Trailer guards were scheduled to actively patrol the jobsites on weekdays from 5:00 a.m. to 7:00 a.m. and from 3:00 p.m. to 9:00 p.m., for a total of eight hours. On weekends, trailer guards were on active patrol from 5:00 a.m. to 9:00 p.m., for a total of 16 hours. For eight hours each day, from 9:00 p.m. to 5:00 a.m., the trailer guards were on call.

If a trailer guard wanted to leave the jobsite while on call, he was required to (1) notify the dispatcher, (2) provide information about where he would be and for how long, and (3) wait for the reliever to arrive. After leaving the jobsite, the guard had to carry a pager or radio telephone and remain within a 30-minute radius. CPS didn't compensate trailer guards for on-call time unless (1) an alarm, noise, motion, or other condition on the jobsite required investigation or (2) they were waiting for or had been denied a reliever.

In 2008, several trailer guards filed a class action lawsuit against CPS for failing to pay minimum wage and overtime. The trial court issued an order requiring the company to pay the trailer guards for all on-call time spent in the trailers. CPS appealed.

Is on-call time compensable?

The issue on appeal was whether the hours the trailer guards spent in the trailers between 9:00 p.m. and 5:00 a.m. were considered "hours worked." Generally, on-call time is considered compensable hours worked if the employee's time is primarily directed toward fulfilling the employer's requirements and policies and the time is so substantially restricted that the employee is unable to engage in private pursuits.

The appellate court concluded that the trailer guards' on-call time was compensable because:

(1) They were significantly limited in their ability to engage in personal activities;

(2) They were required to live on the jobsite;

(3) They were expected to respond immediately when an alarm sounded or they heard suspicious noises or activity; and

(4) Even if they were relieved, they still needed to remain within 30 minutes of the site.

Furthermore, the guards weren't given the normal freedoms of an off-duty employee because they were forbidden to have children, pets, or alcohol in the trailers and couldn't entertain adult family or friends without special permission. Accordingly, their eight hours of on-call duty during the week had to be compensated.

Under California law, however, when an employee works a 24-hour shift, the employer and employee may agree to exclude up to eight hours for sleep time. Accordingly, CPS was ordered to pay the trailer guards for all nighttime hours spent on the jobsites during the week, but it could deduct eight hours of sleep time on the weekends when the trailer guards worked 24-hour shifts, provided:

(1) The guards were afforded a comfortable place to sleep.

(2) They were compensated for any period of interruption.

(3) On any day they didn't receive at least five consecutive hours of sleep, they had to be compensated for the entire eight hours.

Mendiola v. CPS Security Solutions, Inc. (California Court of Appeal, 2nd Appellate District, 7/3/13).

Bottom line

Remember, you must compensate employees for on-call time if their time is primarily directed toward fulfilling your requirements and policies and the time is so substantially restricted that they are unable to engage in personal pursuits. For employees assigned to 24-hour shifts, you and the employees may have a written agreement excluding up to eight hours of sleep time if certain conditions are satisfied.

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WORKPLACE VIOLENCE

Do as I do, not as I say

by Nancy N. Lubrano

If an employee makes a questionable comment and his later explanation of what the comment meant indicates he contemplated violence in the workplace, does the later explanation support a finding that he violated the employer's policy against workplace violence? For the University of California Board of Regents, the answer is "yes."

'Get out of my face!'

James Do was an employee at a University of California medical facility. He worked alongside his supervisor, Richard Fletcher, to provide computer assistance and maintenance services. Do and Fletcher were a two-man team.

After Do received a performance evaluation from Fletcher that indicated he met (but didn't exceed) performance standards, his attitude toward Fletcher changed. At first, he complained to a coworker that Fletcher was wasting resources by over-ordering supplies.

