LBAEE
September 2024 News

UPDATES

- To abide with the association bylaws that call for 6 groups LBAEE's has reorganized some units into a new Group F : Energy Resources / Fire & Code Enforcement / Airport. The original groups are now re-labeled:
  Group A: Building & Safety
  Group B: Utilities
  Group C: Public Works
  Group D: Harbor
  Group E: CM & Survey (Harbor)

- LBAEE met with Harbor HR and Employee Relations about the introduction of a new Manager classification at Harbor that could impact an existing AEE classification; discussions are still ongoing.

- The Port of Long Beach and the Historical Society of Long Beach presented the exhibit The Workers' Harbor that recognized how labor built and shaped the Port of Long Beach which is planned to be on display for a limited time at the lobby of the Port Administration Building

- LBAEE attended the 457 Deferred Comp Meeting where they recommended to visit the customized website for Long Beach : http://www.457longbeach.org/

- According to our negotiated MOU, effective the first full pay period including October 1, 2024, all bargaining unit members shall receive a 1% general wage increase to the base hourly rate.

- The Association is planning a meeting to reach-out and reconnect in person with our members on Wednesday October 9th at Noon. Stay tuned for details in how to RSVP in an upcoming email.

Recent Developments on Harassment Law

Two new legal cases involving public employers highlight important developments in harassment law. In one case, an employee's Instagram posts made outside of work were deemed evidence of harassment. Be careful what you post! One case involved California law, the other involved Federal law. This month, we look at those laws and how these two cases expand important workplace protections for California public employees.

Federal Law: The main federal law prohibiting harassment is Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e). It was originally proposed by President John F. Kennedy. After his assassination, President Lyndon B. Johnson helped secure the law's passage in Congress. He signed the bill into law at the White House on July 2, 1964, more than 60 years ago. Title VII prohibits employment harassment based on race, color, religion, sex, and national origin. The law applies to employers who have 15 or more employees, including California public agencies. The Federal Equal Employment Opportunity Commission (EEOC) enforces Title VII. An individual can sue in court by first filing a complaint with the EEOC within 180 days of learning of the harassment.

California Law: California's harassment law is the Fair Employment & Housing Act of 1959 ("FEHA") (Government Code §12900). The FEHA was signed into law by Governor Pat Brown and took effect on September 18, 1959. It broadly applies to both public and private sector employers, even those with fewer than 5 employees. The FEHA prohibits harassment based on race or color; religion; national origin or ancestry; physical disability; mental disability or medical condition; marital status; sex or sexual orientation; gender identity or expression; age (with respect to persons over age 40); genetic information; military and veteran status; and pregnancy, childbirth, or related medical conditions.

Recent amendments in 2018 have made it easier to establish a FEHA violation. An individual must show the harassment altered working conditions, making it more difficult to do the job. An individual previously had a higher burden, to show that the harassment was so severe and pervasive that it unreasonably interfered with the employee's work performance. This is still the Title VII standard. Harassment cases under the FEHA are rarely appropriate for summary judgment, a legal procedure employers use to dismiss cases before it reaches a jury trial. A single incident of harassment is now enough for a case to go to the jury. A harassing remark, even if not made directly in the context of an employment decision (known as a "stray remark"), is evidence of harassment. Both FEHA

and Title VII prohibit discrimination and retaliation. This includes retaliation for opposing or reporting any unlawful harassment, retaliation for filing a complaint of harassment, and retaliation for testifying or participating in proceedings.

Instagram Posts are Evidence of Unlawful Harassment: In *Okonowsky v. Garland*, decided July 25, 2024, a Federal Court of Appeals reversed the district court's decision to dismiss the lawsuit. Okonowsky, a female staff psychologist in a federal prison, sued the Bureau of Prisons alleging that it failed to take adequate measures to address a hostile work environment at the prison. She discovered a male coworker's Instagram account that contained sexually offensive content related to work. The account had hundreds of posts, including memes referring to the prison that were overtly sexist, racist, anti-Semitic, homophobic, and transphobic. One hundred prison employees, including the Human Resources Manager and the union president, were following the account. Some of the posts were graphic and disturbing, displaying or suggesting violence against women. One post joked about how the all-male custody officers would "gang bang" Okonowsky at her home during a party she was planning to host for staff. She later canceled the planned party after learning of the post.

Okonowsky complained to the prison management. She was told the page was "funny" and "not a problem." The male coworker began to increasingly target her with posts which she reasonably perceived to be an effort to intimidate her and discourage her from making further complaints. Although he was told to stop violating the prison's anti-harassment policy, he continued posting sexually hostile content for another month with no action by the prison. Okonowsky ultimately felt forced to resign. She filed a Title VII lawsuit. The district court granted the government's motion to dismiss her case. On appeal, the Court of Appeals reversed the district court's decision and reinstated her case.

