Employment Roundtable

EXECUTIVE SUMMARY

In this month's roundtable, our panel of experts discuss several employment cases and their impact on the law, including two disability accommodation decisions—*Raine v. City of Burbank* and a case of first impression *Gelfo v. Lockheed*; two sexual harassment decisions *Lyle v. Warner Brothers Television,* a California Supreme Court case, and *EEOC v. Nat'l Educ. Ass'n of Alaska,* a Ninth Circuit Court decision; and the closely followed meal- and rest-break case *Murphy v. Kenneth Cole Prod.* pending before the state supreme court.

The panelists are Marie DiSante of Carlton DiSante & Freudenberger; Pamela Hemminger of Gibson, Dunn & Crutcher; Charles Thompson of Lewis Brisbois Bisgaard & Smith; Lindbergh Porter of Littler Mendelson; Veronica Gray of Nossaman Guthner Knox & Elliot; and Scott Dunham of O'Melveny & Myers. The roundtable was moderated by Custom Publishing Editor Chuleenan Svetvilas and reported for Barkley Court Reporters by Krishanna DeRita.

MODERATOR: A few court decisions have dealt with disability accommodation, including *Raine v. City of Burbank* (135 Cal. App. 4th 1215 (2006)) and *Gelfo v. Lockheed* (140 Cal. App. 4th 34 (2006)). What are the implications of the court's decision in *Raine*, where a police officer injured his knee on the job and was given a temporary civilian desk job while he recuperated?

GRAY: In *Raine*, California has clarified that a temporary position doesn't necessarily convert into a permanent position. An employer can restructure a job without committing to creating a new job. This case will provide guidance to employers in answering the frequently asked question: "Can I provide a temporary position without making it permanent? The irony of this case is that the City of Burbank would have given this plaintiff the desk job, but the plaintiff didn't take it because he'd lose all his deferred benefits as a police officer.

HEMMINGER: *Raine* is a critical case because it deals with the interaction between workers' compensation programs where employers bring employees back to work in temporary light duty jobs and employers' obligations under the disability discrimination law to transfer employees to available jobs as a reasonable accommodation. It makes it clear that the California Fair Employment and Housing Act does not require an employer to convert a temporary light duty job for an occupationally injured employee into a permanent position as a reasonable accommodation.

DUNHAM: I found *Raine* to be almost astounding in the sense that I'm surprised the court actually reached that conclusion. It's really satisfying to see that California courts are finally becoming more reasonable.

Most employers don't see how all these leave laws come into play. They think, "Once I'm done with my FMLA obligations, I'm back to the old way of doing things." But you may have a disability accommodation issue and/or a workers' compensation discrimination issue so you are not free to take just any action you want.

PORTER: I wonder whether *Raine* is clear to us because of the appealing or unappealing—depending on the viewpoint—facts of the case. Raine's conduct or his demand in the interactive process was so unreasonable that it was easy for the court to say, "No, you can't have this job and maintain your salary and benefits as a police officer."

HEMMINGER: What was interesting to me was that Raine was in the temporary job for six years, and yet the court still held that the job was temporary and didn't have to be converted into a permanent job.

DiSANTE: Many employers want to help their employees who have been injured—including employees who have injuries that are not work related—by giving them some work they are capable of performing. But they've been burned in the past because they create some special position, and they get sued when they tell the employee, "Okay, we just can't do it anymore. We want to help you out, but it's gone on too long." This case gives employees some ability to do that and know that when the time comes, they can say, "We are sorry, but the temporary job is over."

THOMPSON: This also seems to be a good application, too, of the interactive process that I saw as a thread through these cases. It seems that that has become very, very important to the court, and it's something that I've been emphasizing in counseling clients.

MODERATOR: What are your thoughts on the *Gelfo*

v. Lockheed case?

THOMPSON: In the *Lockheed* case, the court said that the employer must assess the objective reasonableness of a physician's opinion, which just scared me to death. I've had calls with clients, "What about HIPAA [Health Insurance Portability and Accountability Act]? What should I be asking, and whom should I be asking it from? Should I be reading this medical examination? How involved should I be," and/or, "I think that the applicant injured worker is gilding the lily?" It's a difficult dynamic and is almost tougher than the sexual harassment issues.

DUNHAM: The court's decision is 180 degrees from what I suspect most of us advise. Of course you rely on the doctor's opinion. You don't make your own determination about whether or not somebody is disabled. But then *Gelfo* says you can't rely on that doctor's opinion. That's just crazy. So I'm supposed to make my own layperson's assessment about whether or not this person is qualified and capable of doing the job with or without reasonable accommodation?

