# Employment Law Update




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With more of the nation's employees within our borders than any other state, California employment law is constantly changing. We asked four top lawyers to take us through the recent cases. Joining us are Leslie L. Abbott of Paul Hastings LLP, Patricia K. Gillette of Heller Ehrman LLP, Theodora R. Lee of Littler Mendelson P.C., and Karen E. Wentzel of Dorsey & Whitney LLP. The session was moderated by freelance legal affairs writer Susan Kostal. Transcription services by Cherie L. Lubash for Jan Brown & Associates.

**MODERATOR:** The state Supreme Court raised the bar recently when it comes to retaliation cases. Theodora, what does *Yanowitz v. L'Oreal* mean for employers?

**LEE:** This is a significant case for employers in that it expands whistle-blower protection to those who do not actually blow the whistle. Let me briefly discuss the factual background. Ms. Yanowitz was a regional sales manager at L'Oreal. She alleged that she was repeatedly ordered to fire a dark-skinned, female sales associate who was not sufficiently attractive according to her male superior's standards. Ms. Yanowitz refused, saying she did not receive any justification for the firing. After she refused to fire the female sales associate, her performance was criticized, her expense reports audited, and she was reprimanded in public. She ultimately took a stress leave and filed the lawsuit. During litigation, Ms. Yanowitz for the first time asserted that the request to fire the female sales associate was discriminatory because no one had asked her to fire an

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>
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unattractive male sales associate.

This case is significant in several respects. First, an employee can for the first time silently oppose discrimination and sue for retaliation. Second, the court defined an adverse employment action. It said that an adverse employment action exists where the totality of the conduct materially affects the employee's terms and conditions of employment. Finally, the court applied the continuing violation doctrine, meaning that employees can now bring a retaliation claim based on conduct that occurred years earlier, as long as the employee alleges a pattern of retaliatory conduct.

**GILLETTE:** *Yanowitz* is a huge disappointment. Employers were looking for clarification by the Supreme Court. Instead, I think, what we have gotten is an abdication of responsibility for making a decision; putting decisions that could be made as a matter of law into the hands of the jury as a "totality of circumstances" test.

**LEE:** Further, while the court did not say it, the decision creates the possibility of a claim of appearance-based discrimination. When I look at the Fair Employment & Housing Act, I do not see physical attractiveness as a protected classification.

**WENTZEL:** The question is whether physical attractiveness is a stand-in for sex discrimination, or age discrimination, or disability discrimination. Though couched in terms of physical attractiveness, it could be a pretext for one of those protected categories.

**ABBOTT:** The court required the employee to show that she had a reasonable good faith belief that the employer's conduct was discriminatory, even if it did not ultimately violate the FEHA. The employee supported her belief that the supervisor treated women differently from men with evidence that she had never been requested to terminate a man based on his appearance.

**GILLETTE:** What scares me is that the court seems to be allowing employees to "telepath" their feelings about the actions of their employers, and bill that as "protected activity" sufficient to state a claim of retaliation.

**ABBOTT:** What also troubled the court was that the sales manager asked the supervisor for justification for the termination order, which the supervisor refused to provide. Further, after litigation started, L'Oreal never established that it had a neutral appearance policy or a legitimate, good faith business justification for the termination.

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**Leslie L. Abbott**
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**GILLETTE:** Do you think that would have worked?

**ABBOTT:** I'm not going to rule it out; the court in footnote six expressly stated that such evidence could have made a difference.

**LEE:** In finding that Ms. Yanowitz protested discrimination, the court focused on the fact that she had repeatedly requested adequate justification for the firing. That put the employer on notice that she was protesting discrimination. In my humble opinion, adequate justification could be we should not fire this woman because she is one of our top sales people. It does not necessarily mean it is sex discrimination. I think the court's opinion went too far. Simply asking for adequate justification does not place the employer on notice that an employee is protesting some form of discrimination. Yet that's what the court seemed to have ruled here.

**WENTZEL:** I agree that this makes life more difficult for employers. But because there's no way to anticipate every fact pattern and make a policy to cover it, the best thing employers can do is train their managers. Employers need to make sure their complaint

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procedures are in place, and make sure that their managers can articulate a good, justifiable reason for their actions.

**LEE:** It is almost a shifting of the burden. An employee no longer has to prove retaliation; the employer has to prove a lack of retaliation.

**WENTZEL:** It's important to note that we are still in the summary judgment stage. And the court not only found there were questions of fact regarding whether the employer had articulated a good faith reason for its action, but it also found there was a question of fact whether a series of fairly subtle acts taken against her by the employer constituted an adverse employment action. Over the course of more than a year following her refusal to terminate the sales associate, her immediate supervisor solicited negative criticism from her subordinates, gave her negative performance reviews, criticized her publicly and limited her authority. The court said this series of events could materially affect the terms and conditions of her employment, and then also applied the continuing violation doctrine to her retaliation claim.

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**MODERATOR:** How do juries react to comments such as the L'Oreal supervisor made, "Hire somebody hot?"