Next, Do began rebuffing Fletcher's direction and instructions for completing certain tasks. While he likely was overqualified for his position, he was Fletcher's subordinate. Therefore, he was expected to follow Fletcher's direction and complete work assignments in accordance

with his requests. Yet Do began showing insubordination and neglected certain duties. In fact, he was disrespectful toward Fletcher, and his bad behavior escalated from there.

For several months after receiving his performance evaluation, Do continued to neglect certain duties and disregard Fletcher's authority. The final straw came when Fletcher asked Do to perform a certain task but Do claimed he was too busy. Fletcher insisted that he complete the task as requested, and Do told him, "Get out of my face."

Fletcher reported Do's pattern of insubordination and his comment to Todd Pawlikci, Fletcher's supervisor. Pawlicki and another peer supervisor decided to issue a written warning to Do. Fletcher delivered the warning to him and asked why he said, "Get out of my face." Do explained that he said it so that he "wouldn't deck" Fletcher.

Fletcher was stunned and felt intimidated and in fear of physical harm. On the other hand, Do was shocked that he received a written warning.

A couple days later, Do was placed on paid leave for threatening violence against his supervisor. Approximately one week later, the board of regents terminated his employment for violating its workplace violence policy.

The workplace violence policy

The regents' employment policies include a zero-tolerance policy for "intimidation" or "threats of violence." The policy defines "intimidation" as "an intentional act towards another person, the results of which cause the other person to reasonably fear for his/her safety." Under the policy, a "threat of violence" is "an intentional act that threatens bodily harm to another person." The policy also states that a violation could result in discipline up to and including termination.

Do appealed the regents' termination decision through three levels of the university's administrative review process. The regents' administrative agency upheld the decision at every level of administrative hearings.

Throughout his three appeals, Do argued that he didn't violate the regents' policy. He argued that his comment—"get out of my face"—didn't amount to an intentional threat of violence. He also insisted that his later explanation of his comment—so that he "wouldn't deck" Fletcher—wasn't a policy violation, either. Particularly, he insisted that his explanation was purely speculative.

Do argued that his subsequent explanation of his earlier comment wasn't evidence that he intended to carry out a violent act. He didn't take any action toward Fletcher, and Fletcher couldn't have had any reasonable fear of harm. Thus, he claimed the decision to terminate his employment was improper.

While the "get out of my face" comment was clearly inappropriate, it was Do's later explanation of the comment that was the focus of the review hearings. His explanation revealed his internal thoughts, which led the hearing officers to uphold the termination decision.

Quasi-judicial administrative decision-making power

Ultimately, Do asked the superior court to review the administrative ruling, arguing there was insufficient evidence for the termination decision. The superior court thoroughly discussed the long-standing cases holding that the decision of an administrative agency properly granted quasi-judicial authority shouldn't be reversed unless abuse of discretion is established. Abuse of discretion is established if the court determines the agency's findings aren't supported by substantial evidence. The superior court held that there was substantial evidence to support the agency's ruling and that it didn't abuse its discretion.

Fletcher was stunned and felt intimidated and in fear of physical harm.

Not surprisingly, Do appealed the superior court's ruling to the California Court of Appeal. He argued that the trial court should have reviewed the evidence (or lack thereof) independently. The court of appeal explained the power granted to the regents through the California Constitution. Specifically, as an arm of the state, the board of regents is authorized to self-govern. That power includes the authority to hear evidence and make rulings similar to a state court of law (i.e., quasi-judicial authority). In short, the regents enjoy virtual autonomy in self-governance. Thus, their staff disciplinary matters fall within those powers and won't be disturbed absent a showing of abuse of those powers.

The court of appeal upheld the trial court's ruling. Particularly, it held that the trial court used the correct standard in reviewing the agency's decision and that there was substantial evidence to support the termination decision. Notably, both the trial court and court of appeal acknowledged that Do's facts presented a close call. Still, both courts found that there was substantial evidence to support the decision to terminate his employment even if his later explanation of his comment wasn't technically a threat of violence.

