

TAYLOR & GUTIERREZ LLP

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EMPLOYMENT

'FRIENDS' WRITERS GET CREATIVE WITH LEGAL THEORIES ON DEFENDING SEXUAL HARASSMENT CLAIMS UNDER FEHA

Lyle v. Warner Brothers Television Productions
2004 Cal.App.LEXIS 579
Certified for Partial Publication

"Creative necessity" is one factor a jury could consider in weighing sexual harassment claim

(Taylor & Gutierrez Partner Matthew D. Marca contributed this article.)

Amaani Lyle, an African-American woman, applied and was selected for a writers' assistant position with two of the executive producers and writers of the NBC sitcom 'Friends.' The position required her to type all of the exchanges between the show's writers in order to capture their brainstorming on show plots, dialogue, and the like. Lyle later sued the writers, NBC, and others for, among other things, sexual harassment in violation of the Fair Employment and Housing Act ("FEHA"), asserting that the writers had

subjected her to incessant lewd, demeaning remarks and conduct in the course of her employment. This behavior, Lyle argued, created a hostile work environment.

The writers admitted to having engaged in much of the conduct and making many of the remarks described by Lyle, but asserted that such behavior was engaged in for a legitimate, nondiscriminatory business reason: it was a "creative necessity." In support of their affirmative defense, the writers contended that 'Friends' was a show about young sexually active adults and to generate ideas for the show, they had no alternative but to go through "sexual brainstorming sessions."

Under FEHA and relevant cases, "harassment" includes "verbal harassment, e.g. epithets, derogatory comments or slurs," as well as "visual harassment, e.g., derogatory posters, cartoons, or drawings." The United States Supreme Court, in *Oncale v. Sundowner Offshore Services, Inc.*, held that "alleged sexual harassment must be viewed in the context in which it took place to determine whether the defendants' actions created an objectively hostile work environment."

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Conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job is not harassment.

The Court of Appeal acknowledged the "novel defense" of creative necessity, but stated that there were triable issues as to whether the actions by the writers were within the scope of their duties. The majority of the alleged lewd comments, jokes, pictures, and sexual exploits of the writers were never a part of any episode of 'Friends' and many occurred outside of writer's meetings.

The court did note the limits of the "creative necessity" concept, saying that writers' assistants could not, for example, be fondled in order to develop a love scene or be subjected to personally demeaning remarks. "Within such limits, however, defendants may be able to convince a jury the artistic process for producing episodes of 'Friends' necessitates conduct which might be unacceptable in other contexts."

CONSTITUTIONAL LAW

THEATER'S POLICY ON SEATING FOR COMPANIONS OF WHEELCHAIR-BOUND INDIVIDUALS FOUND TO BE IN VIOLATION OF THE ADA

Fortyune v. American Multi-Cinema, Inc.
2004 U.S.App.LEXIS 7235

(Taylor & Gutierrez Associate Katherine F. Wisinski contributed this article.)

The Ninth Circuit holds that theater's policy of not requiring nondisabled persons to vacate companion seats when screenings are sold out violates the ADA.

On June 25, 2000, Robin Fortyune ("Fortyune") and his wife purchased tickets to see *Chicken Run* at their local AMC theater ("AMC"). Fortyune is a quadriplegic who requires both a wheelchair and an attendant to attend movie theaters. The auditorium in which the film was being shown had four wheelchair

spaces, each adjoined by a companion seat. When Fortyune and his wife entered the auditorium, they found that two of the companion spaces were occupied by a father and son, neither of whom were disabled or accompanying a wheelchair-bound patron. Despite the Fortyune's requests, the father and son would not change seats.

Though the screening was sold out, the auditorium had not yet filled, and other seats were available. A manager's help was enlisted, but the father and son could not be persuaded to move, and the theater's written policy did not allow the manager to require the pair to select other seats. The Fortynunes left the theater without seeing the movie.

Fortyune brought suit against AMC, claiming that their policy of not requiring nondisabled persons to vacate companion seats when screenings were sold out violated the Title III of the Americans with Disabilities Act (ADA). To succeed on his claim, he had to show that (1) he is 'disabled,' as defined by the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; (3) the defendant utilized a discriminatory policy or practice; (4) the defendant discriminated against the plaintiff based upon the plaintiff's disability by (a) failing to make a requested reasonable accommodation that was (b) necessary to accommodate his disability.

The first and second prongs of the test were uncontested. With respect to the third, the 9th Circuit held that the theater's "policy of failing to ensure that a wheelchair-bound patron and his or her companion are seated together has a discriminatory effect in practice." It was undisputed that Fortyune needed an attendant to accompany him. The Court also determined that the requested accommodation was reasonable, i.e. it did not impose an undue financial or administrative burden on the defendant.

Having met his burden, Fortyune was granted the injunctive relief he had sought: the theater was ordered to ensure that a companion of a wheelchair-bound patron be given priority in the use of companion seats.

EMPLOYMENT

JOYRIDE ON WATER SLIDE BY WATER PARK WORKER NOT COVERED WITHIN WORKERS' COMPENSATION BARGAIN

Mason v. Lake Dolores Group, LLC
2004 Cal.App.LEXIS 492

(Taylor & Gutierrez Partner Patrick E. Taylor, Jr., contributed this article.)

