

Employment Law Update

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New State Law Gives More Protection from Sexual Harassment Defamation Claims

Accusing someone of engaging in sexual harassment can negatively impact that person's reputation. If the allegation proves false, it can result in liability for defamation. On the other hand, the fear of facing a defamation lawsuit can deter one from making *bona fide* allegations of sexual harassment. Governor Brown recently signed AB 2770 into law. The measure amends Civil Code Section 47, which relates to privileged communications, to clarify and make explicit that three types of communications related to sexual harassment are privileged. As such, subject to certain limitations, these communications cannot form the basis for a defamation lawsuit.

Specifically, AB 2770 protects as a privileged communication not subject to liability for defamation:

- Any complaint of sexual harassment made by an employee to an employer, based upon credible evidence and without malice;
- Any communication between an employer and interested persons, made without malice, regarding a complaint of sexual harassment; and

- A statement made by a current or former employer to a prospective employer in response to an inquiry as to whether the employer would rehire a current or former employee and whether a decision not to rehire the employee is based upon the employer's determination that the former employee engaged in sexual harassment. (Despite this protection, employers should contact Joel Cook at **JCook@ABLAWYERS.COM** before they provide anything more than employment dates to prospective employers.)

This measure becomes effective on January 1, 2019.

CALIFORNIA APPELLATE COURT: EMPLOYEE DISABILITY LEAVE DURING PROBATIONARY PERIOD NOT GROUNDS FOR TERMINATION

A California appellate court recently held that extending an employee's probationary period due to a disability leave would be a reasonable accommodation the California Fair Employment and Housing Act (FEHA) requires. *Hernandez v. Rancho Santiago Cmty. Coll. Dist.*, 232 Cal. Rptr. 3d 349 (Ct. App. 2018).



The Banking & Business Law Firm

www.ablawyers.com 949.474.1944

18500 Von Karman Ave., Suite 300, Irvine, California 92612

Authors: Mark E. Aldrich, Esq. and Joel N. Cook, Esq.

In this case, the college district hired Hernandez as an administrative assistant. As part of the hiring process, the college district placed her on a one-year probationary period. During that probationary period, her performance was subject to periodic reviews. Eight months into her year-long probationary period, she took a disability leave to have surgery following a work-related injury. She was to return to work on or shortly after her one-year anniversary date of hire. However, while she was on leave, the college district terminated her employment reasoning that it could not review her performance as stipulated. She sued the district alleging it failed to make a reasonable accommodation of her medical condition and failed to engage in the interactive process FEHA required.

At trial, the court ruled that the college district could have accommodated Hernandez by: (i) extending her probationary period; or (ii) deducting the four months she was on disability leave from her probationary period; or (iii) adding the time away from work to the probationary period. The court awarded Hernandez \$723,746 in damages. The college district appealed, asserting again that it had to terminate Hernandez because if it did not, she would have become a permanent employee without the opportunity to assess her performance while on probation.

On appeal, the court found that there are three elements to a “failure to accommodate action” under FEHA: (i) the employee has an FEHA-covered disability; (ii) the employee is a qualified individual, meaning the employee can perform the position’s essential functions with or without a reasonable accommodation; and (iii) the employer failed to reasonably accommodate the employee’s disability. While the college district agreed that Hernandez had an FEHA-covered disability and that she was a qualified individual, it argued that it gave her time off from work to have surgery and to recover from that surgery. Thus, the college district asserted it provided a reasonable accommodation. This argument did not persuade the court. While the court agreed that the district accommodated Hernandez by giving her time off for surgery, that accommodation could hardly count as reasonable when it included the consequence that she would lose her job if she took the time off to undergo surgery. The appellate court upheld the trial court’s ruling.