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The Year In Employment Law Review — Part I

Law360, New York (November 30, 2009) -- While hardly a watershed year when it comes to developments in employment law, 2009 has nonetheless seen its fair share of interesting, and possibly even significant, alterations in the employer/employee landscape.

From unlawful discrimination against white high-achieving fire fighters, to clandestine video surveillance of employees, to chocolate pudding trade secrets, to 750 pages of new tiny-typed mind-numbing FMLA regulations, there was something for everyone this past year.

In fact, there was so much good stuff that it would not all fit in one article.

With thanks to our editors, we present below Part I of our two-part survey, which looks at some of the more interesting employment law developments coming out of the U.S. and California Supreme Courts (including a peek at California's interesting year to come). (Notice we did not say "top" employment developments. We'll leave the rankings to others.)

In Part II, we will look at what the legislative and executive branches (U.S. and California) have been up to, and highlight a few of the more interesting California Appellate Court employment law opinions.

The Supremes in Action

Both the U.S. Supreme Court and the California Supreme Court issued opinions in 2009 that impact employers and employees, some in subtle ways, some with a two-by-four. Here are a few of the more significant ones.

Race, Employment Examinations and Inevitable Lawsuits

Sometimes, employers just can't catch a break. The New Haven, Conn., fire department found this out the hard way after it gave fire fighter candidates written employment examinations and discovered that the white candidates outperformed the minorities.

This created quite the quandary: Should the city hire the candidates who the test said were most qualified (i.e., the white candidates) ... and get sued by the passed-over minority candidates for "disparate impact" discrimination?

Or should it throw the test out ... and get sued by the white high-scoring candidates for race-based "disparate treatment" discrimination? Talk about your lose/lose situation.

Well, New Haven chose the second "lose" and threw the test out. Unfortunately, according to the U.S. Supreme Court, it should have chosen the first "lose."

In Ricci v. DeStefano, 129 S. Ct. 2658 (2009), the court agreed with the high-scoring white plaintiffs that the city had violated Title VII by making a "race-based action" without "a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate impact statute."

"Fear" that it would be sued by the minority candidates under a disparate impact theory was simply not enough to justify a patently race-based employment decision, the court determined in its infinite wisdom.

Pregnancy Leave

Does the 1978 Pregnancy Discrimination Act (PDA) apply retroactively? That was the question before the U.S. Supreme Court as it reviewed the Ninth Circuit's decision in AT&T Corp. v. Hulteen.

"Nope." That was the answer the Supreme Court provided as it once again enjoyed overturning the Ninth Circuit (at 129 S. Ct. 1962 (2009)).

Holding that Congress did not intend the PDA to have retroactive effect, the court ruled that Ms. Hulteen was not entitled to the benefits of the PDA for a leave that occurred prior to passage of the act, even though had her pregnancy leave been considered a disability leave, she would have been entitled to more paid leave (and hence a larger pension upon her retirement). (Does everything come down to money?)

Mixed Motives

What happens when an employer has two reasons for terminating an employee, one legitimate ("she stole money") and one illegitimate ("she's an old woman")? Will the employer be liable for discrimination?

Thanks to the U.S. Supreme Court's clarification in Gross v. FBL Financial Services, 129 S. Ct. 2343 (2009), the answer is: "Uh, maybe."

Actually, in what is considered a major victory for employers at the national level, the court held that plaintiffs in age discrimination cases under the Age Discrimination in Employment Act (ADEA) must prove that age was the "but for" cause of the termination (or other adverse job action).

In other words, if the employee would have been fired for a legitimate reason regardless (i.e., because she was a thief), then the fact that the employer also was prejudiced against old people is not enough to raise an ADEA claim.

This contrasts to claims brought under Title VII for, say, sex discrimination, which looks to whether sex was a "motivating factor" in the job decision.

Hence, a different mixed motive standard will apply under federal law depending on the nature of the discrimination claim being asserted. That makes perfect sense.

Of course, this may have no impact in California where most discrimination claims are brought under the state Fair Employment and Housing Act (FEHA) (not addressed in Gross).

While California courts often follow federal decisions under the ADEA and Title VII when interpreting FEHA (hence it is possible a California court will someday adopt the Gross analysis for age discrimination claims), the FEHA language is not identical to the ADEA and there are plenty of arguments for why FEHA should be interpreted differently.

