▼ Employers Counsel Network (ECN) Member Attorneys

ALASKA

- **Elizabeth (Liz) Hodes,** Davis Wright Tremaine LLP, Anchorage
- **Kristal Leonard,** Davis Wright Tremaine LLP, Anchorage

ARIZONA

- **Jodi R. Bohr,** Tiffany & Bosco, P.A., Phoenix

HAWAII

- **David F.E. Banks,** Cades Schutte LLP, Honolulu
- **Paul M. Saito,** Cades Schutte LLP, Honolulu
- **Amanda M. Jones,** Cades Schutte LLP, Honolulu

NEVADA

- **Shannon S. Pierce,** Fennemore Craig, P.C., Las Vegas and Reno

OREGON

- **Calvin L. Keith,** Perkins Coie LLP, Portland
- **Julia E. Markley,** Perkins Coie LLP, Portland

WASHINGTON

- **Chelsea Dwyer Petersen,** Perkins Coie LLP, Seattle
- **Emily A. Bushaw,** Perkins Coie LLP, Seattle

In *Lyle,* the court's holding largely hinged on the following: (1) most of the sexually coarse and vulgar language wasn't aimed at the assistant or other women in the workplace; (2) the production was a creative workplace focused on generating scripts for an adult comedy show with sexual themes; and (3) the comments weren't severe enough or sufficiently pervasive to create a hostile work environment or an abusive environment.

The two cases have several strikingly similar facts. For one, in both cases, the complaining employees showed other employees made sexual gestures in front of them. Additionally, in both cases, the conduct and offensive language were not specifically directed at the complaining employees. Likewise, in both cases, sexually coarse and vulgar language was used in front of multiple genders. Finally, neither case involved claims of unwelcome sexual advances.

Most notably, even though *Lyle* was decided by a California state court and *Sharp* was decided by the 9th Circuit, both courts relied on case law decided under Title VII, including when *Lyle* interpreted California's Fair Employment and Housing Act (FEHA) and its prohibitions against sexual harassment.

Two different work environments

So why two different outcomes? First, in reaching its ruling, the *Lyle* court highlighted that the "creative workplace" at issue in *Lyle* was the *Friends'* set—one focused on generating scripts for an adult-oriented comedy show featuring sexual themes. This workplace was drastically different from the one in *Sharp*—a warehouse subjecting employees to warehouse-wide graphic and misogynistic music, which served no employment-related purpose.

Also, the *Lyle* court found that the alleged crude comments were made once or twice and weren't directed at the complaining employee, and the complaining employee classified them as "juvenile" and "annoying" rather than "extreme" or "destructive."

In contrast, the *Sharp* court found the music was persistent and routinely played loud enough to be inescapable, was classified by employees as sexually graphic and violently misogynistic, and continued despite almost daily complaints by employees. *Sharp v. S&S Activewear, L.L.C.*, 69 F.4th 974 (9th Cir., 2023).

Bottom line

Ultimately, the *Sharp* decision sends a clear message to employers that before playing or allowing employees to play music (or express themselves through other mediums) in the workplace, you must determine whether such content is appropriate or could be classified as hostile, especially if the music serves no employment-related purpose.

As an added precaution, you should consider implementing a "music policy" with clear guidance on the types of lyrics or other entertainment prohibited in the workplace. This is particularly true given that the *Sharp* decision didn't "ascribe misogyny to any particular music genre" and many popular songs today contain explicit lyrics. Employers failing to take these precautions risk creating a hostile work environment and being held liable under Title VII.

Juliet S. Burgess is the founding partner and Taylor M. McGrew is an associate at The Burgess Law Group in Phoenix, Arizona. They represent employers of varying sizes and industries with respect to labor and employment law, HR matters, commercial litigation, trainings, and workplace investigations. For more information, please visit www.theburgesslawgroup.com. ■

PAID SICK TIME

Court ruling may necessitate overhaul of paid sick time policies and practices

AK	**AZ**	HI	NV	OR	WA

by Jodi R. Bohr, Tiffany & Bosco, P.A.

