ANDERSON, MCPHARLIN & CONNERS LLP
Proactive - Interactive - Accountable
Committed to Keeping You Informed Since 1947

WINTER 2008

Labor & Employment Briefing

A NEWSLETTER ON EMPLOYMENT, LABOR AND BENEFITS LAW FOR CLIENTS AND FRIENDS OF ANDERSON, MCPHARLIN & CONNERS LLP

Employer Must Turn Over Employee and Former Employee Information To Plaintiff's Attorney To Troll For More Class Members

by Colleen A. Déziel

The Court of Appeals has held that when a plaintiff is attempting to obtain class certification, he or she is entitled to the identity and contact information for potential class members despite an argument based on privacy rights.

In Lee v. Dynamex, an employee alleged that the employer's drivers were improperly classified as independent contractors. Lee filed a putative class action on his own behalf and on behalf of similarly situated drivers. He then sought the identity of, and contact information for, potential class members. The employer refused to provide the information on privacy grounds. The trial court agreed with the employer and refused to grant the plaintiff's motion to compel. Since the plaintiff did not have this information, he was unable to establish all of the necessary elements for class certification.

The plaintiff appealed. The Court of Appeals reversed and explained that the California Constitution protects the individual's ***reasonable*** expectation of privacy against a ***serious*** invasion. The court went on to note that the invasion of privacy is to be evaluated on the extent to which it furthers legitimate and competing interests. Given this, and given the California Supreme Court's recent decision in Pioneer Electronics (USA) v. Superior Court (2007) 40 Cal.4th 360, wherein the Supreme Court held that the plaintiff's interest in obtaining contact information outweighed the modest privacy invasion, the appellate court reversed the trial court's order denying the plaintiff's motion to compel.

What does this mean for the employer? No longer can an employer rely on privacy rights to avoid providing a plaintiff attorney with contact information for other potential clients. Plaintiffs and their attorneys will now have an easier time assembling classes of plaintiffs.

Anderson, McPharlin & Conners LLP
Employment Practices Group

Eric A. Schneider, Esq.
Managing Partner/Co-Chair
213.236.1643
eas@amclaw.com

Colleen A. Déziel, Esq.
Partner/Editor/Co-Chair
213.236.1635
cad@amclaw.com

Glen H. Mertens, Esq.
Senior Counsel
213.236.1696
ghm@amclaw.com

Kristin M. Kubec, Esq.
Senior Associate
213.236.1612
kmk@amclaw.com

Michelle T. Harrington, Esq.
Senior Associate
213.236.1681
mth@amclaw.com

Vanessa S. Davila, Esq.
Senior Associate
909.477.4500
vsd@amclaw.com

Brandon N. McMurtray, Esq.
Associate
213.236.1610
bnm@amclaw.com

Inability To Engage In Sexual Relations Found To Be A Substantial Limitation Of A Major Life Activity

by Kristin M. Kubec

Adams v. Condoleezza Rice, Secretary of State CADC 2008 2008 WL 2777903

Cancer affecting an employees sex life seen as substantial limitation of a major life activity

In the matter of Adams, Kathy Adams was a candidate for the United States Foreign Service. As such, she had to pass rigorous entrance exams and receive a medical clearance to serve. Ms. Adams passed both, and received a Class 1 unlimited medical clearance which would enable her to be assigned worldwide. Shortly thereafter, she learned that she had been diagnosed with stage one breast cancer. She was treated successfully, and her application continued to be processed.

Ms. Adams was cleared for a Class 1 certification by the State Department, which cleared her to work "worldwide" for the Foreign Service. After receiving her classification, she told the State Department about her cancer. They in turn asked her to provide reports from her physicians concerning her fitness and the type of future care that might be necessary. Her doctors stated that she was required to take one pill per day, have an annual mammogram, and have a clinical breast exam every six months for the next five years for follow up care.

Upon receiving this information, the State Department determined that Ms. Adams was not fit for a Class 1 certification. Instead, the State Department gave her a Class 5 certification, which would allow her to work for the Foreign Service, but not in certain hardship positions overseas. Ms. Adams then filed an Equal Employment Opportunity complaint, claiming discrimination based on physical disability. The State Department filed a motion for summary judgment which the district court granted on the grounds that Ms. Adams was not, in fact, disabled.

The Court of Appeals overturned that decision using a novel approach to do so. The Court of Appeals agreed that Ms. Adams was not disabled when her certification was changed because she was cancer free and by all accounts, "fit as a fiddle." The Court of Appeals further agreed that she was not regarded as being disabled by the State Department, since they did offer her a position, albeit not the worldwide clearance she wanted.

However, the Court of Appeals held that a triable issue of fact did exist as to whether she "had a record" of an impairment. In doing so, it relied upon the argument that Adams did have a "record" of impairment, since her cancer had substantially limited her in the major life activity of engaging in sexual relations. It noted that inquiries concerning whether there was, in fact, a "substantial" limitation on that activity was an individualized inquiry that focused solely on Ms. Adams's own experience. Since the State Department had not challenged her assertion, the court held that the State Department had conceded that her claimed impairment had, in fact, substantially limited a major life activity. In sum, because Ms. Adams had provided sufficient evidence showing she had a record of an impairment that substantially limited her in a major life activity (sexual relations) and because the State Department did not contest any of her evidence in that regard, the appellate court reversed the grant of summary judgment.

What are employers to take from this?: This case seems to really stretch the boundaries of the protections that the Legislature intended to provide by enacting the Rehabilitation Act. However, the lesson that should be taken from this case is to be flexible when dealing with employee or applicant health issues – the State Department in this case seemingly refused to consider the reports provided by Ms. Adams' own physicians who stated categorically that she was fit to serve anywhere. Instead, they adhered to their seemingly artificially rigid guidelines in determining the level of her certification, and found themselves on the wrong side of a lawsuit.