Particularly, the court of appeal agreed that there was substantial evidence supporting the termination decision in that:

(1) Do and Fletcher worked in close proximity to each other, which made Do's comment more likely to cause Fletcher to reasonably fear for his safety;

(2) There was evidence of growing stress and strain in the working relationship that could have caused Fletcher to reasonably fear for his safety; and

(3) Progressive discipline (rather than termination) wasn't warranted under these circumstances.

Thus, the court of appeal concluded (as did the trial court) that the regents provided substantial evidence from which the agency could reasonably conclude that Do violated the zero-tolerance workplace violence policy. Also, since Do was afforded proper administrative remedies, he wasn't denied his due process rights before losing his property interest in his continued employment.

Bottom line

While the regents—and other public employers—are empowered with quasi-judicial authority, employment decisions by all employers in California are scrutinized by the courts. Thus, it's important to have a well-drafted policy setting forth zero tolerance for violence in the workplace. Once more, you must enforce the policy soundly and evenhandedly.

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LITIGATION

9th Circuit says wage class action properly in federal court

Given the choice, many employers faced with a class action would prefer to defend the case in federal rather than state court. But there are strict requirements for moving a case filed in state court to federal court, a process called "removal." A recent decision from the 9th Circuit (whose rulings apply to all California employers) reversed the trial court's ruling and permitted a California wage and hour class action originally filed in state court to remain in the federal forum.

Case removed to federal court four months after lawsuit served

A class action lawsuit may be removed from state to federal court if (1) it involves one or more claims under federal law or (2) the parties are from different states, so long as the amount at stake is at least $5 million. Generally, an employer has only 30 days from receiving a state-law complaint to determine whether the case qualifies for removal and take the steps to do so.

The case reviewed by the 9th Circuit originally was filed in California state court in 2011 by Amy Roth on behalf of a group of employees of CHS Health Care Management LLC. Approximately a year into the litigation, she filed an amended complaint adding a second named class representative and CHA Hollywood Presbyterian Medical Center as a defendant. Both the original and amended complaints asserted wage and hour claims under California law. The amount of damages sought wasn't specified.

Some four months after the medical center was brought in as a defendant, it sought to remove the case from state to federal court. It asserted that the case belonged in federal court because it had learned that one of the members of the asserted class was now residing in Nevada, making at least one party from a state other than California, and that the amount of damages sought by the class exceeded $5 million. Attorneys for the class persuaded the trial court that the medical center had waited too long—well beyond the 30-day limit—to seek removal to federal court. The medical center appealed.

Court says removal was timely

The 9th Circuit recognized the strict 30-day limit for removal of a case to federal court if the employer can glean sufficient information from the papers received from the employees to determine that the matter qualifies for federal court jurisdiction. In this case, however, neither the initial nor the amended complaint contained information about the state residency of class members or the total amount of damages.

The medical center, after being served with the amended complaint in May 2012, looked into these questions. Only after checking its personnel files to identify potential class members did it realize that at least one now resides in Nevada. It also calculated the projected potential damages, which it estimated to exceed the $5 million threshold. On that basis, the medical center sought to move the case to federal court in September 2012.

The 9th Circuit held that since the class members hadn't presented information in their pleadings to permit the medical center to immediately determine whether the case could be moved to federal court, the 30-day limit hadn't been triggered and simply didn't apply. The medical center had sought removal within less than a year into the action, which the court identified as the outside limit. If class members want to enforce the 30-day limit for removal, the court said, they must provide sufficient information for a determination to be made. *Roth v. CHA Hollywood Medical Center,* Case No. 13-55771 (9th Cir., June 27, 2013).

If served with a lawsuit, consider your strategy promptly

Of course, you hope this is information you will never need because you don't want to ever face defense of a class action. If you are at some point the unhappy recipient of such a claim filed in state court, work with your legal counsel as early as possible to evaluate the question of removal to federal court. This case offers an extra bit of breathing room in certain circumstances, but it's always a good idea to be diligent and timely. ✤