Last month, I alerted readers to an Arizona Court of Appeals case in which the court determined that various deviations from policies allowed an employee to proceed with his retaliation claim against his former employer using the Arizona Fair Wages and Healthy Families Act.

A refresher

According to the former employer, the company paid more sick time to the employee than required by law or company policy. The employer argued that because the former employee didn't have paid sick time (PST) available at the time of his absences, the company's actions couldn't be in retaliation for his use of PST.

The court disagreed, citing the fact that the company had paid the employee for PST in the past 90 days (even though that payment was more than what was required by law or policy). It also cited that this payment of PST within the previous 90 days created a presumption that any adverse employment action was retaliatory. This ruling should have employers on high alert to review their policies and implement best practices to reduce the potential for liability for retaliation.

Am I required to have a PST policy?

The Act doesn't require employers to implement a specific policy for compliance, but it does require employers to notify employees of their rights by posting the Earned Paid Sick Time poster in a conspicuous place, such as a break room.

An employer that does implement a PST policy should ensure that the policy complies with the Act and that the policy is implemented as written. Outside of the FAQs on its website, the Industrial Commission of Arizona (ICA), the agency responsible for enforcing the Act, has provided little guidance since 2017 on how it will interpret the Act with respect to policy language.

One thing is clear: If the ICA determines that the policy violates the Act in any respect, it will assess a penalty against the employer for the technical violation.

What should my PST policy include?

The PST policy should provide comprehensive guidance with respect to accrual, usage, and payment. At the very least, the PST policy should:

- Explain the amount of earned PST the employee will receive and whether the PST will be granted at once or accrued over time.
- State whether the company uses a calendar or an anniversary year when calculating accrual and PST use.
- Provide employees with the permissible uses of PST.
- Explain how to request PST.
- Note whether unused PST is paid out upon separation.
- Contain the enforcement and contact information for the ICA.

Once this PST policy is implemented, PST should be earned and paid out consistently and in accordance with the policy. Deviations from the policy, even if paying the employee more PST than required by the Act, could result in potential liability later for retaliation, as demonstrated by the recent ruling.

Can I combine vacation and sick pay into one PTO policy?

Based on the recent case, employers that implement a combined paid-time-off (PTO) policy may do so at their own peril. The Act creates a rebuttable presumption of retaliation for any adverse employment action taken against any employee who has used PST in the past 90 days.

By combining PST and vacation into one PTO bank, employers may have a difficult time demonstrating that the PTO taken by the employee in the past 90 days wasn't protected PST and will likely have to be prepared to rebut this presumption under the heightened standard of clear and convincing evidence. Separating PTO into distinct vacation and PST banks reduces the chances that PST will have been used in the previous 90 days.

Bottom line

The implications of this appeals court decision are so far-reaching that additional guidance is necessary in determining the proper course of action for each employer. There's no one-size-fits-all policy for PST because different employers and different industries may find certain benefits and processes work better than others.

In addition to reviewing policies and practices, employers should confirm with their payroll providers that the pay stubs are properly reflecting the information required by the Act. The pay stub must properly reflect the amount of PST earned/accrued and used and the dollar value paid out based on the year (calendar/anniversary) selected by the company.

Jodi R. Bohr is a shareholder with Tiffany & Bosco, P.A., and a contributor to the Arizona Employment Law Letter. She practices employment and labor law, with an emphasis on counseling employers on HR matters, litigation, and workplace investigations. She may be reached at jrb@tblaw.com or 602-255-6082. ■

RETALIATION

Alleged whistleblower must only prove protected activity was 'contributing factor'

AK | AZ | HI | NV | OR | WA

by Christopher M. Toner, Axley Attorneys

On February 8, 2024, the Supreme Court of the United States (SCOTUS) found that former employees who filed a federal whistleblower retaliation claim under the Sarbanes-Oxley Act