To establish a sexually hostile work environment, Okonowsky had to prove that she was subjected to verbal or physical conduct of a sexual nature, the conduct was unwelcome, and it was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Okonowsky had to show her work environment was both subjectively and objectively hostile. The central issue in the case was whether it was objectively hostile based on the totality of the circumstances and whether it unreasonably interfered with her work performance. The court had to look at the frequency and severity of the harassment, and whether it was physically threatening or humiliating. The government argued Okonowsky failed to establish an objectively hostile

work environment because the only relevant conduct was five Instagram posts which occurred entirely outside of work.

The Court of Appeals said that sexually harassing conduct, even if it does not expressly target the plaintiff, and non-sexual conduct directed at the plaintiff, could be considered by a jury to be unlawful. The Court of Appeals rejected the government's attempt to limit the inquiry to conduct that occurred inside the physical workplace. The Court of Appeals considered the ubiquity of social media and the ready use of it to harass and bully both inside and outside the physical workplace. The Court of Appeals held that offsite and third-party conduct can have the effect of altering the working environment in an objectively severe or pervasive manner. The Court of Appeals said that management-level acquiescence to offsite conduct by employees, customers, or third parties can be particularly relevant to both the hostile work environment and employer liability elements of a Title VII claim. The Court of Appeals also found that the prison's own standard of conduct policy required employees to "conduct themselves in such a manner that their activities *both on and off duty* do not discredit the agency." For all these reasons, the Court of Appeals said that the government's case "rings hollow." Therefore, social media posts that occur outside of work can be considered as part of the totality of the circumstances in harassment cases under Title VII.

<u>One-Time Racial Slur Is Actionable</u>: In *Bailey v. San Francisco District Attorney's Office* decided July 29, 2024, the California Supreme Court said that a co-worker's use of a one-time racial slur can amount to unlawful racial harassment. Ms. Twanda Bailey sued the San Francisco D.A.'s Office, former D.A. George Gascon, and the City and County of San Francisco (collectively "the City") for race harassment and retaliation under FEHA. Bailey, an African American woman, said she was called the N-word by her coworker, Saras Larkin, a Fijian/East Indian woman with whom she shared an office and job duties with. Bailey alleged that, while in the records room, Larkin said she saw a mouse run under Bailey's desk. Bailey was startled and jumped out of her chair. Larkin walked up to Bailey and quietly said, "You [N-words] is so scary."

Bailey also alleged that, after the incident was reported, the HR manager obstructed the filing of a formal complaint, engaged in a course of intimidating conduct, and threatened she was "going to get it." Bailey did not immediately report it because she feared harassment and retaliation. This fear was based on her understanding that other employees had been harassed and discriminated against following incidents with Larkin.

Bailey also knew Larkin was friends with the office's HR manager, and that Larkin's actions against other African American women caused them to be reassigned or separated from the City. At an offsite office party, Bailey's supervisor overheard a conversation about the incident and told Bailey she planned to notify HR. Bailey felt more comfortable with her supervisor reporting it. Bailey's supervisor did report it, and management interviewed both Bailey and Larkin. Larkin did not admit to making the remark. Larkin was counseled on the City's anti-harassment policy and informed that the use of the alleged language was "unacceptable." No further action was taken against Larkin.

When Bailey later asked for a copy of the complaint, she was told no complaint existed. When she then requested to file a complaint, the HR manager refused, telling Bailey she should not have told her coworkers about the incident because this may cause a hostile work environment for Larkin and Larkin's work could be "messed with." Bailey cried when leaving the office and took a leave of absence. When she returned, the HR manager's behavior towards her became even worse. The HR manager ignored her, laughed at her, stared rudely at her, and made a comment that Bailey's workers' compensation claim was not "real." The City characterized the HR manager's behavior as mere "social slights." Bailey alleged this behavior was continuous and daily. Though Bailey did not believe the HR manager's actions had to do with her race, she did believe the HR manager's behavior was retaliation for filing a complaint.

To prevail on a claim that a workplace is racially hostile under the FEHA, Bailey had to show she was subject to harassing conduct that was unwelcome, because of her race, and that it altered her conditions of employment and created an abusive work environment. The question here was the severity. The trial court granted summary judgment for the City and dismissed the case. According to the trial court, no jury could find unlawful racial harassment based on being called the N-word by a co-worker on one occasion. The trial court said the HR manager's alleged misconduct could not support a retaliation claim because "social ostracism at the hands of co-workers does not amount to an adverse employment action." The Court of Appeal affirmed.

However, the California Supreme Court reversed, and reinstated Bailey's lawsuit. The Court made two important holdings. First, the Court held that an isolated act of harassment – a co-worker's use of an unambiguous racial epithet, such as the N-word – can be actionable if it is sufficiently severe under the totality of the circumstances. Second, the Court held that a course of conduct that effectively seeks to withdraw an

employee's means of reporting and addressing racial harassment in the workplace may constitute an adverse employment action that can support a claim for retaliation.

