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

SPRING 2009

Labor & Employment Briefing

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

Lilly Ledbetter Fair Pay Act signed by President Obama in January of 2009

by Colleen A. Déziel

Back in May of 2007, the Supreme Court held in Ledbetter v. Goodyear Tire and Rubber Company (2007) 550 U.S. 618, that if an employee did not file a claim for unlawful pay discrimination within 180 days from the date of the employer's decision to pay his/her less, he/she will be barred forever from challenging the discriminatory paychecks that followed. Prior to this holding, there was authority which reflected that every discriminatory paycheck was a new violation that restarted the statute of limitations period.

The Ledbetter decision was a huge victory for employers; however, it was not long lived as the Lilly Ledbetter Fair Pay Act ("FPA") restores the legal authority which provided that each paycheck is a new violation. More specifically, the FPA amends Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 and modifies the operation of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation or other practice, and for other purposes.

In essence, the FPA would equalize wage disparities between jobs that are segregated on the basis of sex, race or national origin, but require equivalent skills, effort, responsibility, and working conditions. The FPA provides punitive as well as compensatory damages to those who have suffered wage discrimination, and it prohibits retaliation against those who exercise their rights under the law.

What are employers to take away from this?

Given this new law, employers would be wise to become proactive by immediately reviewing their payrolls and pay structures to determine if any discrimination is occurring. Employers would also benefit from keeping records of the methods they use to set employee wages. The FPA will likely produce a litigation boom, and employers need to act quickly in an effort to avoid being sucked into the boom, which would likely result in enormous expenditures in fees and costs.

Anderson, McPharlin & Conners LLP
Employment Practices Group

Eric A. Schneider, Esq.
Managing Partner/Editor/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

Coffee Shop v. Coffee Joint?

by Vanessa S. Davila

In the recent case of Starbucks v. The Superior Court (Lords) (2008) 168 Cal.App.4th 1436, a group of unsuccessful California job applicants brought a class action lawsuit against Starbucks claiming that the conviction questions on the Starbucks form job applications violate California's Labor Codes Sections 432.7(c) and 432.8 which prohibit employers from asking about marijuana-related convictions that are more than two years old. The plaintiffs sought to recover actual damages or $200 each, whichever was greater, as permitted by these sections, which by Starbucks' estimation could total a whopping $26 million.

Starbucks uses the same two-page job application form nationwide for store level employees. The application's first page includes a question (the "convictions question") which asks: "Have you been convicted of a crime in the last seven (7) years?" It further explains: "If Yes, list convictions that are a matter of public record (arrests are not convictions). A conviction will not necessarily disqualify you for employment."

When using disclaimer language in employment applications placement matters

The reverse side of the Starbucks application contains various disclaimers for United States applicants, as well as for three states: Maryland, Massachusetts, and California. These disclaimers are located in a 346-word paragraph directly above the signature line. The California portion of the disclaimer provides: "**CALIFORNIA APPLICANTS ONLY: Applicant may omit any convictions of the possession of marijuana (except for convictions for the possession of marijuana on school grounds or possession of concentrated cannabis) that are more than two (2) years old, and any information concerning a referral to, and participation in, any pretrial or post trial diversion program.**"

The plaintiffs contended that the California disclaimer was "buried within a block of type," did not specifically refer to the convictions question, and was placed near the end of the document. They feared that applicants either would overlook the disclaimer, or would not want to go back and cross out their previous responses, or ask for a clean copy. The plaintiffs each applied for a job at Starbucks in early 2005 by filling out a job application. None had a marijuana arrest or conviction. None was hired.

At the trial court level, Starbucks brought a motion for summary judgment ("MSJ"). The Orange County Superior Court denied Starbucks' MSJ and determined that the convictions question on its face violated Sections 432.7(c) and 432.8, and ruled that a triable issue of material fact remained on whether the location of the limiting language on the application, the size of the font in which the limitation was printed (which the court guessed to be eight point), and the location of the limitation within the block paragraph was sufficient to alert a reasonable job applicant that the question concerning criminal convictions did not apply to marijuana related convictions more than two years old. The court concluded that the plaintiffs had standing to assert the statutory violation "based on the fact they were given the job application containing the offending question when applying for employment with the defendant . . ." and that the plain language of the statute establishes a strict liability standard of conduct where a job applicant seeks to recover only the minimum statutory damage amount of $200. The court determined that proof of damages was not a necessary element to the plaintiffs' ability to recover the statutory minimum of $200 per applicant.

Starbucks filed a petition for writ of mandate from the order denying summary judgment claiming that, given the size of the class, "this litigation poses such a great monetary risk to Starbucks (at least $26 million), and that it may be forced to settle rather than risk an adverse judgment." The Court of Appeal for the Fourth District issued an order to show cause why summary judgment should not be granted and stayed the proceedings below.