HEMMINGER: The facts were very negative for the employee who may have refused to produce a physician's report that he could return to work, saying, "I'm no longer disabled, but I'm not giving you my medical report, on advice of counsel."

DiSANTE: Cases like this make me want to move out of California. I can buy into the analysis that if an employer on its own has some faulty perception about whether someone has a disability or about the impact of the disability, then the employer must engage in an interactive process and reasonably accommodate what it perceives to be the disability even though, in fact, there is no disability. But to allow that to happen in a case like this, where the faulty perception is based on what the plaintiff's own doctor is telling the employer, and not based on the employer's own misperceptions, biases, or prejudices about certain disabilities or disabilities in general, I just couldn't believe it.

THOMPSON: It seemed that the court held Lockheed to a greater standard of cooperation and communication than it did the plaintiff. This guy doesn't seem very honest, and yet the court finds that Lockheed didn't adequately engage.

DUNHAM: Lockheed had a special committee look at the job, decide what the essential functions were, conduct an individualized assessment of this fellow, review the doctor's information, and then concluded, "We can't accommodate you." Gelfo wrote back, "Look more closely." So they went back, looked again, and concluded he was still disabled and they couldn't accommodate him. What more should you do in the interactive process?

GRAY: Although no one may like the facts or the plaintiff in this case, it is one of first impression for California that employers will have to follow: employees regarded as "disabled" are entitled to reasonable accommodation. It also raises the question of whether an employer is "required to get another medical report as part of the interactive process."

PORTER: Given this case, I would advise the HR person to begin the process from the perspective, "I want to find an accommodation for you. I want to evaluate what you have to say, all of the current medical information that you have, and anything that's not in the record that would help you get this job."

DiSANTE: And I would do all that in writing.

MODERATOR: What did you think about the *Lyle v. Warner Brothers Television* case (38 Cal. 4th 264 (2006)), otherwise known as the *Friends* case?

DUNHAM: I was not surprised by the case. The court adopted what I've always thought was the standard: that in the writers' room, you have a greater degree of freedom than you have someplace else and that is part of the creative process. I've done training on sexual harassment to writers on television shows. I've always told the writers, it doesn't go outside of the writers' room, and you make sure you are talking about story ideas and you are not poking fun at a particular person or directing your sexual comments at a particular person, which are all the things the court latched onto here.

The unanimity of the court surprised me. It was quite pleasing to see the justices reiterating the rules that we thought applied to sexual harassment. The court did, though, stress the specific nature of this case. The first person I talked to that read it said this has general application. Read it again closely, because I think four or five

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ROUNDTABLE

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times, the court says in this particular setting, in this creative process, on this kind of television show. The court was also surprisingly graphic in laying out the facts.

PORTER: The court almost had to do that because of the position it took. It had to be able to say the words. If the court shied away from using what was said in the opinion, it somehow gives credence to maybe it's a First Amendment issue, but there are some things you can imply, but you can't say.

HEMMINGER: It did say you must look to the context in which the remarks are made, but I think many of the statements are of more general applicability. The case is important because it addresses first the whole issue of sexual conduct that is not necessarily directed at someone because of sex, which is critical. But perhaps the area of more general applicability is the discussion of what constitutes a hostile working environment, and the discussion of how severe the conduct really must be, particularly if it's not directed at the plaintiff herself.

PORTER: The notion of environmental harassment was certainly present in *Lyle*, and if we have a cause of action in California for environmental harassment, not necessarily directed at a specific person, or at women generally, but on the subject of sex-based conduct and vulgarity focusing on gender issues, can't that still create a hostile environment?

HEMMINGER: I think not. What the court said was that if the crude, sexual, or inappropriate language is not directed to women in general or to the plaintiff, the conduct is not "because of sex" and a hostile work environment claim is not established. Contrast this with the *NEA* case (*EEOC v. Nat'l Educ. Ass'n of Alaska*, 422 F.3d 840 (2005)), though, holding that gender causation is established even for nonsexual abusive language, if exposure is quantitatively or qualitatively greater for women rather than men.

THOMPSON: It seemed to me though, that they did carve out the exception of the creative environment. I recall some language in there that it could be harassment if you hung out at the front desk and told a lot of dirty jokes depending on the environment. There was an environmental component that the court applied.

GRAY: Although this case reminds us that the law is not a rule of civility and sanctioned the creative process to permit the use of vulgar language and rude behavior in the workplace, when we conduct sexual harassment training, we will still be instructing employees not to engage in rude behavior, not to use vulgar language, and to avoid telling off-color jokes.

