TERMINATION OF SUPERVISING EMPLOYEE FOR DATING A SUBORDINATE DOES NOT VIOLATE STATE LAW

08.2004
Employment Law Reporter, Ervin Cohen & Jessup LLP

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Employment

The California Court of Appeal recently affirmed a judgment that held that the termination of a supervisor because of a relationship with a subordinate neither infringes on the employee's right to privacy nor violates Labor Code section 96, subdivision (k), a statute that prohibits employers from taking adverse action against an employee for any lawful conduct occurring during nonworking hours away from the workplace. In so doing, the Court of Appeal held that even though there may be a legally protected privacy interest in pursuing an intimate relationship, the interests of the employer outweigh that interest, particularly where advance notice of an impending action was given to the employee. The court further held that Labor Code section 96 does not state an independent public policy that provides any substantive rights, but merely establishes a procedure for the Labor Commissioner to exercise jurisdiction.

In *Barbee v. Household Automotive Finance Corp.*, Barbee was the national sales manager for the defendant HAFC, a finance company. Shortly after Barbee began an intimate relationship with a subordinate, Barbee's superiors at HAFC became aware of rumors concerning Barbee's relationship. HAFC had a written conflict of interest policy that provided that if a consensual relationship between a supervisor and any employee within the supervisor's direct or indirect area of responsibility is desired, it is the supervisor's responsibility to bring this to management's attention for appropriate action, i.e., possible reassignment to avoid a conflict of interest. Accordingly, a meeting was held at which Barbee conceded that he had a "special relationship" with a subordinate. Barbee was informed that the relationship created a potential conflict of interest and that Barbee would have to end the relationship or, in the alternative, either Barbee or his subordinate could resign. Barbee was given time to think over his options and subsequently informed management that both he and his subordinate wanted to stay with HAFC. Barbee conceded that, based on this conversation, HAFC "probably assumed" he was agreeing to end the relationship. Regardless, Barbee was

terminated after admitting that he had an additional date with the subordinate after this meeting. Barbee then filed suit against his former employer, alleging invasion of privacy, wrongful termination in violation of public policy, and sex discrimination. The trial court granted HAFC's motion for summary judgment and entered judgment in the company's favor. Barbee appealed the judgment.

The California Court of Appeal emphasized that even though Barbee had a legally protected privacy interest in pursuing an intimate or sexual relationship protected by article I, section 1 of the California Constitution, Barbee did not have a reasonable expectation of privacy for the simple reason that the extent of a privacy interest will depend on the circumstances. Courts have long recognized that employers have a legitimate interest in avoiding conflicts of interest between work-related and family-related obligations, reducing favoritism or even the appearance of favoritism, preventing family conflicts from affecting the workplace and bypassing the risk of potential sexual harassment issues. The court, therefore, concluded that "customs, practices, and physical settings" weigh heavily against finding a "broadly based and widely accepted community norm" that supervisors have a privacy right to engage in intimate relationships with their subordinates. Moreover, HAFC had an explicit conflict of interest policy and Barbee was expressly told that "intercompany dating was a bad idea." Thus, Barbee had advance notice which diminished any expectation of privacy Barbee otherwise may have had in pursuing an intimate relationship with a subordinate.

Barbee's attempt to establish a claim of wrongful termination in violation of public policy also failed. Barbee argued that Labor Code section 96, subdivision (k), prohibits employers from taking adverse action against an employee for any lawful conduct occurring during nonworking hours away from the workplace and that section 96(k) embodied a public policy that was violated by termination of his employment. The court disagreed and held this section does not set forth an independent public policy that provides employees with any substantive rights, but merely establishes a procedure by which the Labor Commissioner may assert, on behalf of employees, recognized constitutional rights. Therefore, in order to prevail on his wrongful termination claim, Barbee had to establish that his employment was terminated because he asserted civil rights guaranteed by the California Constitution. Since he could not meet this burden, the Court of Appeal affirmed the judgment in favor of HAFC.

This case is a victory for employers who struggle with the frequent problem of workplace romance. However, while the case goes a long way in confirming an employer's right to exert some control over workplace relationships, it underscores the need for appropriate written policies and the careful handling of situations as they arise.

Court of Appeal Affirms That Assembly Bill 76 Clarifies Existing Law and Therefore Is Applicable To Pending Cases

In *Salazar v. Diversified Paratransit, Inc.* (see the February 2003 and January 2004 Employment Law Reporter), *Salazar*, an employee of Diversified, alleged that she was repeatedly subjected to harassment by a client of Diversified and that she reported the conduct to her employer which failed to take any corrective action. The Court of Appeal initially upheld the trial court's decision granting nonsuit on the ground that the Fair

Employment and Housing Act (FEHA) does not protect an employee from sexual harassment by a nonemployee. Two months after the California Supreme Court granted petition for review, Assembly Bill 76 amended subdivision (j) (1) of Government Code §12940 to expressly hold employers liable for sexual harassment of employees by "nonemployees," provided the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action. AB 76 also included a declaration that the Legislature intended to construe and clarify the meaning of existing law and reject the interpretation given to the law by the decision of the appellate court. The Supreme Court then sent the case back to the Court of Appeal for reconsideration in light of the amendment, and the Court of Appeal reversed the trial court's decision.

The question of whether the new enactment is simply a clarification of existing law and therefore applies to pending cases or constitutes a substantial change requiring only prospective application was resolved in favor of the former. A legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute because the interpretation of a statute is an exercise of judicial power that the Constitution assigns to the courts. However, an amendment that in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act where the amendment is adopted soon after a controversy arises concerning the proper interpretation of the statute. The court held that, even if there is a span of decades between the two enactments, the Legislature's express views on its statutes are entitled to due consideration which a court cannot disregard.

The holding in Salazar underscores what careful California employers have known for quite some time: employers must remain vigilant to protect their employees from all forms of sexual harassment. Employers should take the lesson of Salazar to update their handbooks and personnel policies to ensure that workers are aware that sexual harassment from coworkers, clients and independent contractors is strictly prohibited and that the employer will promptly investigate allegations of such conduct.

Mr. Scott would like to thank Falk Jellissen for his contribution to these articles. Falk, who comes to us all the way from Munich, Germany, has joined ECJ as an intern for a second consecutive year. He has just completed his German bar examination and is obtaining additional credit in the area of American employment law.