassment perpetrated by non-employees, including customers, as they can for actions by their own employees. As a result, prompt and remedial employer action is necessary in all cases, regardless of the status of the perpetrator. (*Little v. Windermere Relocation, Inc.*, No. 99-35668 (9th Cir. 9/12/01)).

NLRB FURTHER HANDCUFFS EMPLOYERS DURING UNION DECERTIFICATION CAMPAIGNS

In 1999, the National Labor Relations Board ("NLRB") ruled that companies which buy an existing business (often referred to as "successor employers") and are required to recognize an incumbent union must bargain with the union for an undefined "reasonable" period of time without allowing either the employer or the employees to challenge the union's right to continue its representation of employees. The Republican NLRB members vigorously dissented from the majority's ruling, finding that such a decision seriously infringes on employees' statutory right to *refrain* from having a union represent them. *See St. Elizabeth Manor, Inc.*, 329 N.L.R.B. No. 36 (1999).

This summer, in *The Park Associates, Inc.*, 334 N.L.R.B. 55 (2001), the NLRB applied its *St. Elizabeth Manor* decision and deprived employees of their right to participate in a secret ballot vote to determine if the union should be ousted and decertified. Previously, 54 of 93 employees had signed a petition indicating that they no longer wanted to be represented by the union. Additionally, the NLRB ruled that the successor employer unlawfully refused to bargain with the union during the pendency of the decertification process. Finding that the union was entitled to bargain with the successor employer unchallenged for a reasonable period of time, the NLRB ordered that the decertification election be canceled.

Of importance to all employers, the NLRB also found that it was unlawful for Park Associates to provide *truthful* informa-

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"IMPORTANCE" OF PHYSICAL LIMITATIONS REJECTED IN ADA CASE

Last month the Ninth Circuit Court of Appeals affirmed a grant of summary judgment in favor of an employer on claims brought under the Americans with Disabilities Act ("ADA"). The case was significant with respect to how the Court dealt with the physical limitations imposed on the employee, including a unique dissenting opinion by one of the judges.

Jacalyn Thornton filed suit under the ADA against her employer, McClatchy Newspapers, Inc., claiming that her employer failed to accommodate a disability imposed by a workplace injury which she sustained. According to Thornton's doctor, she was limited to 60 minutes maximum per day on tasks involving handwriting or the use of a computer keyboard. Although the employer tried to accommodate Thornton, it ultimately concluded that she was unable to perform the essential functions of her job as a newspaper reporter.

In a 2-1 opinion, the Ninth Circuit agreed with the lower court that Thornton had not stated a claim under the ADA. Specifically, the Court found that Thornton's inability to perform a single job did not substantially limit her ability to work, particularly because the evidence showed that Thornton had gotten another job, teaching journalism, which she was able to perform. While Thornton also claimed a limitation in being able to perform manual tasks, the Court rejected such theory, finding instead that Thornton was able to perform a wide range of daily tasks without limitation, including cooking, caring for herself, grocery shopping, and performing light housework.

The most interesting aspect of this case was the nature of the dissenting opinion by Judge Berzon. In disagreeing with the other two judges, Berzon stated that the Court's inquiry should have focused upon the "importance" of the tasks Thornton was unable to perform, rather than the number of other tasks she could perform.

Judge Berzon specifically noted that one's ability to produce written communications by computer, as well as by hand, is a manual skill of enormous importance such that "no one can realistically be successful in our world of mega-information without being able to use a computer."

Although Berzon's opinion is not controlling, he takes a unique approach to the evaluation of how substantial a limitation can be based upon a particular physical restriction. Hopefully for employers, this type of qualitative analysis will not be embraced in other ADA cases. (*Thornton v. McClatchy Newspapers, Inc.*, No. 99-15857 (9th Cir. 8/15/01)).

► UNION DECERTIFICATION *CONTINUED FROM PAGE 3*

tion about the existing benefits it furnished to non-union employees during the decertification process. The Democratic NLRB members upheld the Administrative Law Judge's finding that the disclosure of such truthful information was an unlawful promise of increased benefits to discourage union support. As pointed out by Republican NLRB Chairman Peter Hurtgen in his stinging dissent, such an outrageous decision flies in the face of employers' rights under Section 8(c) of the National Labor Relations Act to express their views, arguments, and opinions, as long as they contain no threat of reprisal or promise of benefits.

Equally disturbing is the Democratic NLRB majority's ruling that the employer also unlawfully operated an employee telephone hotline through which employees could voice any questions, comments, or suggestions they may have. The majority again agreed with the Administrative Law Judge that such a hotline constituted an implied promise to remedy employee grievances, despite its prior case law establishing that merely listening to suggestions does not, in and of itself, imply that suggestions will be acted upon by the employer.

This decision is another glaring example of why the Bush Administration needs to appoint more moderate and conservative individuals to serve on the NLRB.