Failure To Demand Arbitration On FEHA Claims Within One Year Bars Action

by Colleen A. Déziel

In Pearson Dental v. Super. Ct., August 25, 2008 DAR 13299, the Court of Appeals held that a one-year limitation period in an arbitration clause within an employment agreement does not unreasonably restrict an employee's ability to vindicate his rights under the Fair Employment and Housing Act.

In this case, the plaintiff began working for Pearson Dental in February 1999. During his employment, he executed a Dispute Resolution Agreement. In addition to requiring that any employment disputes be resolved through binding arbitration, there was a time limitation to bring a demand for arbitration. The time limitation reflected that any employment related claims would be waived unless such claims were submitted to arbitration within one year from the date the dispute arose or from the date the plaintiff first became aware of facts giving rise to the dispute. These arbitrations provisions were also contained within Pearson Dental's Employee Handbook, which the plaintiff, through a signed writing, acknowledged he had received in 2001. On January 31, 2006, the defendant fired the plaintiff.

Instead of filing a demand for arbitration as required, the plaintiff chose to proceed directly with a charge to the Department of Fair Employment and Housing. The plaintiff received a right to sue letter in April of 2006, and thereafter, in October of 2006, the plaintiff filed a complaint in civil court. After engaging in some pleading and discovery, and after one year from the date of termination had expired, the defendant filed a demand for arbitration with the intent of having an arbitrator decide the procedural issue of the plaintiff failing to file his own demand for arbitration within the limitations period.

The court did not find that the employer had waived its right to arbitration by filing an answer and participating in discovery

The trial court granted the demand to compel arbitration, and ultimately, the arbitrator granted the defendant's motion for summary judgment on the statute of limitations issue (i.e., the plaintiff's failure to file a demand for arbitration within one year.) The plaintiff appealed challenging, among other things, the validity of the time limitation contained within the arbitration agreement.

Given the plaintiff did not argue the one year limitation was unconscionable until after the court granted the motion to compel arbitration, that the record indicated the one year period was more than adequate for the plaintiff in this matter to vindicate his FEHA rights had he timely submitted the matter to arbitration (i.e., he retained counsel within two weeks of termination, his counsel had the arbitration agreement within days, and a charge was filed with the DFEH within a few months of termination), and given the plaintiff was on notice at the time of the motion to compel arbitration that the time limitation was an issue, the court held that such a time limitation was reasonable and not unconscionable.

Caution: We note that while the appellate court upheld the arbitrator's decision as outlined above, the appellate court also made it clear that it believed that the arbitrator had misapplied the tolling provision in Civil Code § 1281.12, which essentially reflects that in the face of an arbitration agreement, the commencement of a civil action within the specified limitations period shall toll that limitations period contained within the agreement (i.e., the motion for summary judgment on the issue of statute of limitations should have been denied.) The Court of Appeals would not go against the arbitrator's decision because it held that his decision was insulated from judicial review and was not a proper basis upon which to either deny confirmation of the arbitration award or to vacate the award (i.e., it cannot review the decision for errors of law or fact.)

Another point of interest is that this court did not address the issue of whether or not an employer had waived its right to arbitration based on the fact that it had already engaged in the discovery process and had filed an answer to the complaint without including an affirmative defense pertaining to the arbitration agreement. Instead, while the court acknowledged that the plaintiff raised this argument in his opposition to the motion to compel, it focused more on what the plaintiff's attorney failed to do (i.e., he failed to raise the unconscionability argument in his opposition to the motion to compel.) It did not provide any commentary or guidance on the issue of whether the court should have found such a waiver.

What can the employer take from this? While this case resulted in a victory for the employer, the employer cannot rely on the possibility that a plaintiff's attorney could mess up in his or her prosecution of a matter, and should be mindful of the issues of waiver and unconscionability as it pertains to arbitration agreements.

California Supreme Court to Address Important Meal-And-Rest Break Issues

by Glen H. Mertens

As all California employers should be aware, non-exempt employees are entitled to a meal break of at least one-half hour if they work more than five hours in a workday. Moreover, those non-exempt employees are entitled to a ten-minute paid rest break in the middle of every four-hour block of time they work in a workday. An employer is required to compensate an employee one extra hour's worth of pay for each meal break that is not provided. Similarly, an employee is entitled to an extra hour's pay if that employee is not provided with an appropriate number of rest breaks throughout the course of a workday.

Given the fact that a disgruntled employee or ex-employee may seek to recover these extra wages for missed meal and rest break going back three years, the liabilities associated with these break rules can be considerable.

California employers, in attempting to comply with the rules that obligate them to provide meal and rest breaks, have struggled with the question of what the obligation to "provide" such breaks really means. Does "provide" mean that employers must ensure that such breaks are actually taken, or does the term merely require employers to make such breaks available to the affected workers so that they may be taken (or not taken) at the workers' discretion? Although a handful of cases from the federal courts suggest the employer need only make the required breaks available, the authorities at the state level in years past tended to go in the opposite direction. The inconsistent interpretations of the meal- and rest-break requirements have given rise to an increasing number of legal claims in which employees have alleged that they "missed" their breaks and are, accordingly, entitled to recover the one-hour's wage-penalty referred to above, even though the employer may have done nothing to prevent the workers from taking the breaks that allegedly were missed. Courts have often certified these types of missed-break claims for "class action" treatment, taking the position that the only issue that needs to be decided in these disputes is whether or not the breaks were taken; questions about why each individual employee may not have taken a meal or rest break simply would not be relevant under that interpretation of the break requirements.