The City argued that one offensive utterance made in a private conversation between two coworkers is not severe enough to alter working conditions, and that Larkin had no authority over Bailey to affect the terms and conditions of her employment. The Court agreed with Bailey that the lower courts placed undue emphasis on Larkin's status as a coworker. The Court said, "the sufficiency of allegations involving a supervisor does not itself establish the insufficiency of allegations involving a coworker." The status of the speaker may be a "significant factor" in assessing the severity of harassing conduct, but it must be considered as part of the totality of the circumstances. The Court said:

> A rigid distinction between supervisors and coworkers fails to take into account the full context of the workplace. In some work environments, for example, an employee may interact with their supervisor only rarely but be required to work intimately with a coworker. Coworkers who share a physical space, such as long-haul truckers driving a route together, or whose work is closely intertwined, such as an ER nurse working side-by-side with other care providers, might find that harassment by such coworkers more quickly alters the conditions of their employment than harassment by a supervisor. It is of vital importance to consider the nature and extent of coworkers' interactions; a coworker whom one sees at the water cooler is quite different than a coworker with whom one shares an office space or work duties. A rigid distinction between supervisors and coworkers may also ignore informal workplace relationships; not all power appears on an organizational chart. A coworker who holds the manager's ear, is given preferential treatment, or has special sway in the office may have a unique ability to alter the conditions of others' employment without having direct managerial authority. Where a supervisor allows a harassing subordinate to act with impunity or appears to ratify their conduct, this may imbue the subordinate with a certain degree of authority to alter the working conditions of their coworkers.

Applying these standards to the facts of the case, the Court said there was a triable issue of fact whether Larkin's one-time use of the N-word was, under the totality of the circumstances, sufficiently severe to create a hostile work environment. The Court pointed out that the slur was degrading and humiliating in the extreme, that the modifier "scary" further heightened the slur's impact, and it was not possible for Bailey to distance

herself from Larkin – physically or otherwise – because they shared an office space, work duties, and were asked to cover each other's desks on occasion. There was also evidence that Larkin's relationship with the HR manager allowed her to act with impunity and exercise a degree of influence over Bailey's working conditions, and that Larkin had previously interfered with the employment of two other African American women. The HR manager's conduct corroborated Bailey's stated fear of reporting Larkin's behavior.

On Bailey's retaliation claim, the Court found that the HR manager's pattern of conduct, given her position, effectively sought to withdraw Bailey's means of reporting and addressing workplace harassment. "[T]he withdrawal of an employee's right to avail themselves of the HR process typically available to other employees materially affects the terms, conditions, or privileges of their employment," the Court said. "[S]uch treatment is reasonably likely to impair the affected employee's job performance insofar as it leaves them unprotected from the very harms FEHA was designed to eliminate." The Court drew a distinction between the City's inaction and the HR manager's "purposeful obstruction" of Bailey's complaint. The HR manager "included an admonition that Bailey might create a hostile work environment for her harasser if she persisted." This is "quintessentially retaliatory" – "it appears designed to punish Bailey for engaging in protected activity (*i.e.* pursuing her complaint of harassment) and threatens further punishment should she persist." When "a supervisor or other person of authority obstructs and threatens to punish a reporting employee if she persists in bringing a complaint to higher level officials, such acts may be considered by a jury to constitute actionable retaliation."

Conclusion: These two cases highlight that unlawful harassment can extend to conduct occurring outside of work (*e.g.,* on social media), and that even a single harassing remark can be actionable based on the totality of the circumstances. Both cases show that management's acquiescence of, and failure to remedy, the alleged harassment could lead to legal liability for California government employers under either Title VII or FEHA. Both FEHA and Title VII are intended to prevent harassment from occurring in the first place. The remedy is typically for the harassment to stop. Most, if not all, public employers have an Equal Employment Opportunity (EEO) policy that requires alleged violations to be reported to management to allow the agency the chance to remedy it and stop future abuses at the earliest possible stage. If the alleged violations are reported but the harassment continues, an employee can file a charge of harassment with the EEOC or

California Civil Rights Department, and later a civil lawsuit. If you find yourself a victim of unlawful harassment at work, contact your HR Department to file a complaint.

News Release - CPI Data!

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

2.9% - CPI for All Urban Consumers (CPI-U) Nationally

2.6% - CPI-U for the West Region

3.4% - CPI-U for the Los Angeles Area

3.2% - CPI-U for San Francisco Bay Area (from June)

2.8% - CPI-U for the Riverside Area

3.5% - CPI-U for San Diego Area

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: The City initiated recruitment for an analyst position. Several co-workers and I applied. The filing window closed, and the applicants were ranked and banded. The next step was for Human Resources to provide the manager with a list of top candidates. However, we recently learned that HR and the Director transferred an analyst from another department into the position, and never gave a list of promotional candidates to the manager. This seems unfair. Can the City just do that? Or does the manager get to decide who to interview from both the promotional and transfer candidates?

