A Timely Analysis of Legal Developments

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December 2011

California Appellate Court Rules that "All Relevant Evidence" Must Be Considered in Workplace Violence Proceedings, Including Otherwise Inadmissible Hearsay Evidence

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In a ground-breaking decision that will make it easier for employers to obtain restraining orders to protect their employees from violence in the workplace, a California appellate court has ruled that "all relevant evidence" must be considered in such proceedings – even otherwise inadmissible hearsay. *Kaiser Foundation Hospitals v. Wilson*, Nos. D058491 & D058492 (Fourth Dist., Div. One Dec. 5, 2011).

California Code of Civil Procedure Section 527.8 Permits Employers to Obtain Court Orders to Protect Employees Against Workplace Violence

In 1994, California enacted the Workplace Violence Safety Act, which permits employers to obtain injunctions to protect their employees against violence in the workplace. In order to obtain the injunction, the employer must present evidence that an "employee has suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace." The injunction may be obtained on behalf of the specific employee being targeted, as well as "any number of other employees at the workplace, and, if appropriate, other employees at other workplaces of the employer."

Upon filing the petition for an injunction, the employer may obtain a temporary restraining order (TRO) that remains in place until the hearing on the injunction. To do so, the employer must file "a declaration that, to the satisfaction of the court, shows reasonable proof that an employee has suffered unlawful violence or a credible threat of violence by the respondent, and that great or irreparable harm would result to an employee."

In practice, employees who are victims of violence or threats of violence often are reluctant to provide a declaration out of fear that it will provoke additional violence against them. As a result, employers have been caught in a Catch-22 in wanting to take action to protect the workplace while not being able to obtain declarations from those with the most direct knowledge of the threats to the workplace. In those situations, employers have presented declarations from Human Resources or management representatives with information provided to them, and inevitably have faced objections to such declarations as constituting inadmissible hearsay.

The appellate court's decision in *Kaiser* now has removed this entire dynamic from workplace violence proceedings, finding that the trial court must consider all relevant evidence – including hearsay evidence – in determining whether to issue a workplace violence injunction.

The *Kaiser* Decision Makes It Easier for Employers to Obtain Injunctions Against Workplace Violence

In *Kaiser*, the employer sought to obtain a workplace violence injunction after the husband of a terminated employee was heard making threats against managers involved in the termination. The evidence presented in support of the petition consisted of declarations and oral testimony from two of the employees who were the subject of the threats.

At the hearing, it became evident that most of the information contained in the declarations and about which the employees testified was learned from third-parties. Only one threat had been made directly to one of the individuals who testified, and consisted of a heated telephone call from the husband on the day the employee was terminated in which he said "you'll pay for this."

The rest of the evidence consisted of information received by both the witnesses from others that the husband had engaged in threatening behavior at the workplace on two separate occasions, saying he was "going to put [them] down," was "going to flip his lid" and "do something he would regret;" and information one of the witnesses received from the police that the terminated employee had reported that her husband said he was going to shoot the witness.

In response to the husband's objections to the evidence as hearsay, the trial court inquired as to whether "we have any direct evidence of this." Kaiser conceded that the only direct evidence concerned the telephone call the husband made to one of the witnesses in which he said "you'll pay for this." The trial court went on to issue the injunction, however, and the husband appealed.

On appeal, the husband argued that the trial court erred in considering the hearsay evidence, and that the only admissible evidence – the one comment "you'll pay for this" – was insufficient to support a finding that he made a credible threat of violence against Kaiser's employees.

The appellate court disagreed. Noting that no case previously had addressed "the extent to which the rules of evidence do or do not apply" to workplace violence proceedings, the court began with the language of the statute itself. There it found a clear mandate from the legislature that "the trial court 'shall receive any testimony that is relevant' at a hearing on a petition filed pursuant to that statute." The court found further support for its conclusion that hearsay evidence should be considered in workplace violence proceedings from the unique context of such proceedings, "which are procedurally truncated, expedited, and intended to provide quick relief to victims of civil harassment."

As a result, the court in *Kaiser* concluded that the trial court must receive all relevant evidence in determining whether to issue a workplace violence injunction, including hearsay evidence. Because the hearsay rule was the only evidentiary rule at issue, it is unclear whether the *Kaiser* decision will be interpreted to require consideration of any type of relevant but otherwise inadmissible evidence (such as the results of a polygraph test, or evidence of a person's character or trait offered to prove conduct on a specific occasion).

Practical Impact for Employers

Because employers now may rely on hearsay evidence in seeking workplace violence injunctions, they will not be foreclosed from taking action in situations where the employees being targeted are too fearful to come forward as witnesses. In those cases, employers may present all relevant evidence through the testimony of a representative from Human Resources or management, and obtain the protection of the court without putting too much of the spotlight on the targeted employees.

It also bears noting that, just as employers now may rely on hearsay evidence in these proceedings, so may those individuals who are being accused of violence or a credible threat of violence. Employers should be prepared to rebut any such evidence on the merits because it no longer will be excluded from consideration.

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