CALIFORNIA
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MAGAZINE

He Said/She Said

Editor's note: California Employment Law magazine recently asked two prominent employment attorneys in San Francisco — one who represents plaintiffs and another who counsels employers — to engage in a relatively informal e-mail "discussion" about various topics of mutual interest. Over the course of a few weeks, Therese Lawless, a partner at Lawless & Lawless, and Douglas Farmer, a partner at Sheppard Mullin Richter & Hampton, touched on such issues as reductions-in-force, employees who may or may not be "scamming" their employers, and how aging baby boomers are affecting the workplace.

JASON DOIY

DOUGLAS FARMER: "Employers need to think through the potential downsides of arbitration and be comfortable with the risks," says the employers' attorney.

From: Therese Lawless
To: Douglas Farmer
Sent: Wednesday, May 11, 1:57 p.m.

Doug,

We have been receiving many more inquiries in the past year regarding employees' rights with respect to medical leaves pursuant to the California Family Rights Act and the federal Family Medical Leave Act. We have also seen a growing number of employers using reductions-in-force to get rid of employees who have legitimately exercised their rights under CFRA and/or FMLA. Call me cynical or jaded, but I am left with the distinct impression that corporate America has no tolerance for individuals who are very ill and need time off or who need to take time off to deal with ill family members. By throwing these individuals into a larger RIF pool, companies are attempting to disguise illegal behavior (i.e., getting rid of the sick) under the guise of having a legitimate reason for termination (reorganization). We have successfully challenged many of these terminations by attacking the criteria utilized for determining who would be "riffed" and through statistics.

Are you concerned about the misuse of RIFs? How do you counsel your clients with respect to the use of RIFs? My own experience is that pregnant women or women and men who want to take time off to care for a newborn or newly adopted child get the same type of treatment. They are the first ones who get the axe in a layoff, RIF or reorganization.

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From: Douglas Farmer
To: Therese Lawless
Sent: Monday, May 23, 9:27 a.m.

Therese,

I agree with you that RIFs can present special traps for the unwary employer. But I don't think the problem is one of an evil Corporate Empire waiting for the next opportunity to intentionally kick sick people to the curb. The problem arises more from the economic climate that creates RIFs in the first place.

In my experience, RIFs are often part of a larger economic chaos affecting the organization — a merger, a liquidation, elimination of a product line or some significant loss of revenue. Nobody is sitting around saying, "I think we will do a RIF today so we can get rid of some sick employees." The terminations are driven by business concerns at the macro level. In many cases, HR managers and general counsel are spread very thin, and there are often heavy demands on them to move quickly with limited resources. In this context, RIFs can be very risky for employers. Often the resources aren't there to do the thorough statistical analysis you speak of to

be sure everything is on track. So part of our challenge as defense counsel is to try to slow the process down long enough to give good preventive advice while recognizing the practical demands on the business.

I also think that part of the problem in a RIF situation is that the reinstatement provisions of statutes like FMLA, CFRA and California's pregnancy leave laws make it deceptively simple to terminate covered employees. These statutes basically permit the employer to terminate an employee where the employer can show that the employee would not otherwise have been employed in their position at the time reinstatement is required. So in a RIF situation, if the employee's position is eliminated, along with the positions of other persons who have not taken protected leaves, there is a comfort level on the part of both counsel and client that you don't get in single termination cases. How can there be discrimination if positions for protected and non-protected employees are eliminated simultaneously?

But as you point out, that is only part of the picture. When I advise businesses on the legal risks of RIFs, I emphasize the importance of establishing criteria used to select which positions within a single job category will be eliminated. Clients often align their selection criteria according to their tolerance for risk. It's not enough to say that all positions are being eliminated for "economic" reasons. The criteria used to decide which employees to keep and which to let go who hold the same job will determine the level of litigation risk down the road. Second, I'll recommend that we crunch the numbers. If the client has a statistically valid sample size, I will have the numbers reviewed for disparate impact or patterns that can be problematic. I will also suggest that clients document alternatives to the RIF that have been tried and didn't work out. These can include salary reductions, job sharing, exit incentives, reductions in hours, furloughs and the like. There can be tremendous jury appeal in cases where the employer can show that management struggled to retain the employee. Finally, I always explore the use of severance packages in exchange for a release of claims.

