

Ogletree Deakins

EMPLOYMENT LAW BRIEFING

presented by Ogletree Deakins' SAN DIEGO OFFICE

## Recent California Court Verdicts Against Employers – and How to Avoid Getting Sued

Presenter  
Chris Olmsted (San Diego)



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### Frequent Employee Lawsuits

- Wage claims
- Retaliatory termination / Whistleblowing
- Sexual harassment
- Disability discrimination
- Pregnancy discrimination
- Age discrimination
- Race discrimination



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2

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### Frequent Targets

Companies with under 100 employees are the most common targets.

- **42% 25-100 Employees**
- 18% 100-500 employees
- 24% > 500 employees



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## Disability and Age Discrimination

*Roque v. Octapharma Plasma, Inc.*

- 74 year old medical screener in San Diego, 19 year employee
- Reassigned to physically demanding work, complained of back pain (later dx as cancer), told to resign or retire.
- Took a medical leave, company terminated her claiming she verbally resigned.
- \$11,000,000 verdict (\$2.2M compensatory)



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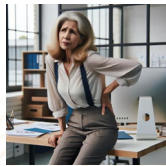
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## Disability and Age Discrimination

*Roque v. Octapharma Plasma, Inc.*

### Lessons:

- Take workplace requests for accommodation seriously
- Follow leave laws carefully; terminations during leaves are risky
- Contriving reasons for termination can seriously backfire
- Long term, older employees with serious health problems are viewed sympathetically



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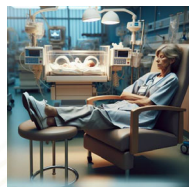
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## Whistleblowing / Retaliation

*Maria Gatchalian v. Kaiser Foundation*

- Neonatal nurse for 30 years at Kaiser
- Complained about inadequate staffing and patient care.
- Caught sleeping and fired.
- Claimed overworked and fired for complaining.
- \$41,000,000 verdict



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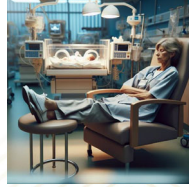
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## Whistleblowing / Retaliation

*Maria Gatchalian v. Kaiser Foundation*

### Lessons:

- Juries don't like disproportionate punishment
- Long term, dedicated employees who try to do the right thing get the benefit of doubt.
- Employee complaints should be investigated and issues corrected.



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## Whistleblowing /Retaliation

### Take-Aways

- Why are retaliation claims dangerous?
  - Juries sometimes decide retaliation happened, even if the underlying issue is minor or questionable.
    - Legally, the employee's reasonable belief of illegal conduct is all that is needed.
  - Juries may understand that people behave poorly and that companies sometimes make mistakes, but they think retaliation is fundamentally unfair.



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## Retaliation

### Take-Aways

- Common examples of retaliation include firing someone for:
  - Reporting illegal activities
  - Complaining about discrimination or harassment, or supporting a victim
  - Safety complaint
  - Complaining about unpaid wages or overtime or breaks
  - Taking protected leave of absence
  - Filing a workers' compensation claim



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9

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## Retaliation

### Take-Aways

- Timing is often important
  - Negative consequences close in time after a complaint or protected conduct is viewed with high suspicion.
  - Sometimes decision-makers are unaware that protected conduct occurred, but knowledge is attributed to them/the company in court.
- Severity of adverse action is important.
  - “The punishment must fit the crime”
  - Decide whether a written reprimand or other lesser punishment is more appropriate than termination.



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## Retaliation

### Take-Aways

- Conduct a thorough and prompt investigation into complaints, taking corrective action, and closure of a matter.
- Ensure that management understands the concept/appearance of retaliatory actions.



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## Retaliation

### Take-Aways

- Also thoroughly document issues/investigate before taking any adverse action against the employee who happens to have complained recently.
  - Enforce clear, reasonable rules.
    - Do you *have* clear, reasonable rules?
  - Objectively measurable failings



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12

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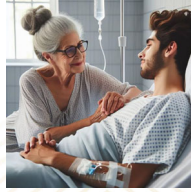
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## Medical Leave

*Marilyn Buron v. Occupational Health Care Centers*

- 69 year old occupational therapist took CFRA leave to care for a disabled adult son who underwent emergency surgery
- During leave, replaced by younger employee. Not told until return.
- Company claimed she didn't want to work full time and found another job soon after.
- \$9,372,000 verdict.



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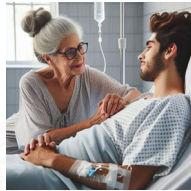
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## Medical Leave

*Marilyn Buron v. Occupational Health Care Centers*

### Lessons:

- Replacing an employee who is on medical leave is risky.
- Changing job duties or assignments is also risky.
- Return employees to same role; deal with performance or job duties at a later date.