In August, 2008, a California Court of Appeals in San Diego issued a very helpful decision that addressed these meal- and rest-break issues head on in the context of a class action lawsuit. In Brinker Restaurant Corp. v. Superior Court, the appellate court ruled that California employers need not ensure that meal and rest breaks actually are taken; rather, an employer's obligation is only to make the necessary breaks available to the affected workers. The court further noted that it was inappropriate to certify this type of missed-break claim as a company-wide class action, because the judge and the jury would almost necessarily have to examine each break that each class member/employee missed to determine if the break was missed as a result of the employee's individual choice or because of some action taken by the employer that made it impossible for the employee to take the break. The appellate court noted that the individualized inquiries into each employee's missed breaks would overwhelm and "predominate" over any "common" questions about the meal and rest breaks that extended throughout the class and, accordingly, held that the case should not proceed as a class action.

Unfortunately, on October 22, 2008, the California Supreme Court decided to review the appellate court's decision in Brinker, which means that the pro-employer rulings issued by the appellate court have effectively been "erased." Courts and the California Division of Labor Standards Enforcement ("DLSE") will no longer consider the Brinker decision in determining whether or not an employer is liable for failing to "provide" meal and/or rest breaks. Indeed, the DLSE immediately issued a special memorandum in which it noted that it would no longer look to the Brinker case for guidance in handling meal- and rest-break claims.

Although the California Supreme Court ultimately may affirm some or all of the appellate court's rulings in Brinker, no one can predict with any certainty what the Court's final interpretation of these break rules will be. What is more certain is that plaintiffs' attorneys will try to have as many of these missed-break claims as possible adjudicated before the Supreme Court issues its decision in Brinker, just so they can try to capitalize on the pre-Brinker authority that was more pro-claimant/employee. The employment community will not be relieved of its obligations to "provide" meal and rest breaks while the Brinker case is under review, and disgruntled employees will still be allowed to bring claims alleging that the required breaks were not "provided" to them.

There has been one promising development since the Supreme Court decided to review the Brinker case. Another appellate court has recently published a separate decision that largely tracks the interpretation of the meal- and rest-break rules that was expressed in the Brinker case. In Brinkley v. Public Storage, Inc., the appellate court held that a California employer is required only to "supply or make available" the required breaks, not to "ensure" that such breaks are actually taken. Where a claimant/employee can produce no evidence that such breaks were actually "denied" to him by the employer, a claim seeking the one-hour's extra pay for the allegedly missed breaks should be dismissed. Brinkley is a pro-employer case, but it may not be on the books long enough to be of real use to companies defending against missed-break claims and lawsuits. The California Supreme Court may well decide to review Brinkley in the same manner as it decided to review Brinker, in which case Brinkley would be "erased" from the books.

Practical Ramifications for Employers—The Supreme Court is unlikely to issue its decision on these meal- and rest-break issues until late 2009. Until the Supreme Court issues a definitive interpretation of an employer's obligation with respect to the provision of rest and meal breaks, employers in California should proceed with caution, erring, to the extent possible, on the side of ensuring that such breaks are actually taken by the relevant employees. Employers are advised to review their daily scheduling procedures to ensure, at a minimum, that staffing levels are such that non-exempt employees truly do have the opportunity to take the required meal and rest breaks throughout the course of the workday. Department supervisors should be directed to manage and monitor daily staffing within the department to ensure that each relevant subordinate employee is, in fact, taking the required number of rest and meal breaks. Written personnel policies should include statements to the effect that employees are entitled to take a ten-minute rest break for every four hours worked and a 30-minute meal break for every five hours worked. Meal breaks should be recorded as part of the daily time records. Rest breaks do not have to be recorded in the same manner, but an employer would be wise to have each non-exempt employee acknowledge that (s)he did take "X rest breaks" for each day worked, the number of breaks noted being dependent on the hours the employees actually worked. [e.g., a full-time employee working eight hours a day would acknowledge that (s)he took two rest breaks for each day worked.]

Intentional Infliction Of Emotional Distress Barred By Workers' Compensation Exclusivity

by Eric A. Schneider

Miklosy v. Regents of the University of California (July 31, 2008) 2008 WL 2923434 involves two former employees suing the University of California in connection with their terminations (one actual and the other constructive) which they claimed arose out of their having reported safety issues concerning nuclear weapons.[1]

The majority of the opinion related to the propriety of their civil action in view of Government Code provisions covering employment claims. Those issues will not be addressed here.

Following the trial court sustaining the defendants' demurrer without leave to amend and affirmation by the Court of Appeals, the California Supreme Court granted review and ultimately affirmed.

The plaintiffs had claimed wrongful termination in violation of public policy pursuant to Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167 wherein the court stated:

> When an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions. (27 Cal.3d 167, at 170.) The high court clarified that a Tameny cause of action must be "carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions." (Gantt v. Sentry Insurance (1992) 1 Cal.4th 1083, 1095.)

The court first dismissed out of hand the claims as against the University itself as being barred by statute. The court thereupon, however, also rejected the claims as against the individual defendants because a Tameny action for wrongful discharge can only be asserted against an employer.

The court next addressed the claim for intentional infliction of emotional distress. The court found that such claims were barred by workers' compensation as the plaintiffs' exclusive remedy for any injury that may have resulted citing Shoemaker v. Myers (1990) 52 Cal.3d 1, 25:

> To the extent plaintiff purports to allege any distinct cause of action, not dependent upon the violation of an express statute or violation of fundamental public policy, but rather directed at the intentional, *malicious* aspects of defendants' conduct . . ., then plaintiffs allege no more than the plaintiff in Cole v. Fair Oaks Fire Protection District . . . The kinds of conduct at issue (e.g., discipline or criticism) are a normal part of the employment relationship. Even if such conduct may be characterized as intentional, unfair or outrageous, it is nevertheless covered by the workers' compensation exclusivity provisions.