Speaking of terminations, it has become increasingly common in my practice to receive calls from clients who say that after they have counseled an employee for performance problems to the point of termination but just before a termination can take place, the employee will make a complaint about some unfair, unsafe or unlawful practice of the company.

Just last week, a client called to say that on Monday morning he interviewed an employee about her role in forging bank documents. By 3 p.m., before the investigation could be concluded, she reported a severe back injury and went out on a workers' comp leave. Medical reports showed the complaint to be completely fabricated. Is this an issue for you in your practice, and if so, how have you addressed it? Are you concerned about employee misuse of employer complaint procedures?

'I must sound cynical but I hear enough of these situations to think less and less of Corporate America.'

— Therese Lawless

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From: Therese Lawless
To: Douglas Farmer
Sent: Monday, May 23, 5:57 p.m.

Doug,

Employers may not consciously sit around and say, "I think we should RIF this employee because she took a medical or family leave." But in many instances it does appear that employees who exercise their right to take leaves are included more frequently and disproportionately in RIFs than employees who don't take leaves. I don't have any hard statistics to prove this overall (but it would be an interesting analysis to make of the Fortune 500 companies as well as others). It does appear, however, that when employees are absent from the workplace, that often has a negative impact on them. Perhaps it is as innocent as "out of sight, out of mind." Perhaps it shows that no employee is indispensable and that the employer learns, in the absence of that employee, that the job can be done without that particular person. Also, if there are financial considerations, most employers would agree that it is expensive to have an employee who isn't working. So I guess what may be occurring is less of an intentional and more of a subtle type of discrimination. If an employer can get 110 percent from a healthy employee and only 85 percent from an employee who is or has been ill or who has a close family member who is ill, won't the employer go for the 110 percent purely out of economics? My job, of course, is to determine which potential claims are actionable. You sound like you are doing your job by having the employers have good systems in place to justify their selections for RIFs.

As for the termination issue you raised, it happens both ways. I do find that there are employees who do not complain until after they have been written up. Generally, those are easy to screen through a thorough intake procedure on my part. In many instances, however, there may have been previous complaints but none that were put in writing. That is why I do a very thorough interview before taking a case. If the employee is simply angry with the employer and files a claim after having been disciplined and the claim is bogus, that's the easy call. The more difficult situation is when there have been allegations short of a written complaint or claim, some retaliation by the employer (i.e. discipline) and then a formal complaint by the employee. I think you would agree with me that these cases are fact-intensive. It is fairly common for me to see the defense you speak of. Often, these are factual disputes, which make summary judgment so fun. In the

scenario you propose, what if the employee had been counseled and then legitimately hurt his or her back and filed a workers' comp claim? If your investigation of the bank forgery is conclusive, would you hesitate to counsel your client to terminate her? I think not. If the bad-back claim is bogus, all the more reason to do so.

So what about age claims? Are you seeing more of these? What happens when you do a statistical analysis of a RIF/layoff and it looks as though older workers are either targeted or significantly impacted? How would you counsel an employer to remedy the situation?

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From: Douglas Farmer
To: Therese Lawless
Sent: Wednesday, May 25, 10:31 a.m.

Therese,

Your point about sick employees being over-represented in RIFs raises some interesting larger issues for employers. I agree with you that there can be subtle and not-so-subtle resentment directed at employees who over-utilize time off. But in my experience, resentment often comes from the employee's coworkers who, in the employee's absence, have to pick up the slack. These workers know better than anyone that you can get a doctor's note to say anything. And they know when their co-workers are scamming the system. The employer's role here is to restore balance by managing leaves aggressively within the boundaries of the law.

