

SEMINAR

2009 EMPLOYMENT LAW UPDATE

Sims & Layton will be presenting its Annual Employment Law Update for employers to explain what decisions were made this past year by the courts; what new laws and policies have been adopted by state and federal governmental agencies and the California Legislature; and what employers can expect for the coming year.

The breakfast program is scheduled for 8:00 to 10:00 a.m. on Wednesday, **January 21, 2009** at Bella Mia Restaurant, 58 South First St., San Jose. Materials will be distributed. If you would like to attend, please complete the enclosed form or contact our office for more information. Registration fee is \$50.00 per person (includes complimentary parking, space permitting, at the lot on 2nd Street behind Bella Mia). Early registration is encouraged as seating is limited.

ON-LINE MATCHMAKING

PLAINTIFF LACKS STANDING TO BRING CLAIM AGAINST TRUEBEGINNINGS, LLC (TRUE.COM)

In the recently decided case of *Surrey v. TrueBeginnings, LLC* et al. (2008), the California Court of Appeals, Fourth District, definitively decided that window shoppers of on-line matchmaking services did not have grounds to bring a claim against the online company for alleged gender-based pricing and discrimination.

In November 2003, TrueBeginnings LLC, began operating an on-line matchmaking service, True.com. After a successful launch, TrueBeginnings realized that it had attracted a disproportionately high percentage of male users. In November 2004, in an attempt to rectify the dilemma and attract more female users to the site, TrueBeginnings began offering free services to women who joined.

In early May 2005, Steven Surrey visited the online matchmaking service True.com looking for love and intended on utilizing its services. Mr. Surrey soon discovered the discrepancy in pricing for matchmaking services offered to men and women and decided not to join. In fact, Mr. Surrey has never paid any fees to the company nor has he ever utilized their services. Instead, he filed a lawsuit on behalf of himself and the general public, claiming that TrueBeginnings, LLC, through their website True.com, violated the Unruh Act and the Gender Tax Repeal Act by charging patrons different rates depending on the patron's sex.

The California Court of Appeal rejected Mr. Surrey's arguments and clearly stated that a person must "tender the purchase price for a business's services or products in order to have standing to sue it for alleged discriminatory practices."

Under the Unruh Act, "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Specifically, the Gender Tax Repeal Act addresses gender-based discrimination, providing that "no business establishment of any kind whatsoever may discriminate, with respect to the price charged for services of similar or like kind, against a person because of the person's gender."

Courts have been clear however, that in order to bring forth a cause of action, a plaintiff must 1) be able to allege an injury i.e., an invasion of his legally protected rights, (*Angelucci v. Century Supper Club*); 2) have a special interest in the outcome of the case that is greater than the interest of the public at large; and 3) an interest that is concrete and actual, rather than hypothetical" (*Blumhurst v. Jewish Family Services of Los Angeles*).

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EMPLOYMENT DISCRIMINATION

A ONE YEAR LIMITATION MAY NOT MEAN A ONE YEAR LIMITATION!

The California Legislature and administrative agencies have adopted, over the years, certain time limits within which a party who wishes to file a claim against another person or entity must do so. The California courts typically follow the law, but the courts also create their own timetables. For example, if there is a breach of a written contract, a lawsuit must be, generally, filed within four years of the alleged breach. In the employment setting, however, a recent California Supreme Court decision determined that there are a number of time limitations that can be extended by the Supreme Court on its own.

On October 27, 2008, the California Supreme Court issued a decision in the matter of *John McDonald, Sylvia Brown and Sallie Stryker v. Antelope Valley Community College District*. The underlying case dealt with a claim of discrimination by the Plaintiffs for racial harassment, racial discrimination, and retaliation against the employees by Antelope Valley Community College. Ms. Brown had applied for a position with the College District two times and was not hired. She filed a claim with the College District claiming she had been discriminated against. The College District had a procedure to handle such claims. Ms. Brown was asked to use the school's system to resolve the matter. The District's Chancellor also told her she could file a claim with California Department of Fair Employment and Housing for discrimination at any time. The original administrative claim was filed in early November 2001 with the District for the alleged discriminatory action that occurred in January 2001 but the claim for discrimination was not filed with the Department of Fair Employment and Housing until October 2002, a year and half from the date that the actual discriminatory acts occurred. The trial court that heard the claim originally determined that the lawsuit by Ms. Brown was not timely filed because she did not file with the California Department of Fair Employment and Housing within one year of the discriminatory acts.

Prior California law provided that if a "mandatory" private administrative remedy was required, then the statute of limitations was waived during the mandatory investigation. However, in this case, the investigation was voluntary - not mandatory. The Supreme Court's decision was not clear as to whether its decision applies only to governmental agencies or to private sector employers. Most likely it applies to both.