The Court of Appeal disagreed with Starbucks that their employment application, as a matter of law, complied with the California statutory scheme, and could not be construed to ask applicants to disclose information about marijuana convictions "it expressly tells them not to disclose."

Although the Court saw no problem with the language of the California disclaimer, it saw what it considered to be significant problems with its placement. Specifically, the court felt that the

"clear and conspicuous" test was not satisfied by its placement of the California disclaimer at the very end of a 346-word paragraph, with a U.S. disclaimer, followed by a host of irrelevant provisions from states like Maryland and Massachusetts. In fact, the Court noted that the disclaimers were not even listed in alphabetical order, with California inexplicably following Maryland and Massachusetts. Although Starbucks emphasized that its California disclaimer was placed in boldface type, the Court was quick to point out that so were the U.S., Maryland and Massachusetts disclaimers, thereby any value gained by the emphasis was submerged in a veritable sea of boldface type.

Despite the foregoing, the Court of Appeal eventually ruled in favor of Starbucks and held that the plaintiffs were not entitled to recovery under the statute as the Starbucks California disclaimer, even if potentially ambiguous, was not ambiguous to the plaintiffs, as two of the three lead plaintiffs testified at their depositions to sharing the same understanding of the application as did Starbucks. At the trial court level, there had been no evidence presented that the plaintiffs believed they were being asked to disclose marijuana-related convictions that were more than two years old. As such, the Court of Appeal held that Starbucks carried its initial burden of production on its MSJ to show that the lead plaintiffs had not been confused by the Starbucks application.

Moreover, as none of the plaintiffs had any marijuana-related convictions, the court found there to be an absence of aggrieved plaintiffs. Only an individual with a marijuana-related conviction falls within the class of people the Legislature sought to protect with this statute. The intent is to ensure that once the offender has paid his prescribed debt to society, he not be further penalized by curtailment of his opportunities for rehabilitation, education, employment, licensing and business or professional advancement. Hooper v. Deukmejian (1981) 122 Cal.App.3d 987.

The Court of Appeal, therefore, let a peremptory writ of mandate issue directing the Orange County Superior Court to vacate its order denying Starbucks' MSJ, and directing it to issue a new and different order granting the MSJ.

What are employers to take away from this?

Although Starbucks ultimately succeeded at the Appellate level, had Starbucks included the California disclaimer immediately following the convictions question in its employment application, Starbucks would have been entitled to a summary judgment in its favor at the trial court level on the reasonableness of the employment application.

Employers would be wise to take heed to this story when including disclaimer language in their own employment applications. To be enforceable, limiting language must be "conspicuous, plain and clear," and placed and printed so that it will attract the reader's attention. Haynes v. Farmers Ins. Exchange (2004) 32 Cal.4th 1198, 1204.

Update: California Supreme Court grants review in another meal-break case

by Glen H. Mertens

We previously reported that the California Supreme Court agreed to review Brinker Restaurant Corp. v. Superior Court 2008 WL 5059737, a significant California Court of Appeals decision that addressed an employer's obligation to provide meal breaks to non-exempt employees. We also noted that another Court of Appeals decision, Brinkley v. Public Storage, Inc., had been issued shortly after the Supreme Court accepted review of the Brinker case and that the Brinkley decision had contained analysis of the meal-break rules that was quite similar to the analysis set forth in the Brinker decision. Not surprisingly, the plaintiff-employees in Brinkley asked the California Supreme Court to review the Court of Appeals' decision, making virtually the same arguments as had been used by the Brinker plaintiffs to obtain the Supreme Court's review in that earlier case.

On January 14, 2009, the California Supreme Court granted the request for review in the Brinkley case, thereby "erasing" the Court of Appeals' decision from the books. The Supreme Court decided to put a "hold" on the Brinkley case pending its review of the earlier Brinker matter, which suggests that the Supreme Court's determination in the Brinker case will determine the result in the Brinkley case.

The Court of Appeals' decisions in both cases were regarded as significant victories for the employer/management community, as both cases held that, while California law requires employers to make half-hour meal breaks available to the relevant employees, the law does not require employers to guarantee or ensure that every employee actually takes those breaks. This issue is of great importance to the employment community, as a contrary ruling that would require employers to "guarantee" that each meal break is in fact taken would create the potential for employees to, in effect, give themselves a "one-hour raise" every workday by simply delaying or foregoing their meal breaks and then claiming they "missed" their "required" breaks. [An employer who does not provide a meal break must pay the affected employee an extra one hour's pay for each workday on which the meal break was not provided, per California Labor Code § 226.7(b).]

We will continue to monitor the appeals in Brinker and Brinkley and report on how the California Supreme Court ultimately rules on these important meal-break questions.