What does this mean for the employer? If an employer is sued by an employee based on the employment relationship, to the extent the employee alleges this as a cause of action, a demurrer should be filed when said employee refuses to dismiss the action. The employer can also expect to see a rise in such claims being asserted in the worker's compensation arena.

[1] They were employed at the Lawrence Livermore National Laboratory.

Employers May Not Discriminate Against Employees Who Choose Abortion

by Michelle T. Harrington

On May 30, 2008, the Third Circuit Court of Appeals in Doe v. C.A.R.S. Protection Plus, Inc., 527 F.3d 358 addressed the question of whether an employee who has exercised her right to have an abortion and is, thereafter, discharged from employment allegedly due to her exercise of that right, has a claim under Title VII for pregnancy or gender discrimination.

Title VII prohibits employment discrimination on the basis of an individual's sex. 42 U.S.C. § 2000e-2(a). The Pregnancy Discrimination Act ("PDA") states that "the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or *related medical conditions*; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons no so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

In the C.A.R.S. case, the plaintiff was informed by her doctor three months into her pregnancy that her baby had severe deformities. At the recommendation of her physician, the plaintiff ended her pregnancy. The day before the plaintiff was to have her abortion (Thursday, August 10), the plaintiff's husband informed her supervisor that the pregnancy would be terminated the next day (Friday, August 11). The plaintiff's husband also purportedly asked for and received permission from the plaintiff's supervisor for the plaintiff to take one-week vacation following the abortion. Neither the plaintiff nor her husband called the plaintiff's supervisor over the weekend of August 12th.

A funeral was arranged for the plaintiff's baby on Wednesday, August 16th. The plaintiff's supervisor gave another employee (the baby's aunt) permission to take one hour off work to attend the funeral. As this employee was leaving, she noticed the supervisor's assistant packing up the plaintiff's personal belongings from her desk. After the funeral, she told the plaintiff what she had observed. The plaintiff called her supervisor who informed her that she had been fired.

The plaintiff filed this lawsuit alleging employment discrimination based upon gender, a violation of Title VII, as amended by the PDA, 42 U.S.C. § 2000e(k). The plaintiff claimed that she was terminated because she underwent a surgical abortion. The defendant sought to have the case dismissed through a motion for summary judgment, arguing that it had terminated the plaintiff because she failed to call in to inform her supervisor that she would miss work the week following her surgical abortion. In opposing the motion, the plaintiff presented evidence of other employees who missed work due to illness and were not required to call the office every day; testimony by her supervisor's assistant who indicated that there was no rule at the company which required an employee who was sick to call the company every day; testimony from her husband that he had called in and obtained her supervisor's permission to take a one-week vacation following the abortion; and evidence of a remark made by her supervisor to another employee in the context of discussing the plaintiff losing her baby. This employee testified that the plaintiff's supervisor stated that the plaintiff "didn't want to take responsibility," which upset him (the supervisor).

Thus, the plaintiff argued that the closeness in time between the abortion and her termination (five days), the employer's disparate treatment of her as compared to other similarly situated employees, and the supervisor's remark constitute factual disputes as to the reason for her termination.

The trial court judge granted judgment in favor of the defendant. The plaintiff appealed the trial judge's ruling, and the Court of Appeals reversed the judgment in favor of the defendant finding that there were disputed factual issues as to whether there was a nexus between the plaintiff's pregnancy and her termination that would permit a fact finder to infer unlawful discrimination. In reaching this decision, the Court of Appeals held that a surgical abortion is a medical condition that was related to the plaintiff's pregnancy. The appellate court was persuaded by the EEOC guidelines interpreting the PDA expressly stating that an abortion is covered by Title VII:

The basic principle of the [PDA] is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. A woman is therefore protected against such practices as being fired … merely because she is pregnant or has had an abortion. Appendix 29 C.F.R. pt. 1604 App. (1986).

The appellate court also cited, as support for its holding, a decision by the Sixth Circuit Court of Appeals in Turic v. Holland Hospitality, Inc. 85 F.3d 1211 (6th Cir. 1996) where that court held that an employer may not discriminate against a woman employee because she has exercised her right to have an abortion.

How does the C.A.R.S case affect employers? The C.A.R.S. case is atypical in that the plaintiff did not assert the usual pregnancy discrimination claim. For example, she did not allege that she was discriminated against because she was pregnant or that she had been fired while on maternity leave. Rather, she argued that she was discharged because she underwent a surgical abortion.

This case is significant because it extends the protections generally afforded pregnant women under the PDA to women who have elected to terminate their pregnancies. It is also conceivable that the ruling in C.A.R.S. could be extended to apply to other related medical conditions to pregnancy, such as infertility. The analysis in C.A.R.S. would apply as well to claims alleging a violation of the California Fair Employment and Housing Act (FEHA). Like the PDA, the FEHA also prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions. Cal. Gov. C. §§ 12926 and 12945. Because the FEHA is modeled after federal antidiscrimination laws, decisions such as *C.A.R.S.* interpreting federal statutes are relevant when interpreting similar provisions of the FEHA.

Finally, both the PDA and the FEHA protect employees who *oppose* acts made unlawful by the statutes. 42 U.S.C. § 2000e-3(a); Cal. Gov. C. § 12940 (h). Thus, it is possible that these statutes may be extended to protect any employee who not only has had an abortion, but one who contemplates having an abortion or one who supports the rights of women who do so.