PORTER: I tend to disagree with Pam slightly about the usefulness of this case. It seems that the question is, did the conduct create a hostile environment or did it reflect a creative environment? And the creative environment seems to be limited to the movie industry as compared to law offices or clients' places of business.

DiSANTE: But look at the *NEA* case. It clearly wasn't "because of sex" in that case, but the court found a way to say it was sex-based. I agree that the *Lyle* case has limited application outside of the entertainment industry. I can see, for instance, in a law firm, if you are doing trial prep on a sexual harassment case, there may be some discussion about sexual themes, about creative ways to pitch the case to a jury. But those discussions can be limited to the lawyers discussing the matter, whereas this woman in the *Lyle* case was hired specifically to transcribe writer meetings. She was part of that creative process. She wasn't a secretary who heard the conversation. It would be appalling for courts to say that in the entertainment industry, you can't have these kinds of discussions when you are trying to develop movie or TV scripts. You must be able to have that freedom.

I do think it's quite interesting that the *Lyle* case and the *NEA* case were decided so closely in time. The *Lyle* case is loaded with sexual talk, coarse language, vulgarity, and there's a finding of no sexual harassment, and then we have the *NEA* case, which has no sex-based conduct anywhere and we have a finding of sexual harassment. And for as much as *Lyle* said, "the law does not establish a civility code in the workplace," the *NEA* case essentially did set up a civility code in the workplace, but it appears to be a discriminatory code that applies only to women.

GRAY: Let's keep in mind, because it's a Ninth Circuit decision, we don't know the effect, if any, it will have in California. Notwithstanding, this case is a significant expansion of what we have previously considered within the realm of sexual

harassment. As an aside, the case recently settled for $750,000.

THOMPSON: I like the language in the *NEA* case about the formula for severity having inverse proportion to the pervasiveness and frequency. It always frightens me when lawyers try to do math. I would hate to explain this little formula to HR folks about how we should be applying that, and how that it might be okay for somebody to yell and scream at the guys, but not at the women, or scream less at the women than the guys.

MODERATOR: What wage-and-hour cases are you following most closely right now?

HEMMINGER: The *Cole* case (*Murphy v. Kenneth Cole Prod.*, Inc., No. S140308) which is before the state supreme court. It presents the issue whether payments for missed meal periods are penalties or wages. There have been court of appeal decisions that have gone both ways. Of course, no one can predict the result, but most of us in the defense bar feel that the result should be that the payments are penalties.

DUNHAM: That case is going to drive so many class actions, in part because of the big difference in the statute of limitations, which is one year versus three years or four years if you have a [California Business and Professions Code section] 17200 claim. We just got a typical class action in which it all turns on whether it's a wage or penalty, because if it's a wage, they want penalties not just under California Labor Code section 226.7, but also section 226 for not having the proper statement within the paycheck, waiting time penalties for those who have been terminated and didn't get their wages, conversion of wage, restitution of wages under 17200 claims, et cetera.

THOMPSON: Do you think the supreme court will hopefully address all those issues, punitive damages and 17200?

DUNHAM: I don't see much controversy about the conclusion that you can't recover penalties under 17200. We have had no trouble convincing courts of that once you convince them it's a penalty.

GRAY: Not only will section 17200 be eliminated as a remedy, so should the other penalty provisions in the Labor Code to avoid any double recovery.

DISANTE: From a purely economic perspective, the *Cole* case is going to have much more significance than any of the other issues we have talked about today. As a social matter, perhaps not, but as an economic matter, absolutely, because so many meal- and rest-break class actions are going on right now. The statute of limitations, and whether employees are entitled to receive one, two, or three penalties per day if they miss two rest breaks and one meal break, these both are very significant unresolved issues. The supreme court is not going to be addressing the latter issue in this case, which is very unfortunate, because these open issues really impact the settlement value of the cases.

PORTER: This is as big as *Foley* in 1988 (*Foley v. Interactive Data Corp.*, 47 Cal. 3d 654), with the contract and tort issues and wrongful termination. This is every bit as big, if not bigger.

DUNHAM: But from a social standpoint, that made a lot more sense. This isn't a big social policy. This is interpretation of the statute. I have a hard time seeing how this court would come out and say it's not a penalty. I think you made that observation earlier, the legislative history is just absolutely clear that this is a penalty.

GRAY: There are two court of appeal decisions analyzing the same legislative history and taking divergent views; there are more cases holding that it is a penalty, not a wage; and the Division of Labor Standards Enforcement has reversed itself—now holding it is a penalty; and the legislature doesn't think that the DLSE should be rendering any opinions. The outcome will have a significant impact on class actions on this issue. ■

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