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Empire College of the Law
Employment Discrimination Law
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ISSUES OUTLINE

PART I: 35 POINTS

1. **Prerequisites to filing suit and preserving claims**
    a. Discrimination claims require exhaustion of administrative remedies; file charge with DFEH/EEOC; obtain "right to sue" letter
    b. Does filing charge of disability and national origin discrimination in October/November 2012 cover Silva's claims of harassment and retaliation? If not, how long does he have to file those charges?
    c. If filing in state court under FEHA, must file within one year of occurrence (300 days with EEOC); When was occurrence? When Hurtfish became manager in January 2012 or when Silva was terminated 7/14/13? Or some other date?
    d. What about statute of limitations for common law claims such as intentional infliction of emotional distress?
2. **Forum**
    a. State Court is preferred forum due to:
        i. Greater potential recovery;
        ii. No cap on compensatory or punitive damages;
        iii. Longer filing period
3. **Possible Defendants** - (see discussion under Causes of Action)
    a. Hurtfish
        i. Potential claims for national origin harassment/hostile work environment and retaliation; No cause of action for disability or national origin discrimination (supervisors not personally liable for discrimination claims)
        ii. Intentional infliction of emotional distress
    b. SLAP
        i. Potential claims for disability and national origin discrimination; national origin harassment/hostile work environment; retaliation (as employer, liable for actions of supervisor)
        ii. Intentional infliction of emotional distress (as employer, liable for actions of supervisor)
    c. Silva's new supervisor

i. Potential claim for retaliation -individual liability for terminating Silva's employment

d. Helen Hurtfish - Potential claims for national origin harassment/hostile work environment and retaliation (not investigating Silva's complaint to Human Resources concerning Hurtfish's remarks and actions) - Doubtful she can be held personally liable

4. **Causes of Action/ Prima Facie Case**

a. Disability Discrimination - Disparate Treatment - *McDonnell Douglas - Burdine*

i. To establish a prima facie case:

1. Plaintiff is part of a class protected by the FEHA and the ADA (Mental disability-nervous breakdown)
2. Plaintiff was qualified for his position and satisfactorily performed his job (prior good reviews)
3. Plaintiff was terminated from his position
4. SLAP filled his position with another employee (assumed fact that position was filled by someone)

ii. SLAP then may articulate a legitimate, non-discriminatory reason for the termination (the alleged timekeeping irregularities and data entry errors)

iii. Plaintiff then has opportunity to prove by a preponderance of the evidence that the reason given by the employer is pretexual. The ultimate burden of proof is on the plaintiff. Plaintiff will point to Hurtfish's conduct toward him, the resulting emotional breakdown which was verified by a Qualified Medical Evaluator, SLAP's failure to investigate Silva's complaints to HR, the assigning of Hurtfish's wife as the HR contact, and SLAP's attempt to have Silva withdraw his DFEH charge for disability and national origin discrimination. No evidence was given to Silva to support Hurtfish's charge of timekeeping and data entry irregularities.

b. National Origin Discrimination - Disparate Treatment

i. Similar prima facie case to disability (but national origin covered by FEHA and Title VII) - protected class is Hispanics; evidence that he, as a Hispanic, was treated differently (requirement not to speak Spanish, use of the term "beaner" and taco reference, asked if he spoke "Spanglish") than non-Hispanics. SLAP would articulate same legitimate, non-discriminatory reason and Silva would use same arguments as in a. iii above (except for the emotional breakdown) to show pretext.

c. Harassment/Hostile Work Environment based on National Origin
    i. To establish a prima facie case:
        1. Actions or behavior must discriminate against a protected classification - national origin is protected under FEHA and Title VII
        2. Behavior must be pervasive, lasting over time - here Hurtfish became Silva's supervisor in January 2012 and except for the month Silva was out of work due to a carpal tunnel issue, continued as his supervisor until August 2012 (7 months) when Silva went out on leave due to an emotional breakdown and for one week in October. During all of the time he was at work he was subject to discriminatory remarks about his national origin (see above)
        3. Behavior or actions must be severe - arguably Hurtfish's actions were severe enough that a QME found that Silva's major source of psychological distress were Hurtfish's actions which in the QME's opinion amounted to harassment - this meets the reasonable person test and also clearly affected Silva's work performance.
        4. It is reasonable to assume that the employer knew or should have known about the behavior. Here Silva complained to HR and there was documentation from the Workers' Compensation determination and the QME's report.
d. Retaliation - *Payne v. McLemore's*
    i. To establish a prima facie case:
        1. Protected activity - Plaintiff must have engaged in opposition to discrimination or participation in either EEOC or DFEH proceedings - Silva filed a complaint with HR and a charge with the DFEH
        2. Adverse action - Must show that employer took an adverse action - SLAP terminated Silva's employment
        3. Causal Connection - Adverse action was caused by plaintiff's protected activity - Silva both opposed discrimination by filing a complaint with SLAP's HR department and was participating by filing a FEHA charge. SLAP's

insistence that Silva drop his DFEH charge or be fired provides linkage.