**WENTZEL:** That's part of the problem with this case – bad facts make bad law. The comments by the boss in this case were really quite egregious. As you said, "Find me somebody hot. Get me a young sexy one like that one over there." The jury is not going to like that, and I think the court believed the facts in this case were so bad it deserved to go to the jury. And it's ripe for punitive damages.

**GILLETTE:** I think the challenge in retaliation cases is keeping the jury focused on what they are supposed to be deciding. It is so easy for them to get confused. So jurors obsess over what the manager said, and forget to separate that from the legal definition of retaliation. Of course, that is our job as lawyers – to separate those two things out. But I agree with Karen, it's hard to do.

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**MODERATOR:** What are these cases worth?

**LEE:** Seven figures, easily. Juries get upset if they feel an employer is retaliating against someone for protesting discrimination or harassment. There is a general feeling that an employee should not be punished for such conduct.

**WENTZEL:** It's a role of the dice to take these to trial.

**GILLETTE:** We have been successful in getting summary judgment in sexual harassment cases where we have retaliation claims.

**LEE:** To avoid such retaliation claims, employers need well-publicized policies with a complaint procedure providing multiple avenues for employees to raise concerns. Moreover, there must be heightened screening of those concerns. Additionally, employers should avoid any kind of physical attractiveness standards.

**ABBOTT:** Employers also need to be vigilant about training supervisors, and making sure employees have an opportunity to respond to performance criticisms.

**GILLETTE:** One of the most important elements of any termination is ensuring that an investigation precedes the termination. So many employers want to skip that step. I always say to my clients, "You know, they're just as fired tomorrow as they are today, so why not just wait a day and make sure we have all our ducks in a row."

**MODERATOR:** Let's move out of the frying pan and into the fire of *Miller v. Department of Corrections.*

**WENTZEL:** Here's a set of facts that were much more egregious than what went on in *Yanowitz.* The case involved a prison setting where the chief deputy warden was having blatant, open affairs with at least three different subordinates. These women made it known that because of their affairs they were getting special treatment. They were repeatedly promoted over others even though they were less qualified. There were, predictably, some jealous scenes. You look at it and you can't quite believe that this could possibly have been going on. The Court of Appeals opinion said, basically, "We're going to just follow the earlier case law that says if the boss has a paramour it disadvantages both males and females equally, so there's no discrimination." The Supreme Court got a hold of this and said, "Wait a minute, not quite." It affirmed the idea that if there is an isolated incident of favoritism toward a female because of a consensual affair that alone may not form the basis for a sexual harassment claim. But when the affairs and sexual favoritism become so widespread that the message to females is that the only way to get ahead is to sleep with the boss, at that point it can form a basis for sexual harassment.

**LEE:** The problem for employers will be how to determine whether the sexual favoritism is isolated or widespread. Is it widespread because those involved in the affairs were carrying on publicly in the office? Is it widespread because these people were fighting amongst themselves over this man?

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**GILLETTE:** I've got to break ranks here because I thought the decision was correct in certain aspects. The fact that men weren't being asked to sleep with the warden does not mean it is not sexual harassment or some form of discrimination. I have always wondered about the viability of a rule that says if you show favoritism to a female employee because she is female or because she is your paramour that's not sufficient to constitute sexual harassment.

**WENTZEL:** The message to all of the women was if you want to get ahead, the only way to do it is to sleep with the boss. That wasn't a message that was given to the men. And again, this was pervasive and incredibly indiscreet.

**LEE:** Let me play devil's advocate. What should an employer do to prevent liability where there is a consensual affair in the workplace? California Labor Code section 96(k) prohibits an employer from discrimination against an employee for lawful off-duty conduct.

**GILLETTE:** I think there is a limit to how far a manager can go in bringing his personal life into the workplace. This man promoted people that should perhaps not have been promoted, fondled employees in front of other women, and basically said that if you had a relationship with him, you could get some kind of favorable treatment. That is unacceptable behavior for a manager. And whoever decided to bring this case to the Supreme Court, in my opinion, must not have been thinking about the "bad facts make bad law" rule.

**ABBOTT:** There will be cases where it's difficult to draw the line, but this was not one of them.

**LEE:** My concern is not the clear case where a manager is carrying on an affair outside of the workplace with a subordinate and is giving preferential treatment in the workplace. I am most concerned about the consensual affairs that are maintained strictly outside of the workplace. To address some of the issues that arise, Littler has developed the "Love Contract." When people are having consensual affairs in the workplace, they sign an agreement confirming that the affair is indeed

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consensual. Further, if one of the parties is reporting to the other, one will move to another department. The parties also affirm that they understand and will abide by the company's harassment policies.

**MODERATOR:** Leslie, if you get a call from a client who says, "I have just discovered the most horrendous situation in my division in Fresno," and the facts look somewhat similar, what is the first thing that you would advise them to do?

**ABBOTT:** The first thing is to promptly start conducting an investigation. Hopefully, this employer will already have a policy prohibiting sexual harassment, and will already have conducted training of its managers and supervisors on sexual harassment. If the investigation reveals a problem, the employer must take remedial action, including termination, warnings, or whatever is warranted under the circumstances.