Tip pooling may be mandated by employer to extend to bartenders

by Eric A. Schneider

In Budrow v. Dave & Buster's of California, Inc. (March 2, 2009) 2009 WL 503359, the Second District Court of Appeal approved a rule instituted by a restaurant requiring food servers to share one per cent of their gross sales with bartenders and other employees. In so doing, the court held that the practice does not violate Labor Code Section 351 which prohibits restaurants from taking any portion of gratuities or deducting such amounts from wages. It clarified Leighton v. Old Heidelberg, Ltd. (1990) 219 Cal.App.3d 1062 which held that servers could be required to share tips with bus personnel. The court rejected, for a number of reasons, the argument by the plaintiff that sharing requirements were limited to employees who provided "direct table service."

What are employers to take away from this?

The opinion is well-reasoned and offers both legal and practical bases for the conclusions. Among other things, it provides certainty to all parties concerned and eliminates that inherent discord that stems from servers having to employ discretion in sharing the tips.

Dealer tip pooling does not give rise to private right of action, however it can give rise to unfair business practice claim

by Kristin M. Kubec

In Lu v. Hawaiian Gardens Casino (2009) 2009 WL 143907 (as modified by WL 32554), the Second Appellate District considered whether dealer tip pooling in casinos (1) gives rise to a private right of action against the employer under California Labor Code Section 351 and/or 450, and (2) whether those or other Labor Code sections can serve as predicates for an Unfair Competition Law claim under California Business and Professions Code Section 17200.

After reviewing the two Labor Code sections at issue, the Lu Court concluded that neither Labor Code Section 351 nor 450 created a private right of action for the plaintiff. However, the Lu Court then noted that such Labor Code sections could nevertheless serve as predicates for the "unlawful" conduct prong under the UCL. The Court then analyzed the various Labor Code sections asserted in the plaintiff's complaint, concluding that Labor Code Section 351 could support a UCL "unlawful" prong claim sufficient to withstand summary judgment. As for the UCL claim itself, the Court held that a triable issue of fact existed as to whether some of the tip pool recipients were "agents" in contravention of Labor Code Section 351, thereby precluding summary adjudication of that claim.

In the modified opinion, the Court makes it clear that it is not expressing an opinion as to the validity of the UCL claim itself.

What are employers to take away from this?

This case makes it clear that, although an individual may not be able to sue directly his or her employer under these two Labor Code sections, he/she still may be able to pursue a claim based on these code sections by using them as predicates for a California Business and Professions Code Section 17200 claim.

Punitive damages not allowed when only violations of labor code found

by Colleen A. Déziel

The California Appellate Court recently held in Brewer v. Premier Golf Properties (2008) 168 Cal.App.4th 1243, that when a trier of fact makes a finding that only Labor Code violations have occurred (i.e., wage and hour claims), punitive damages are not recoverable. In so holding, the court reasoned that the Labor Code statutes provide express statutory remedies, which include penalties for the violation of these statutes that are punitive in nature. The court went on to note that there was no basis for concluding that these penalties were inadequate such that other remedies should be permitted.

Further, the court noted that punitive damages were not available in these type of situations based on the fact that unpaid wages and unprovided meal/rest breaks arise from rights based on an employment contract, and punitive damages are only available for the breach of an obligation not arising from contract.

California Court of Appeals requires employers to disclose contact information regarding putative class members/employees to plaintiff's counsel in wage-hour class action

by Glen H. Mertens

In Crab Addison, Inc. v. Superior Court (2008) 169 Cal. App. 4th 958, the plaintiff filed a class action against his former employer, Crab Addison, alleging that the employer failed to provide meal and rest breaks as required by California law and that certain employees had been misclassified as "exempt." As is often the case in these types of wage-hour class action matters, the plaintiff's attorney sought through the "discovery" process the names, addresses, and telephone numbers of all of the putative class members. The employer-defendant declined to provide such information, arguing that the information sought was "confidential and private." The plaintiff requested that the trial court order the employer to disclose the information that had been requested.

The employer opposed the motion by invoking a "release of contact information" form that many of the affected employees/putative class members had signed. That form asked each employee to state whether or not (s)he consented to disclosure by the employer of his/her addresses and telephone numbers to third parties in the context of litigation. Many of the affected employees had indicated that they never wanted such information released, and other employees had indicated that they wanted to be contacted by the employer before any such information was released. The employer argued that the request for information made by the plaintiff would require the employer to violate the privacy rights that had been asserted expressly by those employees who had signed off on the "release of contact information" form.

Employees preference that their contact information not be disclosed ignored by Court

The trial court granted the plaintiff's motion and ordered the employer to disclose the contact information for the putative class members that the plaintiff had requested. The court concluded that the employees' individual privacy rights were outweighed by the plaintiff's "need for discovery" that was relevant to his class action claims. The employer filed a petition seeking a writ of mandate from the California Court of Appeals that would have ordered the trial court to reverse its ruling and deny disclosure of the employees' contact information.