ii. Common law claims
    1. Mention should be made that Silva has common law claims such as intentional infliction of emotional distress (not necessary to go into detail)

5. **Defenses**
    a. SLAP will argue employment at will but that will not override discrimination charges
    b. SLAP will argue that it had legitimate, non-discriminatory reasons for termination - data entry errors and timekeeping errors - possible question of mixed motive - *Harris v. City of Santa Monica* (in California, plaintiff must show that discriminatory reason was a "substantial motivating" factor in causing the termination)
    c. SLAP may argue that Silva does not meet the definition of a person who is disabled under the FEHA - unlikely to succeed
6. **Damages** - If discrimination is proven
    a. If this is a mixed-motive case, even if discrimination is proven, if defendant can show that it would have made same decision at same time absent discriminatory motive, it may limit remedies that plaintiff receives
    b. Back pay, reinstatement or front pay, compensatory and punitive damages (under the Civil Rights Act of 1991, Title VII limits the amount of compensatory and punitive damages by company size - SLAP has 150 employees and is capped at $100,000) back pay and front pay are not considered damages
    c. Attorney's fees
    d. There is no cap on compensatory and punitive damages under FEHA
7. **Would you take the case and why**
    a. Would take case for following reasons:
        i. Strong evidence of national origin discrimination and hostile work environment based on "stray comments" *Reid v. Google*
        ii. SLAP's failure to investigate Silva's complaints or, apparently, to validate Hurtfish's complaints about Silva's data entry mistakes and timecard irregularities
        iii. Forcing Silva to work under Hurtfish against doctor's instructions (in light of no attempt by HR to validate or invalidate Silva's complaints)
        iv. SLAP's failure to respond to Silva's request for a transfer
        v. SLAP's insistence that Silva give up his DFEH charge or be fired

PART II: 30 POINTS

1. **Causes of Action/ Prima Facie Case**
    a. Sex Discrimination- Disparate Treatment - *McDonnell Douglas - Burdine*
        i. To establish a prima facie case:
            1. Plaintiff is part of a class protected by the FEHA and Title VII (sex)
            2. Plaintiff was qualified for her position and satisfactorily performed her job (she has alleged this)
            3. Plaintiff was terminated from her position (Fedup quit and is alleging constructive discharge) -
            4. HEC filled her position with another employee (assumed fact that position was filled by someone)
        ii. HEC then may articulate a legitimate, non-discriminatory reason for the termination (she resigned)
        iii. Plaintiff then has opportunity to prove by a preponderance of the evidence that the reason given by the employer is pretexual. The ultimate burden of proof is on the plaintiff. In this case, because Fedup is alleging a constructive discharge she must prove that a reasonable woman in her position would view the working conditions as intolerable**.**
    b. Sexual Harassment/ Hostile Work Environment
        i. There are two types of sexual harassment:
            1. Tangible employment action (quid pro quo)
                a. he/she is a member of a protected class (female);
                b. he/she was subjected to unwelcome sexual advances or requests for sexual favors;
                c. her/his refusal to submit to a supervisor's sexual demands affected her employment status;
                d. the harassing supervisor used his authority to subject the employee to adverse job consequences.
            2. Hostile work environment
                a. she/he was subjected to unwelcome conduct based on sex;
                b. the harassment was severe and pervasive; and

c. created an abusive or hostile working condition.

ii. Frieda alleges both tangible employment action and hostile work environment claims. The tangible employment action claim appears weak as there is only one allegation that Wolf, in front of others, suggested that they go to the Holiday Inn to negotiate her raise. This statement appears to be more in line with his other statements which she alleges constitute a hostile work environment. The real issue is whether they were severe and pervasive. In the approximately two and one half years that she worked at HEC it appears Wolf made frequent comments of a sexual nature, even after she complained and he promised to stop.

2. **Defenses**
   a. HEC will argue employment at will but that will not override discrimination charges.
   b. HEC will argue that Wolf's comments were not severe or pervasive.
   c. HEC will claim that Fedup resigned from the company without reason and that HEC took no adverse action against her. Fedup claims a constructive discharge. She lists Wolf's actions toward her including: insulting her because of her gender; making her the target of unwanted sexual innuendos; requiring her and other women employees to get coins from his front pants pockets and throwing objects on the ground and asking her and other women to pick them up. She states that she complained to Wolf about his actions and he said he was only joking, apologized and promised to stop. Based on his assurances, she agreed to stay. However, shortly thereafter, while she was closing a deal, she alleges that Wolf stated in front of the customer and other employees, "What did you do, promise the guy some [sex] Saturday night?" Unless Wolf can offer evidence to contradict these allegations, Fedup would appear to have acted as a reasonable woman would act and have a good case for constructive discharge.
3. If Fedup can prove the allegations made in the complaint, it appears she has a strong case for hostile work environment harassment and constructive discharge.