Don't Retaliate, Really

Why the Supreme Court needed to spend its valuable docket time on this issue is beyond this writer, but in Crawford v. Metro. Gov't of Nashville & Davidson County 129 S. Ct. 846 (2009), the Supremes ruled that Title VII really means it when it says employers cannot retaliate against employees who report sexual harassment.

The twist in Crawford was that the employee didn't initially come forward to report the harassing behavior of the school district's "employee relations director" (now there's someone who should know better); she instead reported the misdeeds as part of her interview conducted by the employer as part of an investigation into "rumors" of bad conduct.

The employer argued that one cannot retaliate under Title VII unless the employee "instigated or initiated any complaint."

In a rare showing of consensus, and an even rarer use of the word "freakish," the Supreme Court unanimously held that "nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question." (Well, when you put it that way ...)

California Supreme Court

Not to be outdone, the California Supreme Court got in on the action as well, though the employment cases still on its docket for 2010 are (in this writer's humble opinion) much more interesting than the ones that slipped off the docket in 2009.

Spying on Employees is ... Fine

On the one hand, California cases have allowed covert videotaping of employees in open and accessible workplace areas. On the other hand, courts have thankfully found a violation of the right to privacy where video surveillance has been made of areas reserved for personal acts such as employee restrooms and dressing areas. So what about that murky gray area between the two extremes?

What about when an employer installs a hidden video camera in an office shared by two employees in a residential treatment center for abused and neglected children in order to identify a third party suspected of accessing pornography at night from the company computer in that office? What if the camera is only turned on after hours and never actually records the two employees?

Well, the employees in this situation felt violated enough to sue for invasion of privacy. The California Supreme Court in Hernandez v. Hillsides Inc., 47 Cal. 4th 272 (2009) thought otherwise.

While finding that the employer had intruded upon the “reasonable expectation of privacy” of the two employees, the court nonetheless dismissed the claims, finding that the employer’s acts were not highly offensive nor did they constitute “an egregious violation of prevailing social norms.”

The decision was not meant to encourage workplace surveillance, according to the court, but to recognize that such measures may be permissible if narrowly tailored in place, time and scope and prompted by legitimate business concerns (catching a seeker of smut who worked in a treatment center for abused children thankfully qualified as a legitimate business concern).

No Such Thing as Stray Bad Acts

Thanks to the Supreme Court’s decision in Reno v. Baird, 18 Cal.4th 640 (1998), it’s been clear for years that managers generally cannot be held personally liable for the employer’s personnel decisions, even if those decisions were unlawfully discriminatory. However, this has not stopped plaintiffs from searching for diversity-killing ways to hold the individual managers liable.

One claim that has stuck is harassment — courts have generally allowed harassment claims to be brought against individual managers, particularly where the harassing activity occurred outside the supervisor’s official “managerial activities.”

But what happens when some of the manager's conduct occurs within, and some outside, his or her "managerial activities?"

Can the conduct falling within the supervisor's management duties be disregarded as that of the employer when analyzing the individual's personal liability for harassment? Or do you include all of the manager's conduct, whether considered "official" or not, in determining whether the manager's conduct is actionable harassment?

In Roby v. McKesson HBOC (S149752) (Nov. 2009), the Supreme Court has resolved this issue: Look at everything.

Even conduct undertaken as part of a manager's official duties can be done in a way that is harassing, according to the Supreme Court, and hence must be considered when evaluating a supervisor's personal liability for harassment.

(The Supreme Court opinion also addressed the size of the jury's punitive damages award and ultimately reduced it, based on Constitutional considerations and the particular facts of the case before it.)

The Court Giveth and the Court Taketh Awayeth

California Business and Professions Code Section 17200, known as the Unfair Competition Law (UCL), has been a plaintiff boom for decades, allowing for representative actions without the procedural protections of the class action statutes.

Indeed, before "Proposition 64" amended the statute, a plaintiff didn't even need standing or an injury to bring a representative action, let alone follow the class action procedural rules.

After Prop. 64, the standing requirement was added, but it still wasn't clear whether the injured plaintiff needed to comply with the normal class action requirements in order to bring a representative action under the UCL.

It's clear now. The Supreme Court in Arias v. Superior Court, 46 Cal.4th 969 (2009) held that Prop. 64 clearly intended "to impose class action requirements on private plaintiffs' representative actions" under the UCL.

That's good news for employers who are regularly hit with 17200 representative actions attacking their wage and hour practices.

Here's the bad news for employers. No such requirements are imposed for representative actions brought under the Labor Code's Private Attorney General Act of 2004 (PAGA) (Labor Code section 2698, affectionately known as the Bounty Hunter Law).