The Court of Appeals denied the employer's petition, effectively affirming the trial court's ruling. The appellate court noted that many employees who had signed the "release of contact information" form did so out of a belief that the form would preclude telemarketers from obtaining their contact information; there was virtually no evidence to suggest that the affected employees had signed the forms to prevent a representative who was seeking to enforce their rights under the wage-hour laws from contacting them to discuss claims that might have benefit to them. Indeed, the employees were not even aware that this lawsuit was pending when they executed the confidentiality forms. The appellate court noted that, while the employees did have rights of privacy under the California Constitution, that right of privacy was not "absolute;" the right protects against serious invasions of privacy. Discovery of employee contact information in the context of this type of wage-hour lawsuit was not such a serious invasion of the employees' rights of privacy that it outweighed the public policy in favor of discovery relevant to a pending lawsuit, particularly given that the discovery sought related to claims in which the affected employees might well have some immediate monetary interest.

This decision will make it more difficult for an employer facing class action lawsuits alleging wage-hour violations to keep the named plaintiff and his lawyer from discovering the identities of and contact information for the putative class members whom the named plaintiff purports to represent. Defense counsel typically have little luck objecting to discovery requests for such information by simply invoking the "right to privacy" without more. In Crab Addison, the defendant-employer actually had something "more" to support the privacy objection, viz., the executed forms from the employees themselves that expressly stated that they did not want their personal contact information disclosed to third parties. Unfortunately, even that evidence was not enough to prevent the plaintiff from gaining access to contact information for his former co-workers and other potential class members, the appellate court noting that the privacy statements had been made by the individual employees without their knowledge of how future class action litigation might affect their personal interests.

What are employers to take away from this?

If the analysis in Crab Addison remains the controlling statement of law on this issue, the only realistic chance an employer might have of resisting a request for contact information regarding potential class members on the basis of "employee privacy" would be to inform each affected employee (and former employee) of the nature of the pending class action litigation and then obtain signed statements to the effect that the employee does not want his or her contact information released to the plaintiff. In view of the fact that such a discussion inevitably would enlighten the employees about the nature of the class-wide claims and the fact they, as putative class members, stand to gain a monetary recovery if the class action were to succeed, this strategy probably makes little sense as a practical matter. Rather than spending time and money resisting discovery requests for contact information that, in the eyes of the judiciary, represent relatively "un-serious" invasions of privacy, the employer-defendant in a wage-hour class action matter would be better advised to devote its resources to defeating the motion for class certification. If the class sought by the plaintiff is not certified, the employer's exposure on such claims typically decreases dramatically.

Employee who provides information on harassment during an investigation of another employee's complaint is protected under retaliation statutes

by Kristin M. Kubec

In Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee (2009) 129 S.Ct. 846, plaintiff Crawford was a participant in an internal investigation conducted by her employer (Metro) concerning allegations of harassment against her supervisor. Ms. Crawford herself had not initiated the complaint giving rise to the investigation, but was interviewed in the course of an investigation pertaining to complaints by two co-workers. During her interview, Ms. Crawford was asked whether she had observed any instances of harassment by her supervisor. She stated that she had, and went on to describe several instances where the supervisor sexually harassed her. The employer took no action against the supervisor, but later terminated Ms. Crawford and the two other accusers. Ms. Crawford then filed suit under Title VII, claiming that Metro had terminated her in retaliation for her report concerning the supervisor's behavior.

Title VII's anti-retaliation provision makes it an unlawful employment practice for an employer to discriminate against any employee (1) who opposes any employment practice that is unlawful under Title VII or (2) because the employee has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under Title VII. The district court granted summary judgment in favor of Metro, holding that Ms. Crawford could not satisfy either the "opposition" prong or the "participation" prong of Title VII's anti-retaliation statute. It found that, since she herself had not accused the harasser, she could not pursue a claim under the "opposition" portion of the statute, and since the investigation that was conducted was not an EEOC investigation, she was not a "participant" either.

The Supreme Court ruled that Ms. Crawford's statements during the internal investigation were, in fact, protected under the "opposition" portion of the statute. First, they rejected the theory that in order to "oppose" a wrongful practice, the employee must actively and consistently engage in activities that oppose the conduct. They further rejected the idea that an employee must instigate some sort of action. They found that the Sixth Circuit's ruling was not consistent with the Supreme Court's rulings in Burlington Industries , Inc. v. Ellerth (1998) 524 U.S. 742, 118 S.Ct. 2257 and Faragher v. Boca Raton (1998) 524 U.S. 775, 118 S.Ct. 2275 which, in effect, provide employers with an inducement to investigate and correct harassment so as to avail themselves of an affirmative defense to a claim of vicarious liability. If the Sixth Circuit's decision were to stand, the Court reasoned, an employer may be free to penalize the employee for speaking out. If the employee kept quiet, the employer could later avoid liability by stating that it had in place policies and procedures to prevent harassment that the employee did not utilize. The Court further reasoned that the district court's ruling undermined Title VII's primary objective of avoiding harm to employees.

