



## COURT UPHOLDS AN EMPLOYER'S ABILITY TO ENFORCE ITS NON-FRATERNIZATION POLICY

(November 24, 2003)

### Summary

Late last week, the California Court of Appeal held that terminating an employee for violating the employer's non-fraternization policy did not violate the law. This issue had been unclear ever since the California Legislature passed Labor Code section 96 (k).

### Details

In [\*Barbee v. Household Automotive Finance Company\*](#), a supervisor had an intimate relationship with one of his subordinates. The company had a conflict of interest policy that prohibited such relationships. When the employer learned of the relationship, it told the supervisor to either end the relationship or resign. When he refused, he was terminated. The supervisor sued, claiming that he was terminated in violation of his privacy rights and in violation of Labor Code section 96(k). Section 96 (k), which became effective on January 1, 2000, provides that the California Labor Commissioner may assert a claim on behalf of employees if they are demoted, terminated or suspended due to their "lawful conduct occurring during nonworking hours away from the employer's premises."

After carefully reviewing the history of section 96(k), the court determined that it does not allow employees to bring a private lawsuit. Rather, it merely establishes a procedure by which the Labor Commissioner may recover wages on behalf of employees based on recognized constitutional rights. Therefore, even though the supervisor's consensual relationship was "lawful conduct occurring during nonworking hours away from the employer's premises," the court concluded that they employer could still regulate the employee's actions.

The Court also disagreed with the supervisor's claim that his termination violated his privacy rights. The court noted that there is presently no privacy interest under the California Constitution in pursuing an intimate relationship, and the court refused to break that ground under the circumstances of this case.

### What this means

This case gives employers some comfort in their enforcement of their conflict of interest policies. Previously, many employers were concerned that section 96(k) could be interpreted to prevent them from regulating employees' off-site lawful conduct, even when that conduct runs afoul of the employer's legitimate business interests.

Although the court could have gone one step further and decided that an employer's legitimate business interest in avoiding conflicts of interest outweighed any employee rights under section 96(k), at least employers can now have some confidence that employees will not be permitted to bring wrongful termination claims based on alleged violations of this seemingly overbroad Labor Code provision. However, employers should be advised that if their regulation of off-duty conduct does violate an employee's constitutional rights, the employee may be able to maintain a public policy claim for such conduct.

If you have any questions about this or any other topic, please contact [Lonny Zilberman](#) at (619) 237-5200 at [Paul, Plevin, Sullivan & Connaughton](#).

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