Unlicensed Employee Estopped From Bringing An Action For Compensation

by Colleen A. Déziel

Plaintiff Chin was performing painting services on behalf of the defendants. These services required Chin to have a license, however his had expired in 2000, which was five years prior. Regardless, in 2005 Chin began working for the defendants and was injured on the job. He sued the defendants claiming that they were his employer. The plaintiff alleged that he was an employee and not an independent contractor, and that he was entitled to sue his employer because the employer did not have worker's compensation insurance to cover him. The plaintiff relied on Labor Code § 2750.5 which creates a rebuttable presumption that an unlicensed person who performs work requiring a license is an employee and not an independent contractor.

Chin sought damages for his injuries as well as unpaid wages and other compensation. His claims included negligence, wrongful termination and violations of the Labor Code.

The Court of Appeals affirmed the trial court when it held that the presumption under Labor Code § 2750.5 did not apply in this circumstance because the plaintiff had represented himself to be licensed and then never informed defendants that he was not so licensed anymore. The court also found that there were sufficient facts presented which would reflect that he was an independent contractor as well. These included the fact that Chin used his own tools, he had the right to control and discretion as to the manner of the performance, he bargained for the paint contract, and he was operating an independent painting business. Given these facts and circumstances, Chin was estopped from asserting that his unlicensed status made him an employee under this Labor Code section.

What does this case mean for the employer? Well, if your company is hiring independent contractors for work which requires a license, it pays to verify that they are in fact licensed, and that their licenses are up to date. In this case, the employer was able to avoid liability on employment and tort based claims.

Non-Competition Agreements All But Obliterated In California

by Colleen A. Déziel

In August of this year, the California Supreme Court handed down a decision in regard to non-competition agreements in Edwards II v. Arthur Andersen et al, wherein it purported to clarify the existing law on such agreements. Essentially, the Supreme Court held that Business and Professions Code § 16600 prohibits employee non-competition agreements, unless the agreement falls within limited statutory exceptions. Presently, those exceptions include non-competition agreements in the sale or dissolution of corporations (16601), partnerships (16602) and limited liability corporations (16602.5). In so holding, the Supreme Court stated that California has long favored employee mobility and open competition and rejected the notion that California courts had embraced the "rule of reasonableness" in evaluating competitive restraints.

This is a huge blow to employers who, to date, have routinely required new employees to execute these non-competition agreements in an effort to prevent the raiding of its personnel and clientele when an employee leaves the company.

The Supreme Court also held in Edwards, that the language "any and all" in an employment release does not encompass nonwaivable statutory protections, such as the employee indemnity protection of Labor Code § 2802, and thus is not void under the Labor Code. How did the Supreme Court come to its decision in regard to non-competition agreements? Read on.

The plaintiff in Edwards was a certified public accountant hired in 1997 as a tax manager by the Los Angeles office of the accounting firm Arthur Andersen. This employment was made contingent upon Edwards signing a noncompetition agreement which prohibited him from working for or soliciting certain Andersen clients for limited periods following his termination. This agreement also prohibited Edwards from soliciting away from the Firm any of its professional personnel for eighteen months after termination. The Agreement did not preclude Edwards from accepting employment with any of the Andersen's clients. Edwards performed well throughout his tenure and was on partnership track. All was well in his world.

Then, in March of 2002 the United States government indicted Andersen in connection with the investigation into Enron Corporation. Andersen began selling off its practice groups and ceased its accounting practices in the United States. In May of 2002, HSBC USA, Inc., purchased a portion of Andersen's tax practice which included Edwards's group. In July 2002 HSBC offered Edwards employment. As part of the offer, HSBC required Edwards to execute a Termination of Non-compete Agreement ("TONC"). Among other things, the TONC required Edwards to (1) resign from Andersen, (2) release Andersen from "any and all" claims, including "claims that in any way arise from or out of, are based upon or relate to Employee's employment by, association with or compensation from" defendant, (3) continue to preserve confidential information and trade secrets, (4) refrain from disparaging Andersen or its related entities or partners, and (5) cooperate with Andersen in connection with any investigation of, or litigation against, Andersen.

Edwards signed the offer letter, but refused to sign the TONC because he believed that doing so would give up his rights to indemnification against Andersen. This was clearly important to him in light of the investigation. HSBC withdrew its offer of employment to Edwards, and in April of 2003 Edwards filed a complaint against Andersen, HSBC and Wealth and Tax Advisory Services ("WTAS"), a subsidiary of HSBC, alleging intentional interference with prospective economic advantage and anticompetitive business practices under the Cartwright Act. Edwards alleged that the non compete agreement violated Business and Professions Code § 16600 (hereinafter "§ 16600"), and that TONC's release of "any and all" claims violated the Labor Code.

The trial court held that the non compete agreement did not violate § 16600 because it was narrowly tailored and did not deprive Edwards of his right to pursue his profession; and the TONC did not waive Edwards's right to indemnification. The trial court used the "rule of reasonableness" in coming to its decision in regard to the non-competition agreement.

The Court of Appeals reversed on both, finding that the non compete did violate § 16600 and the release did purport to waive Edwards's indemnification rights under the Labor Code. Andersen appealed to the Supreme Court.