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14

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## Sexual Harassment

*Sarah Freeman v. Bitchin' Sauce*

- Employee worked at a beach club.
- Supervisor sexually harassed her; she complained, supervisor found out, and he retaliated against her.
- After an investigation where she was interviewed, she was fired a few days later.
- \$9,800,000 verdict



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15

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## Sexual Harassment

*Sarah Freeman v. Bitchin' Sauce*

### Lessons:

- Thoroughly investigate sexual harassment claims; take corrective action
- Refrain from terminating or otherwise taking adverse action against witnesses



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16

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## Sexual Harassment

### Take-Aways:

1. Harassment remains a problem in some workplaces, despite recent social pressures.
2. Interactive training is mandated and important.
3. Leadership must set the tone, and bystanders must be emboldened.
4. Clear, updated prevention policy is a must.
5. Open channels for complaints to HR and management are crucial.
6. Complete investigations and appropriate corrective action are essential.



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17

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## Sexual Harassment

### Keys to an Effective Investigation

- Immediate response
- Competent investigator
- Creation of clear record
- Witness interviews
- Weighing of evidence / determine what happened
- Corrective action or closure
- Follow up to ensure end of behavior / absence of retaliation.



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18

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## Sexual Harassment

**“But what if the allegations are bogus?”**

- Follow the same protocols; conduct a good faith investigation, reach reasonable conclusions.
- Amplify company’s policies and take added steps to prevent retaliation.
- Leave no loose threads.



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19

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## Sexual Harassment

### Recent Legal Developments:

- **Severance Agreements:** California limitations on confidentiality provisions.
  - Employee allowed to discuss facts related to harassment and discrimination; terms of severance agreement may remain confidential.
- **Arbitration:** Federal law prohibits forced arbitration of sexual harassment and sexual assault claims.
  - “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.”



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## Workers’ Compensation

*Jesus Fonseca v. Wal-Mart*

- Delivery driver for 15 years, good performance.
- Rear ended on job, injured. Placed on light duty.
- Accused of workers’ comp fraud and fired.
- Couldn’t find other work, forced to explain why fired. Sued for defamation.
- \$34,700,000 verdict



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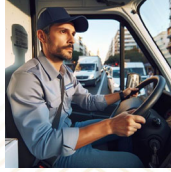
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## Workers' Compensation

*Jesus Fonseca v. Wal-Mart*

### Lessons:

- Consider accommodations for injured workers
- Beware of taking adverse action, which can lead to retaliation claims
- Fraud accusations must be supported by strong evidence



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## Best Practices

- Written policies
  - Clear written policies
  - Specific rules and expectations
  - Updated to reflect current employment laws



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## Best Practices

- Well documented performance management or bad behavior
  - Thoroughly document problems, gather statements and evidence.
  - In most cases, progressive discipline with multiple warnings
  - Punishment fits the crime
  - Consistently apply your standards



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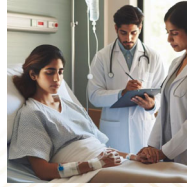
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### Best Practices

- Carefully navigate “protected activity”
  - Leaves of absence
  - Disability accommodation
  - Whistleblowing complaints
  - Harassment, discrimination
- Open door policy; take corrective action; refrain from adverse action close in time to issue



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### Best Practices

- Basic fairness matters most
  - Help employees going through hard times; be sympathetic
  - Give multiple chances
  - Communicate clearly, document
  - “Bend over backwards”
  - Always avoid sarcasm, bad humor, anger, greed, dishonesty, etc.



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### Why Innocent Employers Still Get Sued

#### Things you can't control:

- Greedy people are out to get you
- California loves lawsuits
- Life isn't fair



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## Why Innocent Employers Still Get Sued

### You can control:

- Bad hires
- Untrained, rogue, or mean supervisors
- Unfairness towards employees
- Performance management shortcomings
- Incomplete documentation
- Premature terminations
- Underutilized severance agreements



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## Proactive Steps

- Arbitration agreements
- Policy updates
- Training and education
- Systematic approach to HR and personnel management
- Work with an outside HR consultant and/or employment attorney – the outside perspective can serve you well
- Wage audits



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## Thank you!

Questions and  
Discussion

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## About the Firm

Ogletree Deakins is one of the largest labor and employment law firms representing management in all types of employment-related legal matters.

The firm has more than 900 attorneys located in 54 offices across the United States and in Europe, Canada, and Mexico.

We represent a diverse range of clients, from small businesses to Fortune 50 companies.

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## Our 54 Offices

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Birmingham	Jackson	New York City	San Diego
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Charlotte	London	Paris	St. Louis
Chicago	Los Angeles	Philadelphia	St. Thomas
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32

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