**LEE:** I would probably recommend that the people involved be placed on some kind of administrative leave, to stop the conduct immediately. Then, we would commence the investigation. Under these circumstances, employers must be extremely careful not to do anything negative to the alleged victims.

**GILLETTE:** There are two elements here that are quite important. One is whether these claims of hostile work environment based on paramour relationships may create issues of fact that have to go the jury—creating yet one more circumstance where employers are not going to get summary judgment. The court seems to have adopted the U.S. Supreme Court's totality of the circumstances solution, which suggests that these cases have to go to the jury. The other important issue that arises from this case is whether office gossip should be a sufficient basis for a claim. A lot of times employees think that there's something going on between two people, but there's no truth to their beliefs. The rumor mill should not be sufficient to raise an issue of fact. There should have to be a showing of some sort of a consensual relationship that resulted in some sort of actual favoritism to the employee.

**LEE:** Someone in Human Resources needs to make sure that there is a legitimate business reason why this particular employee got a promotion, and why another particular employee did not. That's the only way that employers may still be able to win summary adjudication in a case where there is alleged favoritism. As a result, Human Resources should to be involved in all promotion and transfer decisions. Indeed, HR should be involved in any kind of employment decision that could be viewed by an employee as favoritism.

**GILLETTE:** And now, employees don't have to claim they are subject to "retaliation." They can merely say they think something is "unfair." I guess the court is saying that "unfair" may be code for discrimination, and somehow the employer is supposed to intuit that. So we have this same theme running through the two cases, suggesting that employees are not going to have to articulate their belief that they think something is unlawful. Instead, they can just think it and state a claim for retaliation.

**WENTZEL:** In that same vein, the court said whether the employee had a subjective good faith belief that it was discriminatory is also usually going to be a question of credibility for the jury. That makes it much more difficult to get summary judgment.

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**ABBOTT:** Based on the employee's deposition testimony that she was too fearful to make a complaint, the court was willing to overlook the fact that the employee had not complained formally. In fact, when the employ-

ee had an opportunity to talk with a supervisor, she only said words to the effect of "the institution is out of control."

**MODERATOR:** So the employer has the responsibility to ferret this out?

**GILLETTE:** Right. The language is loose about what exactly the employee has to say to trigger the obligation of the employer.

**ABBOTT:** And that places the obligation on the employer to make that determination.

**MODERATOR:** Apparently, we need to move into the wage and hour context to find recent cases favorable to employers.

**ABBOTT:** Wage and hour litigation continues in California with new theories every day. Two recent cases have closed the door a little bit. One is *Reynolds v. Bement*, in which the California Supreme Court held that individual corporate agents, including officers and directors, cannot be held personally liable in actions brought by employees seeking unpaid wages under the California Labor Code, Sections 510 and 1194. The court said the only exceptions are where there is a statutory directive allowing personal liability or evidence establishing that the individual is the corporation's alter ego. The second case is *Conley v. Pacific Gas and Electric,* which is a Court of Appeals case. Here, the court affirmed a denial of class certification as to exempt employees who claimed that the employer's practice of taking deductions for partial-day absences from their banks of accrued vacation violated the salary basis requirement and thus destroyed their exempt status. The court followed the federal rule, which allows such deductions so long as an employee has accrued vacation time available and continues to receive a predetermined amount of salary each workweek.

**LEE:** *Reynolds* is great news. However, I want to caution officers, directors and managers because these individuals are not home free. There are other labor code provisions that do provide for individual liability. The decision only applied to claims brought under Labor Codes Sections 510 and 1194. So, it's a very narrow decision.

**WENTZEL:** Managers at companies that are in the zone of insolvency and continue to go ahead with their operations knowing that they don't have money to pay their workers may still also have liability under federal law.

**MODERATOR:** And how do you view *Conley*?

**LEE:** The Court of Appeal, in adopting the federal standard in *Conley*, gives clear guidance. It is significant that these partial day absences can be deducted from vacation leave, and if a person has used their vacation leave, the employer cannot deduct from their pay. Employers no longer have to worry whether they are violating California wage and hour laws if they comply with federal law by making deductions from an employee's vacation bank if the employee has partial day absences. The remaining question that I have is whether a one or two-hour absence triggers a deduction. I interpret the decision as authorizing a deduction for a half-day absence. We do not know whether a deduction would be authorized for a smaller increment of time.

**ABBOTT:** This court was only faced with the issue of half-day absences, but did not foreclose the argument that lesser increments of time can be deducted from accrued vacation banks. I think the rationale for the court's decision would apply to smaller amounts of time just as easily.

**GILLETTE:** Yes, because you have to plug that big, big hole where someone works for an hour of a day and says, "Oh, but you can't deduct from my pay." Hopefully this case will be interpreted more expansively than it is written. Employers need some relief in this area.

**ABBOTT:** Before *Conley*, the only guidance on partial-day absence deductions under California law was from the DLSE. Just before the *Conley* case was decided, the new California Labor Commissioner, Donna Dell, issued an internal memorandum in May 2005, which withdrew the DLSE's prior opinion letters on the subject. So we have the state's wage and hour enforcement agency essentially coming to the same conclusion as the *Conley* court.

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