The California Supreme Court wrote:

"The equitable tolling of the statute of limitations is a judicially created, non-statutory doctrine. . . It is 'designed' to prevent unjust and technical forfeitures of the right to trial on the merits when the purpose of the statute of limitations - timely notice to the defendant of plaintiff's claims - has been satisfied."

In order to qualify for the tolling of the statutory time (one year from the date of the occurrence) to file a discrimination claim, 1) the employee must have timely filed some notice; 2) there must be a lack of prejudice to the employer by employee's claim; and 3) there must be reasonable and good faith conduct by the employee. Timely notice means that the employer must be given notice of a claim within the one year time period, and the party named in the original claim must be the one subsequently named in the action filed with DFEH (e.g., no new parties named after the one year statute has run). The good faith requirement, as many reports have mentioned, is at best "vague." The only clear criterion is that any claim be filed within a "short time" after the statute of limitation has run.

In order to be caught off guard, employers need to document any and all statements or implications that reflect that the employee may have or has raised an issue to claim discrimination. When such claims are made, that is when the statute of limitations begins to run, both for the employee and the employer.

EMPLOYMENT LAW

CALIFORNIA'S LABOR CODE APPLIES TO WORK PERFORMED IN CALIFORNIA BY NONRESIDENTS OF CALIFORNIA

In *Sullivan v. Oracle Corporation*, three nonresidents of California employed by software giant Oracle Corporation filed a would-be class action claim for unpaid overtime damages they claimed were due under California labor laws covering work the employees completed in California. The Federal Appellate

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Court, in agreeing with the three nonresidents, concluded the employees' non California-resident status did not preclude them from labor law benefits. California Labor Codes therefore, DO apply to work completed in California by nonresidents.

Oracle Corporation hired the three nonresidents as "instructors" to train customers on how to use Oracle software and products throughout the county, working in various states for months at a time. Employed from 1998 to 2004, these three instructors sought damages for unpaid overtime not paid prior to 2003. In 2003, Oracle Corporation reclassified its California-based instructors and began paying them overtime under the California Labor Code. In 2004, Oracle reclassified all of its instructors working in the United States and began paying them overtime under the federal law, Fair Labor Standards Act (FLSA).

Oracle's reclassification of its employees was evidently in response to a 2003 class action lawsuit, **Gabel & Sullivan v. Oracle**, previously filed in federal district court. Plaintiffs in that suit also claimed that Oracle misclassified its instructors under the Labor Code and FLSA. Claims by class members for "periods of time they may have worked in the State of California when they were not a resident of the state" were excepted from the settlement and this exception most likely explains the reason why the Plaintiffs brought forth this suit.

The Federal Court of Appeals went through a choice-of-law analysis to determine which state's labor laws should be applied to these instructors. After concluding that California labor laws provided the greatest protections and benefits for the instructors for the work completed in California, the Appellate Court concluded that California Labor Codes do apply to work completed in California by nonresidents.

Citing the California Supreme Court case **Tidewater Marine Western, Inc. v. Bradshaw** (1996), the court found that "California's employment laws govern all work performed within the state regardless of the residence or domicile of the worker."

In justifying its decision, the **Sullivan** court found that "[i]f a California employer may avoid the requirements of the state Labor Code by the simple expedient of hiring nonresidents, California residents will be substantially disadvantaged in the labor market by the cheaper labor that will thereby be made available to California employers." Therefore, California employees would be the ones who would suffer the most had the court not decided the way they did.

California labor laws therefore mandate not only that California employers duly compensate California residents and nonresidents alike for work completed in California but also that any such work be granted the same benefits and protections as well.

ACTIVE IN OUR COMMUNITY

Sims & Layton is a business law firm handling everyday corporate and business concerns, with an emphasis on the representation of management in employment matters as well as dealing with litigation, arbitration, mediation and nonprofit organization issues. **Sims & Layton is an AV rated firm.** Ratings attest to a lawyer's legal ability and professional ethics, and reflect the confidential opinions of members of the Bar and Judiciary with Martindale-Hubbell, which evaluates and rates attorneys.

Phil Sims is the current President of the Guadalupe River Park & Gardens. This organization provides community leadership for the development and active use of the Guadalupe River Park & Gardens through education, advocacy and stewardship. In addition, Phil, a former past President of YMCA, was involved in the legal aspects of the merger between the Santa Clara Valley YMCA and the Mid-Peninsula YMCA to create the YMCA of Silicon Valley.

Rona Layton has been busy presenting training sessions such as "Creating and Leading a Respectful Workplace" for businesses in the Silicon Valley. In her spare time, Rona teaches Employment Law at Golden Gate University.

Sophie Mai is an active member of the Santa Clara County Bar Association and is involved with the Labor and Employment Law section of the County Bar.

