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News & Types: Employment, Labor & Benefits Update

California Employment Law: Anatomy of a Court of Appeal Case

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Employment law changes through two primary methods: legislation and appellate court decisions. However, reading and interpreting either a new law or new case decision is usually more complicated than it seems at first. An appellate court's written decision in a case can be understood in many ways. It is often said among lawyers that law professors' interpretations of courts' decisions are usually much broader than the interpretations that trial judges give to those same decisions. Yet, lawyers and their clients may have different interpretations of the same decision based upon their different perspective.

The Claim. This month, we examine the California Court of Appeal's decision in *McCoy v. Pacific Maritime Association*, No. B210953 (Cal. App. May 14, 2013), and demonstrate how the same decision can provide differing instructions to clients and their lawyers. The *McCoy* case concerned an employee's claims of sexual harassment, intentional infliction of emotional distress and retaliation against her employer, a marine terminal operator, responsible for loading, unloading, and storing ocean vessel containers. The plaintiff had been part of an earlier confidential settlement with her employer and, as part of the settlement, she was entitled to begin training for a promotion. She claimed that while in training, she was the victim of retaliation. She argued that she was subjected to adverse treatment and that she had to endure harassment and abuse from a co-employee who called her "stupid" and made crude remarks about other female employees. As a result, she quit. However, she did not argue that she was constructively discharged.

The Trial. The trial judge granted the employer summary adjudication, throwing out the plaintiff's claims of sexual harassment and intentional infliction of emotional distress. However, the judge ordered a trial on the Plaintiff's other retaliation claims. After trial, the jury returned a verdict of $1.2 million for retaliation, even though she quit and did not sue for her lost wages. In post-judgment motions, the employer asked the court to change the judgment and order a new trial. The employer claimed that the evidence did not support the verdict. The trial judge found that the measure of damages was correct, but the judge granted the employer's motions, effectively finding that the verdict was not supported by the evidence and that the plaintiff's lawyer had engaged in prejudicial misconduct at trial. The case was over.

The Appeal. The plaintiff then appealed the judge's post-trial decisions. The plaintiff argued that she should get a new trial and that the jury measured the monetary award correctly. The employer concentrated its defense on whether it was liable. It argued that the trial judge was correct to throw out the sexual harassment and emotional distress claims, and that the trial judge was also correct to set aside the jury's decision on the retaliation claims. This was because the plaintiff quit and did not seek lost wages from a constructive

discharge. However, the employer never lost sight of the second part of the case – the damages and how they were measured. When the plaintiff appealed the judge's dismissal of the case, the employer cross-appealed, arguing that the trial judge should not have upheld the way the damages were measured. This was not simply to be contrarian, but was clearly designed to soften the blow, if the Court of Appeal ordered a new trial. Unfortunately for the employer, the Court of Appeal disagreed with the employer on both points. The Court of Appeal ordered a retrial of McCoy's retaliation claim and also ordered that there would be no limits on damages.

What Lawyers Tell Each Other. For lawyers, the *McCoy* decision stands for the notion that an employee's retaliation claim can be based on conduct that a jury *might* believe substantially changed the employee's work circumstances. The McCoy court also found that a constructive discharge is not required under California law to allow a jury to award an aggrieved employee economic damages at trial, although a termination of a constructive discharge is a requirement under federal law. A significant fact was that the employer had actually informed the plaintiff's co-employees of her participation in the earlier confidential discrimination settlement. Less formally, the *McCoy* decision reaffirms the notion that retaliation claims are still the most dangerous to employers.

What Lawyers Tell Their Clients. Most people have only encountered litigation by watching television, where it is portrayed as a string of in-court banter, followed, within days, by an emotionally satisfying trial. Most clients can hardly be blamed for thinking of litigation in terms of the ultimate trial. Yet, lawyers charge by the hour, which means that the costs of litigation will dictate much of the overall strategy. Therefore, lawyers will explain to clients the different analyses they perform and the different strategies to employ to help the client.

After deciding that there are no technical objections to the lawsuit, a lawyer will usually start by trying to establish that his or her client is not liable for the plaintiff's claims. If this does not work, the lawyer then also tries to find legal limits for the amount of his or her client's liability. Lawyers refer to these analyses as the "liability" case and the "damages" case. For example, in *McCoy*, rather than waiting for trial, the employer asked the trial judge to enter summary judgment, once the parties had finished exchanging documents and evidence. Lawyers take this approach because obtaining summary judgment is much cheaper for the client than taking a case through trial. In *McCoy,* the company's lawyer had a partial victor. The judge dismissed most of the plaintiff's claims during summary judgment but not all of them. This meant that the parties would try only a single claim -- the plaintiff's allegations of retaliation.

Also in *McCoy*, the employer's lawyer asked the court to suppress several items of evidence, which the court did. However, even with the evidence limited in the employer's favor, the jury still gave the plaintiff a large award of damages. Finally, to avoid the risk and expense of appeal, the plaintiff's employer asked the trial judge to set aside the jury's decision, both on liability and on the measure of damages. The trial judge agreed with the employer that the jury's decision on liability should be set aside. If there had been no appeal, this decision might have ended the case. Yet, the trial judge also disagreed that the jury had no authority to give the plaintiff an award of the size it did. This second decision by the trial judge would not affect the outcome of the case, since the judge already agreed that the employer was not liable for any award.

The *McCoy* decision also illustrates another important tactical point. Both the trial judge and Court of Appeal agreed that Ms. McCoy's employer was entitled to a new trial based on the antics of Ms. McCoy's trial lawyer. Her counsel apparently used a photograph of a headless body and repeatedly ignored the judge's instructions to avoid making several comments that were designed to make the jury believe that the case concerned racial discrimination. In other words, *McCoy* is a lesson to clients not to expect their lawyers to engage in the sort of theatrics one sees on television.