The Court did not reach the question of whether her participation in the internal investigation was protected under the "participation" prong of the statute, and remanded the case to the district court for further proceedings.

What are employers to take away from this?

Any employee who conveys information to the employer about sexual harassment he/she has experienced is going to be protected by the anti-retaliation provisions under Title VII. It does not matter if an investigation began or ended with the complaining employee.

Even though a determination was made that the plaintiff's claims against a supervisor were frivolous, vexatious and brought in bad faith, the supervisor was awarded only $1.00 in attorneys fees

by Colleen A. Déziel

Defendants in employment cases cannot seem to get a break when it comes to defending frivolous claims. In a recent decision, the California Court of Appeals found that while the plaintiff's claims against an individual supervisor were "frivolous and vexatious," it declined to award the defendants any fees beyond $1.00. How could this happen? Read on.

In the matter of Young v. Exxon Mobil, (2008) 168 Cal.App.4th 1467, an employee of a Lancaster service station was terminated for many acts of insubordination, absences and problems with customers. More specifically, it appears from the evidence that within a short four month time period the plaintiff routinely arrived tardy for work, had several failures to appear for work without any call, had a problem controlling her temper (i.e., she "smashed another sales associate"), and had many complaints from customers made against her (i.e., she was routinely rude and disrespectful).

The event that led to her termination centered around the plaintiff's behavior on September 15, 2004. She was working the night shift alone when the person who was to relieve her at midnight failed to show up for work. The plaintiff called the assistant station manager, Wanda Najera, yelling and very angry saying she had to leave. Najera advised her that she could not do that and that she should wait around for Najera to arrive to relieve her. It was a "posted offense" to shut down the gas pumps and effectively close the 24 hour station.

Despite Najera's instructions, the plaintiff shut down the pumps, logged off her cash register and effectively shut down the station. The plaintiff then called Angela Lopez, the station manager, yelling and out of control. Lopez informed her that she would get someone there as soon as she could, and proceeded to call Najera. The plaintiff also called Najera again and, as with the first conversation, began yelling at her again. Najera represented that she would be there as soon as possible.

When Najera arrived approximately one and one half hours later, the station was closed down and the plaintiff was gone.

The next morning Lopez contacted the Territory Manager for Exxon, Karen Johnson. Johnson presented to the station to meet with Lopez about the incident. Johnson reviewed the plaintiff's employment file as well. Lopez prepared forms for the plaintiff's termination, however, since Johnson did not have the authority to hire or fire, she contacted Exxon's human resources department out of state. The department concluded that the termination was proper on grounds of insubordination and neglect of duty and provided an endorse code demonstrating that the plaintiff's termination was endorsed by human resources.

A few months after the termination, the plaintiff filed a charge with the Department of Fair Employment and Housing alleging she was fired, harassed and retaliated against by Lopez and other Exxon employees based on a mental disability. Her causes of action in civil court against Exxon and Lopez included disability discrimination and harassment, and intentional infliction of emotional distress. Against Exxon, she also alleged causes of action for wrongful termination in violation of public policy and violation of Labor Code section 1102.5 (concerning retaliation).

The plaintiff alleged that as a result of the removal of a tumor from her brain when she was a child, she suffered from (1) visual and audio processing deficiencies (i.e., she testified that "[she] understand[s] things; [she] comprehend[s] things perfectly. But the speed at which [her] eyes and ears observe what is to be processed by the brain, the brain process itself is a slower process, not much slower." The plaintiff admits that there is no name for this alleged disability), (2) manic depression, and (3) obsessive compulsive disorder. She claims she informed Lopez of this in July of 2004 during the first reprimand for her failure to show up for work.

The plaintiff also alleged that while Lopez did not harass her, it was shortly after Lopez learned of the plaintiff's alleged disability that other employees began a campaign of harassment which consisted of ignoring the plaintiff, physically obstructing her movements in the station's work area, telling customers, vendors and suppliers that they worked with a "psycho-retard," and showing up late for work so that the plaintiff would have to work more hours. The plaintiff complained to Lopez, who told her that this type of stuff just happens.

Lopez then allegedly retaliated against her by calling her a "retard," cutting her hours, refusing to work around the plaintiff's school schedule and refusing to allow her to train other employees on the graveyard shift.

Both Exxon and Lopez moved for summary judgment on various grounds. The motions were granted essentially due to the fact that the plaintiff could not establish that the proffered reasons for her termination were pretextual, and Lopez then moved for an award of attorney's fees, but Exxon did not so move.