Negligence action brought by water park employee after he incurred injuries using water slide after hours and without permission not barred by workers' compensation exclusive remedy rule.

Arriving early for his shift as a pool technician for the Lake Dolores Group ("LDG") water park, James Mason ("Mason") thought he would take a ride on one of the more popular water slides, the Doo Wop Super Drop. Though he had not yet clocked in, he helped a co-worker take a flag down before asking another co-worker to turn on the slide for him. At no point did Mason seek supervisory permission for his plan to ride the water slide. Turning on water slides without express authorization was forbidden, due to both the electrical costs and dangers involved. The Doo Wop Super Drop had been turned off for one hour; water had not had time to fill the runout lane at the bottom. Mason crashed into the dam at the end of the slide with very little water to cushion his landing. Paramedics arrived on scene to find that he had been rendered a paraplegic.

Mason sued LDG for negligence. LDG argued that Mason's injuries arose out of and in the course of his employment and his suit was thus barred by the exclusive remedy of workers' compensation.

The Court of Appeal analyzed the language of Labor Code section 3600(a), which sets forth the terms of the 'compensation bargain' and found that the manner in which Mason had sustained his injuries was not contemplated by the Code. "He was not 'performing [a] service growing out of and incidental' to his employment at the time of he was injured. [Citation

omitted.] Nor was he doing any of 'those reasonable things which his contract with his employment expressly or impliedly permit[ed] him to do.'" The court noted Mason's actions were in fact in direct contravention of LDG's employee policies. The fact that Mason had helped a co-worker with a flag did not change his 'off-duty' status when he was injured just moments later.

The Court likewise rejected the idea that Mason's injuries were brought within the workers' compensation sphere by the 'personal comfort' doctrine, whereby "the course of employment is not considered broken by certain acts necessary to the life, comfort, and convenience of the employee while at work." Turning to precedent, the Court noted that "it is settled that '[p]ersonal activity *not contemplated* by the employer may constitute a material departure from the course of employment."

Mason's conduct was ultimately held to be outside the scope of the workers' compensation scheme, and the jury verdict in his favor on the claim of negligence was reinstated.

HOW ARE WE DOING?

Enclosed with this month's issue, please find a Reader Survey. If you would take a minute to complete the questionnaire and return it to us via facsimile, we will incorporate your suggestions and comments into future issues.

UPDATE: The court's opinion on the matter of *Dixon v. Regents of the University of California*, which appeared in the February 2004 issue of T&G's newsletter, has been decertified and should not be cited as authoritative.

TORTS

Zamos v. Stroud
2004 Cal.LEXIS 3048

Attorney who continues prosecution of lawsuit which he knows to be meritless may be liable for malicious prosecution. Such actions are not limited to the commencement of a groundless suit.

EMPLOYMENT

Shuer v. County of San Diego
117 Cal.App.4th 476

After advising terminated employee that she had no right to a hearing to appeal an employment decision, county was barred from asserting that employee had failed to exhaust her administrative remedies.

INDIVIDUAL RIGHTS

Venegas v. County of Los Angeles
32 Cal. 4th 820

County sheriff acts as a state agent in conducting a criminal investigation and is therefore immune from liability for alleged civil rights violations under 42 U.S.C. 1983. Court thus sustained demurrer as to that cause of action filed by officer who detained wrong individual in course of search for vehicle thief.

EMPLOYMENT

Salazar v. Diversified Paratransit, Inc.
2003 Cal. LEXIS 9118

State Assembly bill which expressly stated its purpose as clarifying the meaning and effect of existing law will apply to all existing causes of action from the date of its enactment. AB76, which was enacted while case was pending, thus applied to matter at hand.

Taylor & Gutierrez is currently representing a Bay Area municipality in an assault and battery claim against a police officer.

On January 1, 2001, plaintiff was involved in a motor vehicle accident a local airport. Plaintiff and the other driver became embroiled in a heated verbal altercation over who caused the accident. Several police officers were called to the scene to calm the drivers and make sure the exchange did not become physical. When plaintiff failed to respond to the officers' repeated requests to calm down and stay away from the other driver, the officer in charge had no choice but to place plaintiff in handcuffs until he regained control of himself. Plaintiff physically resisted the officer's attempts to place him in handcuffs. In the wake of the incident, plaintiff sued for injury to his rotator cuff.

This case recently went to arbitration and the arbitrator found in favor of the municipality. He found that although plaintiff was injured while being handcuffed by the officer, plaintiff did not meet his burden of proving that the officer negligently caused the injury.

The arbitrator noted that the officer is a credible, reasonable witness whom the jury will like and believe. Plaintiff, on the other hand, will not impress the jury. The jury will not appreciate the extent of his belligerence toward the other driver and the officers following a minor vehicle accident. The arbitrator also noted that, based on the testimony of the witnesses, plaintiff's injury most likely occurred because plaintiff physically resisted being handcuffed.

Plaintiff rejected the arbitration award and we are now gearing up for a September trial. We expect the trial to go as well as the arbitration hearing.

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