

Exclusive Remedy Exlipse: *Light v. California Dept. Of Parks and Recreation* David J. Kahn, Esq.

Attention California employers! When an employer's conduct falls outside the risks inherent in the employment relationship it loses exclusive remedy protection and the employee's remedy is to sue the employer for civil tort damages. Such is the holding of a recent partially published opinion by the California Fourth District Court of Appeal, *Light v. California Department of Parks and Recreation* (2017 WL 3393079). At first, this holding may seem controversial--another anomalous opinion from a rogue anti-employer California court. However, when placed in its proper context against the Workers' Compensation System, the *Light* decision shines a light on what work-related injuries are covered by Workers' Compensation and those which do not fall within the parameters of the statute and are not covered. This understanding is critical to California employers and their insurers who must

make informed decisions along the thin line between investigating claims and the unintended consequence of manufacturing damaging evidence which could be used by an employee in a civil tort action.

1. The Compensation Bargain and Workers' Compensation Exclusivity

The no fault workers' compensation system is predicated on a compensation bargain struck between employers and employees who sustain an injury *arising out of and during the course of their employment*. In exchange for prompt medical treatment and disability benefits for time lost from work (*temporary disability*) and reduced ability to compete in the open labor market (*permanent disability*) without having to legally prove negligence employers are protected from exposure to civil tort damages. The protection from civil liability given to the employer is commonly referred to as the exclusive remedy doctrine which is codified in *California Labor Code § 3600(a)(1)*. The Labor Code provides five limited exceptions for otherwise covered claims.¹ However, injuries which occur during the course of employment but do not *arise out of the risks inherent in the employment relationship* do not meet

the threshold requirement for compensation and therefore such claims are not covered by the workers' compensation statute and the employee's remedy is to sue the employer for civil tort damages.

2. Extreme and Outrageous Retaliation Is Not Protected By Workers' Compensation Exclusivity

The exclusive remedy issue in the *Light* case involves a claim for intentional infliction of emotional distress against Ms. Light's direct supervisor, which had been disposed of by summary judgment at the trial level. Plaintiff in the *Light* case was Melony Light, a seasonal employee of the California Department of Parks and Recreation. In 2011, Ms. Light was employed as an Office Assistant stationed at the Department's Octollio Wells District in the Anza-Barrego Desert State Park located in western San Diego County. Ms. Light sued the Department and her supervisors Leda Steals and Kathy Dolinar based on a series of allegedly retaliatory adverse employment actions taken by the Department and Ms. Light's Supervisors against Ms. Light due to her support of friend and co-worker Delane Hurley, whom Ms. Steals believed to be a lesbian.

¹The statutory exceptions to otherwise covered claims which allow an employee to sue the employer for civil tort damages

are (1) employer assault (*LC§3602(b)(1)*); (2) fraudulent concealment (*LC§3602(b)(2)*); defective product

(*LC§3602(b)(3)*); (4) power press (*LC§4558*); and (5) uninsured employer (*LC§3706*).

It was alleged Ms. Seals tried to enlist Ms. Light in Ms. Seals' harassment of Ms. Hurley based on sexual orientation. Ms. Light claims she suffered emotional distress from Ms. Seal's actions.

Ms. Hurley went on stress leave and filed a complaint against Ms. Seals with the Department's Human Rights Office. Ms. Light was interviewed as part of the investigation. Plaintiff alleged prior to the interview Ms. Seals told her she was expected to lie to the investigators and protect her supervisors and if she refused her career would be over.

Following her interview, plaintiff claimed she was confronted and verbally abused by Ms. Seals who berated her for not following orders. Ms. Seals reportedly told plaintiff she was being transferred to another assignment with Visitor Services where she would fit in because the employees there do not follow orders. When plaintiff tried to leave, Ms. Seals blocked the office doorway. Plaintiff claims she was able to escape Ms. Seals' office and returned to her own office. Ms. Seals followed and when plaintiff tried to close the door, Ms. Seals pushed it open causing plaintiff to step backwards. Ms. Seals then put her foot in the door and tried to talk to plaintiff.

Following this incident, plaintiff filed her own claim with the Human Rights Office. The investigation concluded Ms. Light was retaliated against for her cooperation in the investigation of Ms. Hurley's claim finding Ms. Dolinar was responsible for creating a retaliatory culture which encouraged supervisors

such as Ms. Seals to retaliate against employees such as Ms. Light.