PART III: 25 POINTS

1. Although employers may require employees to wear uniforms, a recent California amendment to the FEHA defines religious creed, religion and religious observance and belief, to include all aspects of religious belief, observance, and practice, including religious dress and grooming practices. Religious dress

practice is construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed. Religious grooming practice is construed broadly to include all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed. The statute expressly forbids placing an employee in a non-customer contact position as an accommodation. Unless there is a health or safety reason, I would advise the manager to permit the employee to wear his turban and not to transfer him to a non-customer contact position.

2. In California an employer may not discriminate against an employee because she is pregnant and must provide up to four months disability leave for a woman who is disabled due to pregnancy, childbirth, or a related medical condition. A woman who works for a covered employer (5 or more employees) is eligible for pregnancy Further, an employee does not have to work full-time in order to be eligible. Pregnancy leave is required only when a woman is actually disabled by her pregnancy, childbirth, or a related medical condition. This includes time off needed for prenatal care, severe morning sickness, doctor-ordered bed rest, childbirth, recovery from childbirth, and any related medical condition. In addition to the up to four months disability leave, she is also entitled to up to 12 weeks off under the California Family Rights Act (CFRA). To be eligible for CFRA leave, an employee must be either a full-time or part-time employee working in California, have more than 12 months (52 weeks) of service with the employer, have worked at least 1,250 hours in the 12-month period before the date the leave begins, and work at a location in which the employer has at least 50 employees within 75 miles radius of the employee's work site. That means that a woman who is eligible for CFRA leave could take up to four months of pregnancy disability leave for her pregnancy disability and may also be entitled to up to 12 weeks of CFRA leave to bond with the baby. She is also entitled to return to her position even if she takes the full 7 months off. I would advise the Finance manager to explain these entitlements to the employee (with the help of HR) and ask for as much advance notice of absence as possible. I would also advise the manager to get approval to bring in a temporary employee to learn what our employee is doing or be prepared to outsource her work so that he has coverage for his audits while she is on leave. (Note: students were not expected to describe CFRA requirements in detail)

3. Age discrimination is covered under both the FEHA and the Age Discrimination in Employment Act (ADEA) and covers employees 40 years of age and older. Turtle is covered under both statutes. Therefore, I first want to caution the head engineer about these laws and that he needs to be careful what he says (*Reid v. Google).* He should not be calling Turtle anything which has ageist connotations. I should find out if Turtle has ever been counseled in writing concerning his performance and ask to see his last performance review. I should find out what the dollar cost to the company is for the 15 minute crash? has it happened before? If it has happened before, was Turtle responsible or someone else? If someone else, was he/she disciplined or their employment terminated? After I have the

answers to these questions, you may be able to terminate his employment for cause and he may not be able to show that age was a "substantial motivating factor." Even if it is, you still may be able to mitigate damages under the *Harris* case. If Turtle has not received any prior written warnings and the cost to the company was not extreme, the safest move would be to place Turtle on written warning.

4. First, I would note that we are not looking at California law but rather at federal and Nevada law (which we haven't learned). Under Title VII, the applicant could argue a disparate impact claim (*Griggs v. Duke Power Co.).* To establish a prima facie case of disparate impact the plaintiff must point to an employment practice that is based upon facially neutral criteria but that in fact falls more harshly on one group and cannot be justified by business necessity; no proof of discriminatory motive is necessary. (*Teamsters v. United States).* As in *Griggs,* where a high school degree was in issue, the question is whether the requirement of a college degree unfairly excludes members of a protected class -in this case, Blacks. Evidence in disparate impact cases is usually statistical but can also be anecdotal. Under the Civil Rights Act of 1991, once the plaintiff has met the burden of production and persuasion that the defendant uses a particular employment practice which causes a disparate impact because of race, an employer can show (burden of production/persuasion) that the particular practice (in this case the college degree) is job related for the position in question and consistent with business necessity. The plaintiff then can show (burden of production/persuasion) that there are alternative employment practices that do not have a disparate impact but still accomplish the defendants' objective. In this case, the plaintiff might argue that a certain number of years of experience in sales might be an alternative to a college degree and still ensure a knowledgeable sales staff. I would recommend to the General Counsel that we consider engaging in conciliation with the plaintiff and the EEOC as we do not have a high probability of success and this case will undoubtedly end up as a class action which could be very costly.