As noted above, the Supreme Court affirmed the Court of Appeals as to the non-competition agreement, but reversed it as to the release. In coming to its decision, the Supreme Court initially outlined a brief history of § 16600. In summary, the court noted that under common law, contractual restraints on the practice of a profession, business, or trade, were considered valid as long as they were reasonably imposed. However, in 1872, California settled public policy in favor of open competition, and rejected the common law "rule of reasonableness" when the Legislature enacted Civil Code § 1673. This Code section ultimately became Business and Professions Code § 16600 in 1941. Essentially, covenants not to compete were void, subject to several exceptions. These exceptions are very limited and include non-competition agreements in the sale or dissolution of corporations, partnerships and limited liability corporations. The court explained that this law protects Californians and ensures that every citizen retains the right to pursue any lawful employment and enterprise of his/her choice.

Andersen argued that limiting one's ability to practice a vocation is not a restraint or prohibition on one's ability to engage in his or her profession, trade or business. Andersen contended that some California courts embraced the "rule of reasonableness" in evaluating competitive restraints (i.e., Andersen relied in part on South Bay Radiology Medical Associates v. Asher (1990) 220 Cal. App.3d 1074 and Vacco Industries, Inc. v. Van Den Berg (1992) 5 Cal.App.4th 34.) Andersen contended that these cases show that § 16600 prohibits only broad agreements that prevent a person from engaging entirely in his chosen business, trade or profession, and that agreements that do not have this broad effect, but merely regulate some aspect of post-employment conduct, are not within the scope of § 16600.

The Supreme Court disagreed and pointed out that both South Bay and Vacco simply recognize that the statutory exceptions to § 16600 reflect the same exceptions to the rule against non-competition agreements that were implied in the common law (i.e., these two cases involved a dissolution of a partnership and the sale of shares of a business, both of which fall within the statutory exceptions.) As such, the "rule of reasonableness" applies only to those agreements that fall within one of the statutorily specified exceptions.

Andersen also requested that the Supreme Court adopt the limited or "narrow-restraint" exception to § 16600. However, the Supreme Court refused to do so, stating that if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect.

Thus, it appears that it is now up to the Legislature to decide whether or not to adopt the narrow-restraint exception, adopt additional exceptions or to otherwise relax the statutory restrictions.

How does this affect employers? Well, companies with employees in California that once had at least some limited protection from former employees pilfering its clients or existing employees, or both, through limited non-competition agreements are now stripped of that protection. Employers can no longer rely on these non-competition agreements in California unless such agreements fall into one of the narrow exceptions outlined above, and can expect more California employees to challenge such agreements. It should be noted that jurisdictions outside California have continued to uphold non-competition agreements.

At The Federal Level, The High Court Confirms That Employees Can Continue To Pursue Retaliation Claims Through 42 U.S.C. § 1981

by Colleen A. Déziel

In the recent case of CBOCS West, Inc., v. Humphries, the highest court in the land confirmed that employees can indeed pursue claims of retaliation through statute 42 U.S.C. §1981 even though the plain language of the statute does not provide for such an action. The Supreme Court relied upon prior Federal Court of Appeals decisions (i.e., stare decisis), which have interpreted §§1981 and 1982 alike to come to the same conclusion as the appellate courts. (§§1981 and 1982 represent immediate post-Civil War legislative efforts to guarantee the then newly freed slaves the same legal rights that other citizens enjoy.)

More specifically, in this case, the plaintiff alleged race discrimination and retaliation based upon his complaints to a manager that a black co-worker was also dismissed for race-based reasons. He asserted claims under Title VII and §1981. The employer filed a motion for summary judgment which was granted on both claims. In regard to the 1981 claim, the District Court held that there was no retaliation claim within §1981. As for Title VII, the motion was granted for reasons that have nothing to do with the §1981 claim, which is the subject of this article. The plaintiff appealed, and the Federal Court of Appeals upheld the District Court's ruling on the Title VII argument, but reversed as to the §1981 cause of action finding that this statute allowed a retaliation claim. As noted above, the Supreme Court upheld this decision.

The Supreme Court's opinion notes that §1981 provides that all persons have the same right to make and enforce contracts as is enjoyed by white citizens. In the employment context, this has applied to acts which preceded the formation of employment agreements. Thus, the Supreme Court seemingly acknowledged that traditionally, it appeared that a retaliation based claim would not arise out of this statute since the conduct would necessarily have occurred after the formation of the contract. However, the Supreme Court went on to reason that post creation of the Civil Rights Act of 1991, relevant case authority has interpreted the section differently. Since 1991, these courts have interpreted 1981 and 1982 alike apparently because they were enacted together, have common language and serve the same purpose of providing black citizens the same legal rights as enjoyed by other citizens. Based on this reasoning, instead of looking at the plain meaning of the language of the statute, the Supreme Court went along with the majority of the appellate courts on the subject.

What are employers to take from this? This is yet another statute available to employees for retaliation based claims. We note that in California, this will not likely affect employers too much, based on the fact that most employees will continue to file under the employee friendly Fair Employment and Housing Act.

Equitable Tolling Permitted By Supreme Court

by Eric A. Schneider

In McDonald v. Antelope Valley Community College District, the California Supreme Court took the opportunity to examine the concept of equitable tolling in the context of a claim of violation of the Fair Employment and Housing Act. The high court determined that the circumstances present in this case allow for the application of equitable tolling.

Sylvia Brown and two other college district employees had filed suit against the District alleging racial harassment, racial discrimination, and retaliation. The opinion relates only to Brown's claim and the single issue of whether equitable tolling may apply to the voluntary pursuit of internal administrative procedures prior to the filing of the FEHA claim.

The following are the pertinent facts. In October, 1999, plaintiff Brown sought a promotion which was denied, from her perspective, because of her race. She reapplied for the promotion in January, 2001 and was again denied. She again attributed that denial to racial discrimination.

