

Paul Plevin & Sullivan LLP

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Recent
Developments

COURT HOLDS PROLONGED STARING MAY BE SEXUAL HARASSMENT

GOVERNOR DAVIS SIGNS BILL PROHIBITING EMPLOYERS FROM LIMITING THE USE OF NON-ENGLISH LANGUAGE IN THE WORKPLACE;

AND VETOES BILL THAT WOULD RESTRICT MONITORING OF EMPLOYEE E-MAIL AND COMPUTER FILES (October 10, 2001)

*(This E-Update also contains information about PP&S's
Annual Employment Law Update: "WHAT'S NEW IN 2002")*

Don't Look Now – Staring Can Constitute Harassment

An opinion issued on October 9, 2001 by a California court has declared that staring, even in a non-sexually suggestive manner, can constitute sexual harassment. In [Birschstein v. New United Motor Manufacturing](#), an employee complained to her manager that a male co-worker was making unwanted sexual advances, sharing sexual fantasies about her and following her around the workplace. After the co-worker's manager warned him to leave the female employee alone, the co-worker never spoke to the employee again. Instead, he began staring at her several times each day. Uncomfortable with the staring, and unsatisfied with the employer's response to her complaints, the employee filed a lawsuit.

The trial court initially dismissed the claims against the co-worker and the employer because it believed that simple staring could not create a sufficiently hostile work environment to justify liability. The Court of Appeal, however, disagreed and issued a strong opinion permitting the case to go to a jury. The Court found the staring to be intimidating and retaliatory behavior, which was directed at the employee because she was a woman. Thus, coupled with the prior unwanted sexual advances, the female employee was entitled to have a jury decide her case.

WHAT THIS MEANS:

This case underscores the variety of conduct that can constitute harassment or retaliation. The case is another example of why employers must be vigilant in their efforts to eliminate harassment through a multi-faceted program, including (1) a strong policy with a clear complaint mechanism, (2) training of management and employees, (3) prompt and thorough investigation of every complaint of harassment or retaliation, (4) the implementation of decisive remedial action, and (5) taking proactive steps to identify possible retaliation. Such an approach is quickly becoming the standard to which employers are being held by employees, and by the courts.

Governor Davis Signs New Law Restricting "English Only" Rules

On September 12, 2001 Governor Davis signed [AB 800](#) into law. This new law adds yet another section to the Government Code that prohibits various discriminatory employment practices. Specifically, the new law makes it unlawful for an employer to adopt or enforce a policy that prohibits the use of any language in the workplace unless the policy is justified by business necessity.

The legislative history indicates that the bill's intent was to statutorily implement the constitutional protections provided by Section 8 of Article I of the California Constitution, namely that no person may be disqualified from entering or pursuing a profession, vocation, or employment because of national or ethnic origin, among other factors.

The new law codifies existing Fair Employment and Housing Commission regulations by making it an unlawful employment practice to require that employees speak English unless it is a "business necessity." Business necessity is defined and specifically limited to the "necessary, safe and efficient operation of the business."

WHAT THIS MEANS:

Rules prohibiting the use of languages other than English may discriminate and have an adverse impact on protected groups. This is because language can be intimately tied to national origin (a protected classification). Thus, unless an employer can demonstrate an important safety or efficiency reason, they may not require their employees to only speak English in the workplace. If employers currently have "English only" requirements, they need to reassess whether their existing policy falls within the business necessity definition of this new law.

Governor Davis Vetoes Bill Restricting Employers' Rights to Monitor E-Mail

On October 4, 2001, Governor Davis vetoed SB 147, which would have required employers, by March 1, 2002, to execute signed or electronically verifiable agreements with their employees regarding an employer's right to monitor employees' e-mail traffic and computer files.

In his [veto message](#), Davis explained that "employees in today's wired economy understand that computers provided for business purposes are company property and that their use may be monitored and controlled." In addition, Davis observed that under current law, employers are potentially liable if employees use the employer's computers for improper purposes, such as sexual harassment, defamation and the like. Therefore, Davis stated that "any employer has a legitimate need to monitor, either on a spot basis or at regular intervals, such company property, including e-mail traffic and computer files stored on either employer-owned hard drives, diskettes or CD-ROMs."

WHAT THIS MEANS:

While the governor's veto message is not law, it should give employers comfort that they do, in fact, have a right to monitor employee email and computer files that are maintained on employer owned equipment, even without a written agreement permitting this. Notwithstanding the veto of this bill, the "best practice" in this area is to have a comprehensive technology policy informing employees what is considered proper use of the employer's systems, and notifying employees that their use of email and the company's computers may be monitored.

SAVE THE DATE! SAVE THE DATE! SAVE THE DATE!

PAUL PLEVIN & SULLIVAN SEMINAR ANNOUNCEMENT

"WHAT'S NEW IN 2002" is an interactive workshop that will focus on how recent developments will impact your company's day-to-day employment practices and what you need to do in 2002 to stay current with the law.

We will examine the impact of new laws and court decisions and how these impact the workplace. We will review the changes you should make to practices and documents and will provide concrete suggestions for improving your policies in the coming year.

We will also offer practical, proactive suggestions about what you can do to manage the workplace issues arising from recent world events, addressing such topics as military leaves, stress leaves, employees who are afraid to fly or work in particular locations and increased harassment based on race, national origin and religion.

As always, we will also give you the floor to ask questions of our employment law experts.

WHEN: November 8, 2001, 8:00 a.m. - 11:00 a.m.

WHERE: La Jolla Marriott
4240 La Jolla Village Drive
Registration and Continental Breakfast: 8:00-8:30 a.m.
Seminar: 8:30-11:00 a.m.

REGISTER: Via email (seminars@paulplevin.com), by phone ((619) 237-5200), by fax ((619) 615-0700) or by mail. Advance registration is strongly suggested because seating is limited.

COST: \$95.00 includes breakfast, seminar materials and parking and can be paid in advance or at the door.

This E-Update is offered as general information to our clients and friends. The Update is not intended as legal advice applicable to any specific situation and should not be taken as such.

Send comments to info@paulplevin.com. Last modified 10/10/01