As noted above, while the court found the claims against Lopez to be frivolous and brought in bad faith, the court would not make a true award of attorney's fees to her based on the fact that an award to Lopez would actually be an award to Exxon, which did not claim that the plaintiff's claims against it were frivolous. The court observed that the trial court had discretion to deny attorney's fees, and further that Lopez could not show that Exxon incurred fees on her behalf that it would not have incurred in any event. In its decision, the court also noted that a trial court can take into account a plaintiff's ability to pay when attempting to determine whether, and how much, to award in attorney's fees.

What are employers to take away from this?

It is nearly impossible to obtain an award of attorney's fees in favor of a defendant on these employment claims. If the trial court is able to consider not only whether the claims brought against the moving defendant are frivolous, but the wealth of the plaintiff, which rarely exists, and which defendant actually incurred the fees, then it is unlikely that the defendants will ever recover fees under the Fair Employment and Housing Act.

In order to position itself better, an employer should attempt to keep very detailed invoices of work performed by attorneys on behalf of the defendants, and for which defendant said services were performed. It should also attempt to get sued only by wealthy plaintiffs. One consideration for an employer and/or manager in this position is to consider suing under a malicious prosecution theory.

As a side note, there was a small ray of light in this opinion when the Court of Appeal found that the trial court did not abuse its discretion in refusing to continue the summary judgment hearing so that the plaintiff could take additional depositions. This is significant because ever since Code of Civil Procedure 437c was modified to require 75 days notice to the opposing party, court's have uniformly granted extensions of time and continued hearings to allow the opposing side the opportunity to conduct more discovery. This has occurred even when the opposing party did not expressly request such an extension.

Given the ruling in Young, it appears that it has become a bit more difficult to get that continuance. The Court of Appeal explained that the plaintiff had not made the necessary showing that further depositions might disclose facts essential to justify opposition. The plaintiff's declarations were conclusory and did not detail in any way the particular essential facts that might exist. Declaring that testimony would be "critically important" was not sufficient.

A final decision maker's wholly independent, legitimate termination decision can insulate from liability a lower level supervisor who has a retaliatory motive to have the employee fired

by Colleen A. Déziel

In a matter of first impression in the 9th Circuit Federal Court of Appeals, the court pondered the question of whether a final decision maker's wholly independent, legitimate decision to terminate an employee insulates from liability a lower-level supervisor involved in the process, who had a retaliatory motive to have the employee fired. In a nutshell, the court concluded that because the termination decision was not shown to be influenced by the subordinate's retaliatory motives the lower-level supervisor was so insulated.

More specifically, in Lakeside-Scott v. Multnomah County, 556 F.3d 797 (9th Cir. 2009), the plaintiff complained that her supervisor, Jann Brown, favored gay and lesbian employees in hiring and promotion decisions. The plaintiff also complained about certain co-workers' violations of County policies. Ultimately, the plaintiff was terminated by Joanne Fuller, the director of the Department of Community Justice's information systems department, for improper use of DCJ's computers and email system. The plaintiff filed a retaliatory charge against the County and Brown alleging that Brown wanted to retaliate against her for complaining about her. She contended that Brown unlawfully influenced Fuller's decision to fire the plaintiff.

The evidence presented at trial reflected that Fuller had ordered Brown to conduct an investigation into another employee, David Landis. Brown delegated the investigation to Tami Williams due to Williams's expertise in computer searches. This investigation resulted in Williams finding a journal prepared by the plaintiff and which contained excerpts of personal emails and some derogatory remarks about homosexuals. This journal was forwarded along with other material to the human resources department.

Upon reviewing the journal, the human resources department or Fuller instructed Brown to look for additional material related to the plaintiff. Brown again delegated the task to Williams. After further material was provided, and after Brown had the opportunity to review the journal, Brown, Fuller and County counsel met to discuss the matter. Fuller decided to place the plaintiff on administrative leave while further investigation was conducted into the plaintiff's activities. With the assistance of the human resources department, Brown prepared the letter placing the plaintiff on leave and also met with the plaintiff along with two other managers.

Once the plaintiff was on leave, Fuller directed John Turner, an investigator on staff, to conduct the internal inquiry. Brown was not involved in the framing of the charges, outlining the direction of the investigation or providing a list of witnesses. At the end of the investigation, and after the plaintiff admitted to the pending charges (i.e., misusing County property, conducting personal business on County time, engaging in prohibited workplace harassment and prejudicial acts, etc.), Turner issued a report recommending that all of the charges be sustained. Brown had nothing to do with the investigation conducted by Turner, other than to answer his questions.

After meeting with the plaintiff, Fuller decided to terminate the plaintiff. Fuller testified that while the journal was the reason that an investigation began, the decision to terminate was based on everything that Turner had found in his investigation.

While the trial court found in favor of the plaintiff and against Brown, the appellate court reversed this decision by holding that the above evidence reflected that, as a matter of law, Fuller's wholly independent decision-making negated any causal connection between Brown's retaliatory bias and the plaintiff's termination.

What are employers to take away from this?

