

AGENCY ACTION

Annual report shows record year for EEOC.

The Equal Employment Opportunity Commission (EEOC) finished fiscal year 2011 with a 10 percent decrease in its pending-charge inventory, the first such reduction since 2002. The annual Performance and Accountability Report released in November also shows the agency achieved the highest-ever monetary amounts through administrative enforcement, and it received a record number of discrimination charges. The fiscal year ended with 78,136 pending charges, a decrease of 8,202 charges. The agency received 99,947 discrimination charges during the fiscal year and delivered more than \$364.6 million in monetary benefits in workplace discrimination cases.

New union-reporting rule takes effect. The U.S. Department of Labor's (DOL) new rule on reports filed by union officials — the Labor Organization Officer and Employee Report (Form LM-30) — became effective in November. The DOL said the new rule requires union officials to disclose payments and interests that involve actual or likely conflicts between their personal financial interests and their duties to the union. The statement also says the new rule removes requirements to report transactions "that create no actual or likely conflicts of interest." The new rule reverses one published in 2007 that expanded the LM-30.

NLRB sees increase in activity for fiscal year.

The National Labor Relations Board (NLRB) issued 368 decisions in contested cases during fiscal year 2011, according to year-end figures from the agency. The numbers, which include 272 unfair labor practice cases and 96 representation cases, show an increase of 17 percent over the previous year. The number of pending cases at the end of the fiscal year dropped from 236 in the previous year to 209.

Agency releases pension projections. The Pension Benefit Guaranty Corporation (PBGC) has released its long-term exposure report, which shows financial deterioration in some pension plans and increased deficits for the PBGC. The exposure report provides projections on the future status of private pension plans and their effect on the PBGC's financial status. The projection, as of September 30, 2010, in the PBGC's single-employer program was for a deficit of \$24 billion in 2020, an increase from the program's \$21.6 billion deficit on September 30, 2010. For the multiemployer program, the deficit was projected in the same period to reach \$9.4 billion, up from \$1.5 billion. Projections in the report show a nearly 30 percent chance that the PBGC's multiemployer program will run out of money within 20 years. The PBGC performed 5,000 computer simulations on the future of the single-employer program, and none projected the program running out of money in the next 10 years. ❖

WORKPLACE VIOLENCE

Hearsay evidence enough to issue restraining order

by Michael Futterman and Jaime Touchstone

The husband of a terminated employee threatened his wife's former coworkers. The trial court granted the employer's request for restraining orders against the husband. On appeal, the husband argued that the trial court had improperly considered hearsay evidence in issuing the restraining orders.

The California Court of Appeal affirmed the orders, finding that under the workplace harassment statute, courts can and should consider all relevant evidence, including hearsay, when reviewing applications for restraining orders aimed at preventing workplace violence.

Husband reacts violently to wife's termination

On April 7, 2010, Kaiser Foundation Hospitals terminated Diane Younge-Barnes. Her husband, Jeff Wilson, then called Marites Arendon, the manager on duty, and stated in an irate manner: "If something happened to my wife who just stepped out of the hospital right now, you are going to pay for this." Wilson sounded "very, very upset," and his telephone call "alarmed" Arendon.

On May 25 and 28, Younge-Barnes and Wilson came to Kaiser to visit with Younge-Barnes' daughter, who had just given birth. Both times, a Kaiser employee reminded Younge-Barnes that she couldn't be in the nurses' area.

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In response, Wilson yelled that he was going to "put [her] and Marites down" and said he was going to "flip his lid" and "do something that he would regret." On June 26, the police detained Wilson for making

threats that he was going to "kill someone," and the next day, Younge-Barnes told a therapist he had threatened to shoot Kaiser employee Arlene Gibson.

On July 2, Kaiser applied for restraining orders prohibiting Wilson from committing acts of violence or making threats of violence against Arendon and Gibson. In support of its applications, the hospital submitted declarations by Arendon and Gibson recounting Wilson's threats. It wasn't clear from the declarations if either Arendon or Gibson had personally witnessed any of the alleged threatening behavior.

At the hearing in the trial court, Arendon and Gibson both testified about the information contained in their declarations. Wilson's attorney asked the judge to question both women about whether they had personal knowledge of Wilson's violent behavior or had just heard about it from others.

The court asked the women what they "saw" Wilson do. Arendon didn't "see" him make threats at the Kaiser nurses' station, but a manager who was present had told her about the incident. Gibson testified that Wilson didn't say or do anything to her directly, but a police officer had informed her that he had threatened her life. During the testimony, Wilson's attorney repeatedly objected that neither woman personally witnessed the incidents about which she was testifying, and therefore the testimony should be disregarded as inadmissible hearsay.

Over Wilson's objections, the court found "clear and convincing evidence of a threat . . . [and] threats of physical violence against Kaiser employees" and entered a restraining order requiring that he stay away from and have no further contact with the hospital. The court issued additional orders barring him from engaging in further violence or threats of violence. Wilson appealed, and the court of appeal affirmed the decision.

Judges may consider all relevant evidence

An employer may seek a temporary restraining order and an injunction on behalf of an employee who

has been threatened with or has suffered workplace violence. The employer's application must be supported by reasonable proof that an employee has suffered unlawful violence or a credible threat of violence and that the violence or threat of violence could cause great or irreparable harm to the employee. When deciding the matter, the judge should consider all relevant evidence and may make her own independent inquiry.

Wilson contended that the usual rules of evidence apply to hearings on applications for restraining orders to prevent violence. Specifically, he argued that the judge shouldn't have considered the majority of Arendon's and Gibson's testimony because the women didn't have personal knowledge of the majority of the facts about which they testified. He argued that only one instance of threatened violence — his April 7, 2010, threat to Arendon over the telephone — should have been considered and that threat alone was insufficient to warrant issuance of restraining orders.

The court of appeal held otherwise. Temporary restraining order hearings are procedurally truncated, expedited, and intended to provide quick relief to victims of workplace harassment. The evidence is heard by a judge, not a jury. Judges are particularly aware of the potential unreliability of certain testimony, including hearsay, and are likely to keep that in mind when weighing the evidence.

Given the gravity of the harm that can arise from workplace violence, the California Legislature authorized trial courts to consider all relevant evidence when deciding whether to issue a restraining order. In effect, the potential for serious harm justifies relaxation of traditional standards of evidence.

In this case, it was clear to the court of appeal that Wilson made a credible threat of violence against Kaiser's employees and a restraining order would help protect them from the possibility of great harm. *Kaiser Foundation Hospitals v. Wilson* (California Court of Appeal, Fourth Appellate District, 12/5/11).

Bottom line

You must treat allegations of violent threats by employees or directed at employees with the utmost seriousness. The legislature has recognized the potential dangers inherent in these situations and has given the courts wide latitude in evaluating evidence presented in support of applications for restraining orders to protect employees from threatened workplace violence. You should look to both the police and the courts to help prevent potential workplace tragedies.

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