Under PAGA, aggrieved employees can act like a private attorney general and seek to collect civil penalties for Labor Code violations.

The catch: the employee must give 75 percent of the collected penalties to the Labor and Workforce Development Agency, with the remaining 25 percent distributed between the impacted employees.

Without going into the gory details of the court's reasoning, suffice it to say that the court concluded that a representative PAGA claim could proceed without satisfying class action requirements.

In a companion case, Amalgamated Transit Union Local 1756, AFL-CIO et al. v. Superior Court, 46 Cal.4th 993 (2009), the court held that labor unions could not bring UCL or PAGA claims on behalf of their members. The unions themselves do not have standing, and the employees cannot assign their rights to the unions under these acts.

California Supreme Court Circa 2010

The best is yet to come out of the California Supreme Court. Here are this writer's favorite employment matters currently pending before the High Court, ready for new law in 2010:

Shorten those Pesky Statutes of Limitations?

Why can't employers simply impose an Armendariz-compliant arbitration requirement on their employees as a condition of employment, and (while they are at it) include a provision whereby the parties "agree" that the statute of limitations will be shortened to something less than that permitted by the Fair Employment and Housing Act (FEHA)?

Seems reasonable (if you are an employer), doesn't it? The Supreme Court will help us with this when it rules in Pearson Dental Supplies Inc. v. Superior Court (No. S167169.) The matter is fully briefed.

Ignore those Stray Bad Comments?

Sometimes, a manager will have good reasons to terminate an employee. Sometimes that same manager will run off at the mouth and say things here or there that are less than professional.

Should these "stray remarks" ("Hey, old man," "he's such a fuddy duddy") be considered by a trial court when evaluating an employer's motion for summary judgment ("he was terminated because of poor performance, not his age")?

In other words, if the employer demonstrates a nondiscriminatory basis for the termination, should summary judgment nonetheless be denied if the employee can

come up with the existence of isolated or “stray remarks” which occurred outside the employment decision?

The Supreme Court will tell us in Reid v. Google (S158965). This case is also fully briefed.

Force Them to Take Their Breaks

Does the California Supreme Court believe that employers are inherently good or inherently evil? This seems to be the underlying tension in Brinker Restaurant v. Superior Court (S166350).

There, the court is being asked whether California’s wage and hour laws require employers to merely make rest and meal breaks available to their employees, or must they ensure that the employees actually take those breaks?

The lower courts have ruled that the employer need only make the breaks available; they don’t need to police each and every employee to ensure that they actually clock out. The Supreme Court should rule shortly as the matter is fully briefed.

Officers and Directors Personally Liable?

In a case that should have officers and directors paying rapt attention, and that could provide plaintiff’s yet another vehicle for defeating federal diversity jurisdiction, the California Supreme Court will decide in Martinez v. Combs (S121552) whether officers and directors can be held personally liable for causing the corporation to violate the statutory duty to pay minimum and overtime wages. This is fully briefed.

One Would Think this Would Already be Resolved

With our economy having been a national one for generations — with employees working in different states from time to time — one would think the question of whose labor laws apply would be well settled. Apparently not.

In late 2008, the Ninth Circuit ruled in Sullivan v. Oracle Corp. that California’s overtime rules (which are generally stricter than the overtime rules in other jurisdictions) apply to the portion of work performed in California even if the work is done by residents and employees of other states.

In contrast, the Ninth Circuit ruled that California’s unfair competition law at Business & Professions Code Section 17200 could not be applied outside California’s borders.

However, the Ninth Circuit later withdrew its opinion and certified the question to the California Supreme Court, which accepted the case in April 2009.

Pending now before the court is whether California Labor Code's overtime rules will apply to work performed in California for a California-based employer by out-of-state employee residents (we predict "yes").

It will also look at whether 17200 will apply to work performed inside California by out-of-state residents, and to work performed outside California for a California-based employer by out-of-state employees.

Attorneys Fees

In California, successful employee plaintiffs can recover their reasonable attorney's fees under FEHA (shockingly, it is much more difficult for successful employers to recover their fees).

There are many who believe this plaintiff-friendly fee-shifting statute encourages the filing of marginal cases since in the past, even very modest recoveries have justified attorney's fee awards worth many times the actual damages.

On the court's docket in Chavez v. L.A. (S162313) is the question of whether a court can deny attorney's fees to a FEHA plaintiff who received only a modest recovery. A negative ruling could impact the filing of future employment cases in California.

Stay tuned for Part II, to be published next week.

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