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ATTORNEYS AT LAW

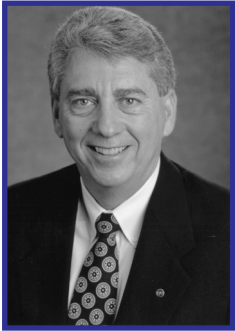
LawNotes

The information provided in this issue of "LawNotes" is general in nature. Articles should be viewed only as a summary of the law and not as a substitute for legal consultation in a particular case. Legal counsel should be sought on any specific issue. Your comments and questions are always welcome.

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WHATEVER YOU DO, DON'T USE GINA!

By Phil Sims



Well, next year, on November 21, 2009, it will become official that under federal law, a business cannot use GINA. California law has prohibited GINA's use for some time. The question arises, why is everybody avoiding GINA? What is so bad about GINA? Actually, GINA is not bad. It is how GINA is used that bothers people.

GINA is not a person but rather an acronym for the Genetic Information Nondiscrimination Act. Both California and the federal government have adopted statutes that create prohibitions about the use of individual genetic information, specifically in the employment setting.

California Government Code Section 12926(h)(2) includes genetic characteristics in the definition of "medical condition" and defines genetic characteristics this way: prohibits discrimination based on what an employer and/or insurance company can obtain from an employee when an employee is hired, during the employee's employment, or be the basis for termination of an employee. The pertinent section of the statute provides:

Genetic Characteristics. For the purpose of this section "genetic characteristics" means:

A. Any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, that is known to be a cause of disease or disorder in a person or his or her offspring, or that is determined to be associated with a statistically increased risk of development of disease or disorder, that is not presently associated with any symptoms or disease or disorder.

B. Inherited characteristics that may derive from the individual or family member, which are known to be a cause of disease or disorder in a person or his or her offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder, and are presently not associated with any symptoms of any disease or disorder.

One of the major reasons for prohibiting the use of genetic testing or information is to prohibit medical insurance organizations from restricting or limiting employees who can be covered by health insurance programs. If an employer is covered by the Fair Employment and Housing Act (five employees or more), the employer cannot, directly or indirectly, have an applicant or employee to be tested for genetic information.

California Government Code 12940(a) prohibits discrimination based on genetic characteristics at any stage of the hiring, employing, and firing process.

At the federal level, Congress had proposed many bills that would limit or restrict genetic testing, but none had gotten past committee discussions. One of the main arguments against passing any restrictions on genetic information was that there was, and is, a current federal statute in place dealing with genetic information that prohibits use of genetic information. The statute is the Health Insurance Portability and Accountability Act of 1996 (aka, HIPAA).

HIPAA has a strong prohibition against the use of, or disclosure of, an individual's medical file and medical condition, including one's genetic information. HIPAA, however, only applies to health plans, health care providers and clearinghouses - in other words, an employer's health care plans and not the individual's employer. However, HIPAA became an issue in discussions about GINA by Congress and Senate members. It was determined that HIPAA's privacy rules were to be amended to prohibit the use or disclosure of genetic information for insurance underwriting purposes and disclosure to others.

On May 21, 2008, Congress passed, and President Bush signed, the Genetic Information Non-Discrimination Act of 2008.

The federal law is somewhat similar to California's genetic testing prohibition. Like California's law, the federal statute also strictly prohibits employers, employment agencies, labor organizations, and health insurance providers from discriminating against, reducing benefits for, or not providing coverage to, employees based on the results of genetic testing. Under the federal legislation, after six years, a commission is to review the then current science of genetics and make recommendations to Congress on the need to establish disparate impact standards for genetic discrimination.

Federal law makes it illegal for health insurers to deny coverage or charge a higher rate to an otherwise healthy person found to have a "potential" negative genetic predisposition. Specifically, the new federal law:

- Prohibits insurance companies from making access to a person's genetic information in making enrollment decisions
- Prohibits employers from making decisions based on genetic information
- Prohibits insurance companies from discriminating based on genetic information
- Prohibits employers from using genetic information to make an employment decision
- Provides fines of up to \$300,000 for any violations of the new law

It was acknowledged in the new law that individuals in some jobs would be allowed and/or be required to undergo genetic testing (e.g., persons working with hazardous or nuclear material). In such cases, employees need to be aware of the genetic testing requirement before applying for the position.

Like most legislation, regulations are subsequently issued by the administrative agency charged with monitoring the statute. In this case, the U.S. Department of Health and Human Services must issue regulations that amend HIPAA's prior regulations dealing with privacy and issue genetic nondiscrimination rules. The Equal Employment Opportunity Commission (EEOC) will be issuing new regulations for employers on how to implement the new federal policies.

Again, California has had its own privacy rules dealing with genetic information. It will be interesting to see how the federal and state rules will be matched when the GINA law and its regulations take affect next November. As is commonly stated, "The devil is in the details."