It behooves an employer to make sure that those who investigate employee complaints and/or employee misconduct, and those who make the ultimate termination decisions are persons who do not have an agenda or the appearance of an agenda with regard to the investigated and/or terminated employee. If there is evidence or even a suggestion that a supervisor has a reason to want an employee investigated or terminated, then they should be as far removed from the process as is practically possible.

ADAAA enacted and diabetes found to qualify as a disability under both pre-ADAAA case authority and under the recently enacted ADAAA

by Colleen A. Déziel

On September 25, 2008, the ADA Amendments Act of 2008 ("ADAAA") was signed into law in order to "restore the intent and protections of the Americans with Disabilities Act of 1990" which was that the Act provide a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and provide broad coverage."

The matter of Rohr v. Salt River Project, 555 F.3d 850 (9th Cir. 2009),was pending at the time that ADAAA was enacted. Thus, the question in that matter became whether the ADAAA was to be applied retroactively. However, given the fact that the Court of Appeals found the plaintiff in this matter to be a qualified individual who was disabled under both the ADAAA and pre-ADAAA case authority, the court ultimately did not have to decide this issue. As such, the retroactive application of the Act remains in question.

On the issue of whether the plaintiff was a qualified individual with a disability, the trial court held on summary judgment that Rohr's diabetes did not qualify him as being disabled, and further found that his inability to complete the respirator certification test because of his disability rendered him unqualified for his position. The Court of Appeal disagreed on both counts.

More specifically, plaintiff Rohr was a metallurgy specialist who was diagnosed with insulin-dependent type 2 diabetes which caused symptoms including high blood pressure, deteriorating vision and occasional loss of feeling in his hands and feet. The plaintiff was required to follow a "very demanding regimen" to manage his diabetes. Travel presented a particular problem, as the plaintiff was required to find ways to keep his insulin chilled, and changes in his work day greatly affected his treatment routine.

Thus, when his employer assigned him a job which required him to travel out of town for five or six weeks he sent a letter to his employer requesting certain accommodations. These requested accommodations included that he not be required to drive

for more than three or four hours at a time, engage in strenuous activities, work more than an eight or nine hour shift, work in extreme heat, climb scaffolding or ladders, work around moving machinery or go on overnight out-of-town travel. He explained that these accommodations were necessary because he would otherwise become exhausted, overheated, weak or dizzy as travel would exacerbate his condition.

The plaintiff's doctor provided a note which supported his request for no overnight travel, exposure to extreme heat and an extended work day. The employer's doctor initially agreed with all of the plaintiff's requested accommodations with the exception of the one for overnight travel. However, approximately five months later the employer's doctor agreed with the restriction for overnight travel as well. The doctor issued a note indicating that "it remains my opinion that Mr. Rohr is physically able to perform the essential functions of his job with the accommodations as outlined."

In regard to travel, part of the plaintiff's job required him to be available to act as a "borrowed hand" at various out of town plants when those plants incurred outages or other problems. This rarely occurred, and the plaintiff estimated that he had traveled out of town maybe 12 times in 23 years. The plaintiff provided testimony that his job was performed mainly in an office environment. When he did travel out of town, the hours he worked included 10-12 hour days, seven days per week.

There was also testimony that because of his diabetic symptoms, he was unable to renew his respiration certification, which was required under OSHA. Before the diagnosis, he was always able to obtain the certification.

Despite what the employer's doctor had opined concerning the plaintiff's work status, the employer informed the plaintiff that because he could not go on overnight trips, he was prevented from performing the essential functions of his job and he could either (1) remain in his position for 90 days while seeking another position within the company, (2) apply for disability benefits, or (3) take early retirement.

Thereafter, the plaintiff presented to his doctor and requested the travel restriction be removed. His doctor complied, however, the employer's doctor would not remove the restriction without some note from the plaintiff's doctor indicating how the plaintiff's circumstance had changed such that he could now travel.

The plaintiff's doctor explained that the plaintiff was able to manage his condition through medication and diet, and that if the travel involved inspection type work, as opposed to being a "borrowed hand," then he could travel (i.e., a borrowed hand position required climbing, hot and hazardous environments and long hours all of which the plaintiff was prevented from performing).

Ultimately, the plaintiff chose to go out on disability, and thereafter filed a charge with the Equal Employment Opportunity Commission.

The Court of Appeal held that diabetes is a physical impairment that substantially limits the major life activity of eating (i.e., it affects the digestive, hemic and endocrine systems). As applied to Rohr, the court stated that it must consider the nature and severity of the plaintiff's impairment, the duration or expected duration of the impairment as well as the permanent or long term impact of the impairment. The court stated that it must also consider whether his efforts to mitigate the disease constitute a substantial limitation.