All of the laws we have talked about afford employers abundant protections from abuse. But few employers ever take advantage of them. Under the FMLA/CFRA, for example, employers can temporarily transfer employees who request intermittent leave to another position more suitable for that type of leave. Employers can also request medical re-certification in 30 days if they doubt the need for continued leave or in less than 30 days if there is evidence that the leave is no longer needed. Under ADA/FEHA, an employee is not entitled to the disability accommodation of their choice, only an "effective" accommodation. So for the employee in a wheelchair who wants all drinking fountains lowered so that he can drink like everyone else, a $3 paper cup dispenser may be an "effective" accommodation and all that is required. We could go on and on, but you get the idea. Employers need to stop resenting the burden of these laws and more aggressively manage time off using the tools provided by these statutes.

As to your comments about employee complaints just prior to termination, it's good to hear that the plaintiffs' bar is aware of the trend and screens its own cases for this problem. Because the law gives so much weight to the timing of an adverse employment decision in relation to the employee's complaint to determine retaliation claims, I don't think there is an employer out there who doesn't feel some uneasiness in terminating an employee who has recently complained. But employers are also tired of being scammed. So where there is the slightest evidence of a setup, employers, too, are carefully scrutinizing the facts and moving on terminations in spite of some risk. I think it's part of a larger trend. An employee who reports a finger in their bowl of chili no longer gets the benefit of the doubt.

'I don't think the problem is one of an evil Corporate Empire waiting to intentionally kick sick people to the curb.'

— Douglas Farmer

In response to your age discrimination question, I'm not yet seeing an uptick in such claims. But I think there are demographic changes at play that will soon make this inevitable. Over the next decade, I think we're going to see one of the most profound games of musical chairs in the history of labor relations — one where older, experienced workers will be managed more and more by youthful inexperienced managers. As the baby boomers age, they won't be opting for retirement in the traditional sense of the word. I think we will see older workers, either out of necessity or boredom, proliferate in the lower ranks of the workforce — part-time jobs, seasonal positions, on-call positions, lower paying jobs, jobs requiring less skill — jobs previously reserved for young or immigrant workers. Many of these older workers will be highly competent, some coming off of highly successful careers and savvy about their rights. In contrast, their managers will be relatively youthful and inexperienced. These demographics alone suggest a substantial uptick in age-related claims. I think the political response will be more protective legislation at the state and federal levels.

As to your question about how we would advise a client in situations where a statistical analysis showed a disparate impact on older workers, I think the employer has several options. First, the employer may want to reexamine or adjust their termination criteria for the RIF to achieve a more balanced result. For example, giving less weight to criteria such as salary and more weight to company or departmental seniority could achieve a better balance. If the employer is heavily weighting performance, I would want to be sure that the performance evaluation criteria used is as objective as possible and recently documented. To the extent possible, subjective criteria like "attitude" and "demeanor" have to go. Objective criteria like "total widgets made per month" or "number of absences in past 12 months without excuse" stay. And then you re-crunch the numbers until the employer is at a risk tolerance level they can live with.

But I am curious to know what kinds of things you look for in selecting clients to represent on a contingency basis. Are there mistakes that employers make that you find more appealing than others? Also, are there any areas of the law that you think employers are having a particularly hard time with? Wage-and-hour

