



Termination of an Employee for Lawful Off Duty Conduct Is it Legal?

California Labor Code section 96, subdivision (k), which went into effect on January 1, 2000, provides for the assignment of rights by an employee to the Labor Commissioner for "[c]laims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises." This Labor Code provision has rarely been interpreted by the courts. However, it was widely believed that this provision would give employees a public policy cause of action against employers for adverse employment actions arising out of lawful off-duty conduct. In the case of Barbee v. Household Automotive Finance Corporation, decided November 20, 2003, the California Court of Appeal, Fourth Appellate District, ruled that the termination of an employee supervisor for dating a subordinate did not violate Labor Code section 96, subdivision (k).

In Barbee, the supervisor was a national sales manager responsible for leading the company's entire sales force. The supervisor began dating one of his subordinates. The company had a conflict of interest policy that required supervisors to bring to the attention of his or her manager any consensual relationships between the supervisor and a subordinate employee. Additionally, the supervisor was warned that inter-company dating was a bad idea. The supervisor never brought the relationship to the attention of management. The supervisor had been told that he would have to end the relationship or either he or his subordinate could choose to resign. The supervisor was terminated for failing to end the relationship. He subsequently filed a claim alleging that the company violated the public policy expressed in Labor Code 96, section (k). The Appellate Court held that Labor Code 96, subdivision (k) does not, on its face, preclude an employer from taking any adverse employment action against an employee, but rather simply provides the Labor Commissioner with the authority to take assignment of preexisting claims from the employee.

Despite what appears to be a very favorable ruling for employers, employers should still be very cautious about taking adverse employment actions based on their employees' off-duty activities. In Barbee, the Court noted in a footnote that neither party relied upon Labor Code section 98.6, which was amended in 2001, and provides in relevant part that: "(a) No person shall discharge an employee or in any manner discriminate against any employee or applicant for employment because the employee or applicant for employment engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of section 96"

Consequently, this case has failed to clarify the uncertainty surrounding an employer's ability to lawfully terminate an employee for off-duty conduct that violates company policy.

Subsequent lawsuits may provide greater guidance to California employers. In the meantime, it would be prudent for employers to consult with their labor counsel in these circumstances.

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