The court spent considerable time discussing how difficult it is to manage diabetes and how dangerous it can be having to give insulin to someone. The court also noted that there was sufficient evidence that the plaintiff was substantially limited even while taking medication and the insulin, because in spite of the medicine and insulin, he was still required to snack regularly, plan his daily schedule around his diet, avoid skipping meals and eat immediately upon feeling dizzy. The court noted that the general population does not have to follow such a regimen and straying from a diet or missing a meal will not result in exposing them to fainting or worse.

In addition to the above, the court found that there was an issue of fact as to whether the plaintiff was a qualified individual, and further, there was no evidence offered as to whether a similar alternative test could have been given to determine if the plaintiff could renew his respiration certification, or that the particular test given was necessary. Similarly, the court held that there was a sufficient issue of fact as to whether the plaintiff could perform the essential functions of his job. Given the above, the court held that summary judgment should not have been granted in favor of the employer.

What are employers to take away from this?

The ADAAA has greatly expanded the scope of the term disability. It behooves employers to consider the more broad definitions when making decisions related to employee disability. The more narrow definitions outlined in Supreme Court holdings such as Sutton v. United Air Lines, Inc. are no longer going to be applied. Much more care and consideration

needs to be given to the determination of whether a disability exists, and of whether the employee can perform the true essential functions of a job.

Also, employers need to be very careful how they define the essential functions of a job and how they administer tests. If there are alternative tests which can be given to come to the same findings, they should be considered when attempting to accommodate employees with particular disabilities.

Please note that the amendments will have a much lesser effect in California because the Fair Employment and Housing Act already protected employees in this state to the degree that the amended federal statutes do.

Plaintiff's requested accommodations were given, but the plaintiff still was not happy and sued

by Kristin M. Kubec

In Wilson v. County of Orange (2009) 169 Cal.App.4th 1185, plaintiff Julie Ann Wilson was a communications coordinator (basically a radio dispatcher/operator) for Control One, which is a county-wide emergency communications system for all agencies, police departments, and public agencies in Orange County.

As a radio dispatcher, Ms. Wilson was required to work at each of the five different communications desks, including the "Red Channel" (also called the "Pursuit Desk") which provides assistance to police officers as they leave their jurisdiction during a pursuit. The Red Channel was generally considered to be the most stressful of all of the channels to operate. If a communications coordinator was unable to handle the responsibilities of that desk, he/she would be moved out of Control One and relocated to another job in the department.

Ms. Wilson began working for Control One in 2001 and was trained on all channels, including the "Red" Channel. In 2002, she was diagnosed with an autoimmune disorder that caused her blood to coagulate, causing thrombosis and clots. She was hospitalized and out on extended leave. In 2003, she returned to work and worked all of the desks, including the "Red" Channel. In September 2003, she complained that she did not like working on the Red Channel which because she felt she made errors and was criticized. In August 2004, she made some mistakes on the Red Channel that caused her supervisors to increase her hours on that desk in order to try to improve her skills. A week later, she told her supervisors she could not work the Red Channel for medical reasons and she was placed on a work restriction. Her supervisors agreed to the restriction and assigned her to the Teletype desk. They also began looking for other positions for her at that time.

Ultimately, on August 29, 2005, Ms. Wilson and her supervisors reached an agreement that she would not be required to work Red Channel shifts, and that her shifts on that desk would be for no more than five consecutive days at a time, no more than 10 hours per day, with no graveyard shifts. This was exactly the accommodation that had been requested by Ms. Wilson once the discussions began concerning how to address her limitations.

Wilson sued the county, claiming that the County violated the Fair Employment and Housing Act because it failed to accommodate her disabilities and failed to engage in the interactive process until June 2005. The jury determined that the County had complied with the requirements of FEHA, and she appealed. The Court of Appeals upheld the jury's verdict, holding that there was abundant evidence that the County provided her with a reasonable accommodation, and engaged in a good faith interactive process with her to arrive at that accommodation. The Court found that, although a formal reference to commencement of the interactive process was not made until June 2005, there was ample evidence presented to the jury that the interactive process had been going on all along prior to June 2005.

What are employers to take away from this?

This case illustrates the inherent difficulties facing an employer in attempting to accommodate a disabled employee. Even though the County of Orange apparently began discussions about accommodating Ms. Wilson's disabilities in 2004, and ultimately agreed to give her exactly what she wanted (despite the apparent hardship to the department itself), Ms. Wilson still was able to pursue a claim based on the argument that they did not do so quickly enough. This case demonstrates the importance of documenting every discussion about accommodation, although the discussions in this case prior to June 2005 did not formally reference the "interactive process," both the court and the jury felt that those documented discussions were sufficient to show the process had been going on all along anyway, whether formally or not.

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.

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
777 North Rainbow Boulevard
Suite 145
Las Vegas, NV 89107
Main: 702-479-1010
Fax: 702-479-1025

www.amclaw.com

Eric A. Schneider, Esq.
Managing Partner/Editor/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