class actions seem to be on everyone's mind at the moment

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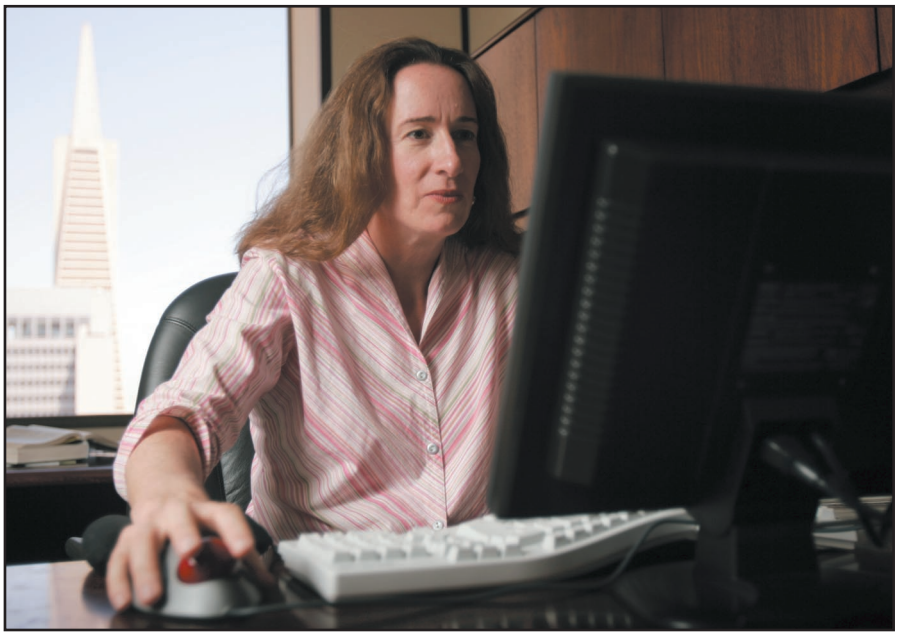
From: Therese Lawless
To: Doug Farmer
Sent: Tuesday, May 31, 12:48 p.m.

Doug,

Just this morning I was counseling an individual who has been out on a family leave and was informed of a so-called job elimination. It seems that her job was the only one eliminated and her duties were given to another person who was promoted. Her employer then had the nerve to tell her they were restructuring and that she could apply for two other jobs while simultaneously telling her that they had already filled one of the other jobs (i.e. the job with her previous duties, which someone else was promoted into without having to apply). The remaining job was part-time at less than half her salary. The good news is that they didn't have the foresight to give her a waiver with some severance.

I know I must sound cynical to you but I hear enough of these situations to think less and less of Corporate America. As the woman informed me this morning, at first they were accepting of her medical situation. But when she had to use all of her leave in a one-year period and also needed accommodations for her illness, she said they "seemed to get tired of it." She was a good, faithful employee who continued to get good reviews through her illness. She was not scamming the system. She just needs help getting through a hard time. Now she is on the street, in her mid-fifties trying to mitigate with a health condition that could result in her having to apply for disability. No wonder the French don't want to ratify the European Constitution and join the global work force where profit is God.

I find your comments about the aging work force interesting. From a purely philosophical point of view, I am always intrigued by how our cultural obsession with youth plays out in the work force. I see more and more of the situation you describe where younger managers are overseeing older workers. As we baby boomers age, I, too, believe that the dynamics in the work force will change. We saw a bit of this with the dot-com boom but will certainly see more. Taking this to another venue, as you may know, many of us plaintiff attorneys are not fond of young jurors who have little work experience, no family to support and believe that life is full of hard knocks that one must bear. I call it the "ignorance and arrogance of youth" and much prefer, as my juror, the seasoned worker who expects companies to follow certain rules of fairness.



JASON DOIY

THERESE LAWLESS: "As we baby boomers age, I believe that the dynamics in the work force will change," says the plaintiffs' attorney.

What do I look for in a contingency case? First, I need to know that the client has not signed a waiver. One of the big mistakes, which, quite frankly, I do not see very often these days, is the failure of the employer to have the employee sign a release in exchange for severance. The employer described above could have easily avoided a lawsuit by simply offering a fair severance. I know you religiously counsel your clients to do as such and, in most instances, employees will sign. Often an employee will come to me and we will discuss whether or not they should sign the waiver/severance agreement. Sometimes we will negotiate for more. In my opinion, employers who take a "take it or leave it position" are often being penny-wise and pound-foolish.