Answer: Your frustration is understandable! However, there are situations where the employer may be required to give someone else the job over promotional candidates. For example, if a former employee is recalled from a layoff list under your MOU, or an employee is transferred as a reasonable accommodation under state or Federal disability law, that individual's right to

the position may take precedence over the interest of promotional candidates.

Many cities have personnel rules, civil service rules, or hiring policies that set forth the rules for how these decisions are made. There may also be language in your MOU that applies. Check these documents to see what rules, if any, govern this situation. Sometimes the rules may grant transfer candidates priority over promotional candidates. Sometimes the rules may require that management interview all qualified candidates in a certain pool or band. If there is a specific rule that was violated, an employee can file a grievance.

The employer typically retains the right to decide who to hire for an opening, subject to any limitations identified in the rules or policy. Most public agencies use a merit system, and the successful candidate must meet the minimum qualifications of the position to be selected. If the candidate who transferred was qualified for the vacancy – which is likely if they held the same position in another department – there is probably nothing improper about the transfer candidate getting the position over other qualified candidates. In the absence of any written limitations, management can decide who to select amongst the pool of qualified applicants.

You can reach out to the manager, Director, or HR to find out whether you were qualified and if so where you ranked. This can give you a good idea of how competitive you might be for a future opening. You can also ask what steps, if any, you can take to be competitive for the next opening.

Question: Can I use vacation hours to cover sick time? I did not have enough sick time on the books to cover a sick absence. Now my boss is refusing to let me use my vacation hours, so I'm losing pay. Can I challenge this?

Answer: Generally speaking, yes, an employee should be able to use their own paid leave to cover an absence before having to take time off unpaid. However, whether you can do so in your case depends on what your employer's leave policies, or your MOU, says about using paid leave benefits.

If you have one paid time off bank (PTO or annual leave), you can use your paid leave for either sick time or vacation. The reason for the leave is not important. However, the policy may require you to request leave in advance, particularly for a planned absence, absent emergencies.

For employees who have separate sick and vacation leave banks, the employer may require that the time be deducted from the appropriate bank first. Also, sick leave policies may limit your ability to use sick time to only those situations where you are sick or are caring for someone who is sick. Vacation policies typically allow you to use the time for any reason, including for sick time once sick leave is exhausted.

Depending on the reason for your absence, the employer may be legally required to allow you to use vacation time for a sick absence. For example, the employer may be required to allow you to use vacation concurrent with an absence under the California Family Rights Act (CFRA) or the Family Medical Leave Act (FMLA). If you are caring for a family member with a serious medical condition, employer CFRA or FMLA policies typically require an employee to exhaust vacation time before using sick leave. If the absence is for an employee's own serious medical condition, employer CFRA or FMLA policies typically require an employee to exhaust sick leave before using vacation time to cover the absence. Either way, many employer policies typically require using paid leave first, before going unpaid.

Question: I manage a Community Center. I was threatened by a resident back in September. We took multiple steps to find a way not to allow him to come back to our Center, but he insisted on being able to attend all events. The resident also threatened other residents. My coworkers and I learned from the Director that the resident is coming back, and we need to accommodate his return. There were steps put in place that he would have to follow before coming back, which did not happen. There is more to what took place. Who should I speak with and what do I do going forward. This resident has started multiple fights and is now posting online and continuing to talk about other residents.

Answer: Effective July 1, 2024, employers – including California public agencies – must maintain a workplace violence prevention plan. The plan should provide information on who to contact about a potential workplace violence threat. Workplace violence threats include incidents involving a resident or customer who may be harassing city employees or other residents or visitors at a worksite.

It sounds as though this behavior may have been reported previously, but

before the workplace violence prevention plan was in effect. If the resident is back and posing a threat at a worksite, it is best to immediately report the threat to management or Human Resources in accordance with the workplace violence prevention plan.

The City may have to balance its mission to provide public services to residents with the need to protect its employees from safety threats. Although the City does have an obligation to provide services and access to residents, the City also has an obligation as an employer to keep its employees safe, along with other residents or visitors at city facilities.

Some MOU's also contain health and safety provisions that pertain to safety concerns such as yours. If the City does not take appropriate action under the workplace violence prevention plan, you may be able to file a grievance if the MOU's health and safety provisions have been violated. You may also be able to file a grievance if the City does not comply with their own workplace violence prevention plan.

Contact your representative to see what options you might have if this situation continues after you report it. Your Association may be able to facilitate a discussion with Human Resources and identify an arrangement in which the City can provide services or access for this resident while also keeping workers and other members of the public better protected from the threat that this resident presents.