In October, 2001 she brought a complaint to the human resources department of the office of the Chancellor by way of a letter, and followed up in November, 2001 with a formal discrimination complaint with the Chancellor's office. The Chancellor's office forwarded the complaint to the District to investigate and told the plaintiff that she had until January 31, 2002 to resolve the claim and would then have a right of appeal. It also told her that she could file a complaint with the Department of Fair Employment and Housing.

The District hired an independent investigator who concluded that the complaint was unsubstantiated. On February 14, 2002, Brown appealed to the District's board of trustees which affirmed those findings.

In November of 2002, she appealed to the Chancellor's office, and in May of 2003, the Chancellor's office reported that it concluded that the charges were unsubstantiated.

In the meantime, on October 11, 2002, Brown filed a complaint with the DFEH which issued a right to sue letter on October 24, 2002. Brown filed suit on October 24, 2003 and eventually amended her complaint twice.

The District then brought a motion for summary judgment on the basis of untimeliness arguing:

1. That the last alleged act of discrimination occurred in January, 2001;
2. That Brown filed her DFEH complaint in October, 2002, more than one year later; and
3. That equitable tolling should not apply in large part because it had written Brown on November 7, 2001 stating that "the Chancellor's office does not have primary jurisdiction over employment related cases and in order to obtain a final determination, you must file your complaint with the Department of Fair Employment and Housing. . . . You may file a complaint the DFEH at any time before or after the District issues its report and you may do so whether or not you also submit objections to the Chancellor's office."

The trial court granted the motion for summary judgment because of the passage of time between the last alleged act of discrimination and the presenting of a complaint to the DFEH concluding that Brown was not entitled to equitable tolling because the Chancellor's office had advised her that she could file a complaint with the DFEH.

The Court of Appeals reversed the trial court's judgment finding that there were triable issues of fact with regard to the application of equitable tolling.

The Supreme Court began its discussion with background concerning the doctrine of equitable tolling. It noted that the equitable tolling of statutes of limitations is a judicially created, non-statutory doctrine to prevent unjust and technical forfeitures of the right to trial on the merits when the purpose of the statute of limitations has been satisfied. It applies when an injured person has several legal remedies and reasonably and in good faith pursues one of them, and that it serves the need for harmony and avoidance of chaos in the administration of justice. It further noted that tolling eases the pressure on parties to seek redress concurrently in two separate forums with the attendant danger of conflicting decisions on the same issue.

The court then reviewed the circumstances which prohibit equitable tolling and determined that none of them applied:

1. There was no express negation of equitable tolling by the legislature;
2. There is no statutory text or manifest legislative policy that could not be reconciled permitting equitable tolling; and,
3. There is nothing in the text of the FEHA which suggests an implicit legislative intent to preclude equitable tolling.

Instead, the legislative policy favoring liberal construction of the statute of limitations supports an interpretation of the FEHA under which the limitations period is equitably tolled while the employee and employer pursue resolution of any grievance through an internal administrative procedure. Tolling in fact promotes resort to such procedures.

What does this mean to employers? It means that if the employer wants to use complaint procedures designed to avoid litigation, it must recognize that these procedures could result in the sacrifice of the statute of limitations as a defense.

California Labor Code Applies To Non Residents Of California Who Perform Work In California

by Colleen A. Déziel

In November of 2008, the Federal Court of Appeals decided the issue of whether individuals who perform work in California, as well as in other states, but whom are not residents of California are entitled to the protections of the California Labor Code for the time they actually worked in California. The answer is yes.

In Sullivan v. Oracle Corp., three teachers filed an action against Oracle for overtime pay, which included causes of action based on the Labor Code, Unfair Business Practices and violations of the Fair Labor Standards Act. Each of the teachers worked in multiple states, which included California, Colorado, Arizona and other various states. None of the plaintiffs held residence in California, although each performed at least part of their job in California.

The plaintiffs alleged that they were misclassified as exempt employees, and sought pay for the overtime each worked while in California. Oracle argued that since the three plaintiffs were not residence of California, they were not entitled to the protections of California's Labor statutes.

The Court of Appeals did not buy this argument. The appellate court pointed out that the California Supreme Court has held that California's employment laws govern *all* work performed within the state, regardless of the residence or domicile of the worker. The appellate court also found that California has a clear interest in the effect compensation for nonresidents working in California would have on compensation for California residents. If a California employer were able to avoid the requirements of the state Labor Code by the simple expedient of hiring nonresidents, the California residents would be substantially disadvantaged in the labor market by the cheaper labor that would thereby be made available to employers. Given this, the appellate court held that the plaintiffs were entitled to seek compensation for the hours spent working in California. The court also made it clear that these same plaintiffs could not use California employment statutes for work performed outside California.

What does this mean for employers? Well, if the employer has employees who work in offices both inside and outside of California, it behooves the employer to ensure that it follows all employment related statutes for the time those employees perform services in California. The employer cannot simply choose the labor statutes for the state where the employee resides or the state where the employee performs the most work.

Appellate Court Invalidates An Arbitration Agreement Which Vested The Arbitrator With Exclusive Authority To Determine Its Enforceability

by Brandon N. McMurtray

In a recent case that is already receiving attention, Ontiveros v. DHL Express, 164 Cal.App.4th 494 (2008), the California Court of Appeals invalidated an employment arbitration agreement vesting the arbitrator with exclusive authority to determine its enforceability.

The plaintiff sued her former employer for various claims of sex discrimination, harassment and retaliation, and the employer moved to compel arbitration. The trial court denied the employer's motion finding that "it is required, in the first instance, to determine whether the contract is unconscionable, despite any provision requiring arbitration of issues relating to arbitrability." The court then went on to find that the agreement as a whole "is permeated with unconscionability and will not be enforced."