I recently resolved a case in the seven figures for an employee who was willing to negotiate a much smaller severance at the outset. But the employer refused to move beyond five figures. Second, I'm interested in presentable, sympathetic, credible individuals who are workers and not whiners. Third, I look for situations that reek of unfairness and that will appeal to a jury. Subjective decision making, as you have suggested, is much easier to fight than objective rationale tests. Of course, high earners are attractive because their damages are potentially greater. But if I believe a low earner has been treated unjustly, I won't hesitate to take the case. That's what the attorney fee provisions are for.

The biggest mistakes I see are probably when employers act hastily or out of anger and frustration. As my mother always said, "haste makes waste." A smart employer calls counsel first before taking a drastic step and then listens to counsel. Some plaintiffs' attorneys will not take cases with arbitration clauses, but I will. We've been very successful defeating motions to compel arbitration. Even when we haven't succeeded,

we've obtained some great results and then the employer has no right to appeal. I always wonder about the wisdom of those clauses from the employer perspective. They have no leverage after the plaintiff prevails at arbitration. Do you counsel your clients to include those in employment agreements?

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From: Therese Lawless
To: Douglas Farmer
Sent: Wednesday, June 1, 12:21 p.m.

Doug,

It's a beautiful day today and it's my birthday to boot so I'm heading out of Dodge early. It may be the last time I turn 29.

I was thinking more today about what I look for in a plaintiff. Since I litigate almost all of my cases, I carefully assess my clients from the beginning as to jury likeability. Is this someone who will resonate with a jury? Will his or her story fly? Is this person in it for the long run? I do not take cases that I would not feel comfortable trying before a jury. I do not have patience with a prospective client who has no intention of moving forward if the employer is not interested in resolving the matter right off the bat. The plaintiff has to be willing to go to the mat.

Having said this, please don't misunderstand me. I am a huge fan of mediation when the parties are willing and ready and the time is right. I do not like being used by clients who have no intention of going forward but want to use my or my firm's name to "scare the other side." (Their words, not mine. I'm not really that scary and I'm far too civil to opposing counsel.) So I try to screen out those clients who really don't want to go forward, and maybe just want a few more dollars to settle. I'll send them to other counsel who prefer writing letters and never going into the courtroom. I'll also discourage certain individuals from litigating whom I feel don't have the stomach for it. I give a pretty tough speech about litigation and going to trial to all of my prospective clients because I think they need to know that it can be rough and risky. I feel I have a duty to do that. Those who survive the speech without walking out the door are usually fighters with staying power.

Finally, I never tell a prospective client what the value of the case is. Believe me, they all ask, "What do you think it's worth?" I get very frightened when someone brings in newspaper clips with huge verdict numbers. I'm very wary of those individuals as you might expect.

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From: Douglas Farmer
To: Therese Lawless
Sent: Wednesday, June 1, 2:18 p.m.

Therese,

In another, more idealistic life, I was a trial attorney for the EEOC. I used to give similar speeches to charging parties. I always thought that it was important to try to manage expectations on the front end so that there were no surprises later on.

Happy birthday!

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From: Douglas Farmer
To: Therese Lawless
Sent: Wednesday, June 1, 6:27 p.m.

Therese,

As to arbitration, I think employers have for too long marched lockstep to the tune that says arbitration is "better, faster, cheaper." After the California Supreme Court's decision in *Armendariz* a few years ago, I'm not so sure that one size fits all anymore. Employers need to think through the potential downsides of arbitration and be comfortable with these risks. The limited right to appeal or set aside a ruling, as you point out, can be significant. If you end up on the wrong side of a punitive damages ruling, your chances of escape may be close to nil.

I also think that cost is now a very real factor. Two aspects of the *Armendariz* opinion drive the cost issue: the employee's right to conduct "more than minimal discovery" and the employer's obligation to shoulder the cost of arbitration. In a single-plaintiff sex discrimination case, minimal discovery could mean personnel files and depositions for a dozen male comparators. So much for faster and cheaper. In addition, many arbitrators view the world differently than judges. They approach arbitration with a "split the baby" mentality, where both sides get something at the end of the day. In many cases this is exactly what the employer doesn't want. In cases where the prevailing party is entitled to reasonable attorneys' fees, such as FEHA claims, this can be a disaster. In the end, I can't see why an employee with a weak case would not prefer arbitration.