Plaintiff then filed her lawsuit against the Department, Ms. Seals and Ms. Dolinar. After demurrers by the defendants, the remaining claims against the Department were for disability discrimination, retaliation, and failure to prevent retaliation. The remaining claims against Ms. Seals were for assault, false imprisonment, and intentional infliction of emotional distress. The sole remaining claim against Ms. Dolinar was also for intentional infliction of emotional distress. The trial judge granted summary judgment as to all remaining claims. In disposing of the intentional infliction of emotional distress claims, the trial court found they were barred by workers' compensation exclusivity. On Ms. Light's appeal, the court upheld the summary judgment as to the claim against Ms. Dolinar but reversed as to the claims against Ms. Light's direct supervisor Ms. Seals. The court's evaluation of the distinction between the conduct of Ms. Seals and the conduct of Ms. Dolinar illustrates which emotional stress claims are barred by the exclusive remedy and those which could subject the employer to civil tort liability.

The Court of Appeal followed a line of appellate cases which have held workers' compensation exclusivity does not apply when the defendant's conduct falls outside the risks inherent in the employment relationship. In other words, the injury does not

arise out of the employment relationship and is therefore not covered by the workers' compensation statute when the defendant retaliates in violation of FEHA in a manner so extreme and outrageous so as to also make out a claim of intentional infliction of emotional distress. The court found the intentional infliction of emotional distress claim against Ms. Seals met the elements of a discrimination and retaliation claim under the Fair Employment and Housing Act ("FEHA") and the common law tort intentional infliction of emotional distress. An intentional infliction of emotional distress claim requires conduct to be outrageous and so extreme as to "exceed all bounds of that usually tolerated in civilized society." *Light v. Dept.*, p. 18. A trier of fact could conclude the alleged conduct of Ms. Seals including asking Ms. Light to lie to investigators and pursuing her at home and in the office afterwards to see if she did so, and verbally and physically attacking Ms. Light after she disobeyed orders to be extreme and outrageous conduct taken for purposes of retaliation in violation of FEHA.

On the other hand, ordinary garden variety retaliation is a risk inherent in the employment relationship and is still protected by the exclusive remedy bar, which the court acknowledged in upholding summary judgment as to Ms. Dolinar. Ms. Dolinar allegedly refused to listen to Ms. Light's complaints about retaliation, encouraged Ms. Seals's efforts to silence Ms.

Light, and participated in the Department's retaliation against Ms. Light by denying promised training and relocating Ms. Light to a different location. The court characterized Ms. Dolinar's conduct as common "misguided" supervisory conduct which a trier of fact could find violated FEHA but could not reasonably conclude was extreme and outrageous. *Light v. Dept.*, p. 18. The court also points out extreme and outrageous conduct cannot be imputed from one employee to another so the conduct of Ms. Dolinar could not be held liable for the conduct of Ms. Seals. According the *Light* court, it is not the mere existence of retaliatory conduct, but the manner of the conduct which separates emotional distress claims protected by workers' compensation exclusivity and those which will survive summary judgment.

3. Lessons for California Employers

It is some consolation to employers the *Light* decision does not diminish workers' compensation exclusivity for all acts of retaliation and FEHA violations. In fact, the *Light* court reinforces acts of ordinary retaliation are to be expected and fall within the employment relationship. To get around the exclusive remedy bar, the employee must allege and prove facts which satisfy the elements of a FEHA claim and intentional infliction of emotional distress, meaning extreme and outrageous conduct. However, employers need to be mindful of this

potential when conducting an investigation of a claim of harassment or retaliation. Although it was not addressed in the court's analysis, the Department's internal investigation which found a culture permissive of retaliation was the impetus for Ms. Light's civil suit. It is not clear to what extent the internal investigation and the underlying interview of Ms. Light with respect to the Hurley investigation were discoverable in the *Light* civil action.

The takeaway from *Light* for employers and claims representatives is legal counsel should be consulted before conducting a formal investigation of work related stress-only claims where the allegations involve extreme and outrageous conduct by a supervisor. However, there is no bright line rule as to what conduct falls over the line into extreme and outrageous territory. Therefore, active involvement of legal counsel at an early stage is critical to evaluate the allegations and develop a plan of action for investigating the claim. Active involvement of legal counsel will help to confer protected status to the investigation. Specifically, legal counsel should also be consulted about the propriety of conducting recorded witness interviews in such cases and whether those interviews will be protected from disclosure in a potential civil action. At the *Light* case demonstrates, if the internal investigation concludes there was wrongdoing on the part of a supervisor and the investigation is not protected from disclosure,

the employer may have unwittingly provided a disgruntled employee with the evidence needed to support a civil action against the employer for tort damages.

ABOUT THE AUTHOR

David Kahn specializes in civil litigation in the areas of personal injury, professional liability, general liability, and employment litigation. Contact David at 858.459.4400 or dkahn@tysonmendes.com.