The employer appealed and the Court of Appeals affirmed finding the provision substantively unconscionable and the agreement as a whole so "permeated with unconscionability" as to be unenforceable. In doing so, the court relied on two recent decisions holding similar provisions unenforceable coupled with a "genuine concern about the potential for the inequitable use of such arbitration provisions in areas, such as employment, where the parties are not at arm's length and do not have equal bargaining power." Elaborating, the court stated "[i]n such situations… the arbitrator has a unique self-interest in deciding that a dispute is arbitrable… [i]ndeed, an arbitrator who finds an arbitration agreement unconscionable would not only have nothing further to arbitrate, but could also reasonably expect to obtain less business in the future, at least from the provider in question." Thus, it concluded "the provision requiring that the arbitrator decide enforceability issues is substantively unconscionable."

Turning to the remainder of the agreement, the court found two other provisions substantively unconscionable as well. First, a provision requiring the employee to pay a portion of the arbitration-related costs and, second, a provision limiting both the employer and the employee to a single witness deposition except as ordered by the arbitrator upon a showing of "substantial need." As to the former, the court rejected the employer's arguments that the provisions were valid because as the amounts were "small" and less than the "court costs in the event of a trial" as irrelevant. To the contrary, the court found "[b]ecause an employee may not be required to pay fees unique to arbitration, the provisions in the agreement requiring such payment is unlawful and hence substantively unconscionable" regardless of the amount. As to the latter, the court found that "the permitted amount of discovery is so low [and] the burden for showing a need for more… so high that plaintiff's ability to prove her claims would be unlawfully thwarted." Thus, the provision is substantively unconscionable.

Together, the Court found these provisions so "permeated [the agreement] with unconscionability" that the trial court did not abuse its discretion in *holding the entire agreement unenforceable*.

How does this case affect the employer? To the extent that an employer has included the above discussed provisions in its arbitration agreement, it should consider immediately modifying them, as the appellate court has made it clear that it will not uphold these provisions, and possibly the agreement as a whole with these provisions included. The employer should also take care to ensure that the rest of the agreement is not so one-sided in favor of the employer, or that it does not contain provisions that affect its employees' ability to present their case, as the courts are increasingly limiting the enforceability of these agreements.

Be Aware That Expert Witness Fees Can Be Recovered By A Prevailing Party On FEHA Claim Even Though The Trial Court Did Not Order The Expert Testimony

by Colleen A. Déziel

The California Court of Appeals has confirmed in Anthony v. City of Los Angeles that a prevailing party on a FEHA claim is entitled to seek expert witness fees even though the trial court had not ordered the expert witnesses to testify. The appellate court pointed to Government Code § 12965 to support its decision.

In this section, the statute allows a prevailing party not only the right to recover reasonable attorney's fees and costs, but expert witness fees as well (i.e., "the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs, including expert witness fees….")

The court further noted that the proper way to attempt to recover those fees is through a properly noticed motion, as is required for the recovery of attorney's fees (as opposed to including the requested expert fees in the Memorandum of Costs.)

What does this mean for the employer? This is yet another factor that the employer should consider when attempting to make a business decision on whether to settle a claim, as expert witnesses can be very expensive.

Employment Practices Group at Anderson, McPharlin & Conners LLP

Our Employment Practices Group places a special emphasis on keeping pace with rapidly changing employment laws and providing employers with effective representation in this constantly evolving area. For twenty years, our clients have known that we understand the challenges they face and that we will work with them in assessing risks and developing cost-effective strategies to bring employment matters to prompt and satisfactory resolution.

Our Employment Practices Group has broad experience with labor and employment matters and is well versed on the intricacies of the subjects with which we deal. Our Employment Practices attorneys have published numerous articles on a wide range of labor and employment topics and are frequently featured as speakers at seminars and conferences around the country. Equally important, the Group's attorneys have considerable "hands on" experience in addressing the problems that businesses encounter in managing a workforce and are thus able to offer practical, real-world advice that makes good business sense.

AMC LOS ANGELES, CALIFORNIA · ONTARIO, CALIFORNIA · LAS VEGAS, NEVADA
ANDERSON, McPHARLIN & CONNERS LLP
LAWYERS
ESTABLISHED 1947

LOS ANGELES OFFICE
444 South Flower Street
31st Floor
Los Angeles, CA 90071
Main: 213-688-0080
Fax: 213-622-7594

ONTARIO OFFICE
3602 Inland Empire Blvd.
Suite C-100
Ontario, CA 91764
Main: 909-477-4500
Fax: 909-477-4505

LAS VEGAS OFFICE
2300 W. Sahara Avenue
8th Floor
Las Vegas, NV 89102
Main: 702-856-4740
Fax: 702-856-4744

www.amclaw.com

Eric A. Schneider, Esq.
Managing Partner/Co-Chair
213.236.1643. . . . .eas@amclaw.com

Colleen A. Déziel, Esq.
Partner/Editor/Co-Chair
213.236.1635. . . . .cad@amclaw.com

Glen H. Mertens, Esq.
Senior Counsel
213.236.1696. . . . .ghm@amclaw.com

Kristin M. Kubec, Esq.
Senior Associate
213.236.1612. . . . .kmk@amclaw.com

Michelle T. Harrington, Esq.
Senior Associate
213.236.1681. . . . .mth@amclaw.com

Vanessa S. Davila, Esq.
Senior Associate
909.477.4500. . . . .vsd@amclaw.com

Brandon N. McMurtray, Esq.
Associate
213.236.1610…….bnm@amclaw.com