I also think that with the passage of the California Private Attorney General Act (PAGA) in January 2004, there are now additional risks in implementing aggressive arbitration agreements. Too many employers mistakenly view PAGA as a wage-and-hour statute. In fact, PAGA establishes penalties for those sections of the Labor Code where none previously existed. This includes Labor Code section 432.5, which prohibits employers from requiring employees or applicants to agree in writing to terms the employer knows to be unlawful. If employer arbitration agreements don't square with every footnote in *Armendariz*, you can be sure PAGA lawsuits will follow. So when all is said and done, arbitration agreements may present more headaches than they are worth.

But at the end of the day, I think the vast majority of employers still favor the use of arbitration agreements. And they do this for one important reason: to avoid the risk that jury trials present. Both sides know how difficult it is in many jurisdictions — San Francisco, Los Angeles and Alameda superior courts, to name a few — to convince a jury to see the employer's side of the story. Whether employers like it or not, statistically they will end up with at least some jurors who have one objective in mind — to redistribute wealth. The plaintiffs' bar is keenly aware of this. And whether it is spoken or unspoken, it creates leverage at the settlement table. So if the employer can remove this factor with an arbitration agreement, I think most will

continue to do so.

I want to turn your attention to a topic that continues to be a hot button in employment law — sexual harassment. The courts and the Legislature seem to be getting tougher on employers all the time. Over the past several years, new legislation has mandated sexual harassment training for managers at companies with 50 or more employees, created liability for employers who fail to respond to employee complaints of harassment by members of the general public and recognized harassment claims by independent contractors. There is also a case now pending before the California Supreme Court, which your firm is handling, that will address when a "paramour preference" can become unlawful sex discrimination. Any thoughts about this trend and what it means for the workplace?

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From: Therese Lawless
To: Douglas Farmer
Sent: Thursday, June 2, 3:18 p.m.

Doug,

One would think the tougher laws would bring us closer to a world in which sexual harassment and gender discrimination were passe. Not so. Our recent case that we argued before the California Supreme Court early last month, *Mackey v. California Department of Corrections*, unfortunately shows how pervasive these issues are even today. As I said to my law partner/sister the day before the argument, "Can you believe that it is 2005 and we still have to go to court to enforce the basic right to make a living in a workplace where sex is not the controlling issue? Have we made no progress?"

As you are aware, the *Mackey* case involved two women, Frances Mackey and Edna Miller, who worked at the Department of Corrections. The warden slept with numerous women and promoted those who complied with his unusual workplace demands. Miller and Mackey, however, did not sleep with the warden and, consequently, were not promoted. Miller and Mackey did not allege quid pro quo sexual harassment because they were never expressly propositioned by the warden. They did allege, among other claims, that the warden's practices resulted in a pervasive and hostile workplace environment. Previous paramour cases (I do not consider our case to be a paramour case) have held that an individual cannot make a claim for sex discrimination/harassment where another individual who is in a romantic relationship with a superior is given a promotion instead of the individual who is not in the romantic relationship. Isolated incidents of preferential treatment, the courts have held, do not constitute sex harassment.

The lower courts essentially threw out our case on these grounds. We argued that our case was not the typical paramour case. The warden's practices were so numerous and pervasive as to create an environment in which women knew that in order to move up, they had to sleep with him. Our appellate specialist, Dan Smith, made a compelling argument that the lower courts failed to look at "the totality of the circumstance" and essentially made factual determinations that the warden's "relationships" were of the consensual and romantic nature when the evidence suggested otherwise. In other words, the relationships might not really have been paramour relationships.

I am not doing the case or the facts justice here so if you want more you can read the briefs, which are posted on the Supreme Court's Web site. I'm hopeful for all the women of California and for my daughters that the Supreme Court will do the right thing and overturn the Third Appellate District's opinion. This is more than you wanted to hear, I'm sure. ❖