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Labor & Employment Briefing

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

DEFINITION OF EMPLOYER MUCH BROADER IN CALIFORNIA

by Kimberly M. Foster

In May, 2010, the Supreme Court of California held in *Martinez v.* Combs, 49 Cal. 4th 35 (2010), that for purposes of imposing liability for unpaid minimum wages under §1194 of the California Labor Code, courts are to employ the definition of "employer" under the applicable wage order rather than the more narrowed definitions under common law or federal law. In sum and substance, the Court imposed minimum wage liability on "any person…who directly or ***indirectly***, or through an agent or other person, ***employs or exercises control over the wages, hours, or working conditions of any person***." (emphasis added)

In addition, the Court affirmed that the Industrial Wage Commission's definition of "employer" does not impose liability on corporate agents acting within the scope of their agency. Thus, owners and supervisors are generally not individually liable for unpaid wages.

In *Martinez v. Combs*, six agricultural workers who picked strawberries for Munoz & Sons in the Santa Maria Valley in 2000, sued Munoz & Sons and two produce merchants who purchased strawberries from Munoz for unpaid wages. After Munoz & Sons declared bankruptcy, the workers attempted to recover the unpaid wages from the produce merchants under various theories of liability, most significantly that the produce merchants qualified as "employers" under the wage order because they benefited from the work performed by the pickers and further exercised control over [plaintiffs'] wages, hours, and working conditions, by virtue of the sales contracts Munoz entered into with the producers.
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Ultimately, the Court affirmed the lower court's order that the producers could not be held liable for unpaid wages since neither had the power to prevent the pickers from working and Munoz and his foreman had exclusive power to hire and fire the pickers, to set their wages and hours, and to tell them when and where to report.

Even though the specific outcome for the produce merchants was favorable, the message to California companies was clear: the scope of employer liability under California law is much broader than previously thought.

WHAT CAN EMPLOYERS TAKE AWAY FROM THIS?

Corporations that enlist the help of temporary agencies, vendors, and subcontractors must be vigilant when determining whose responsibility it is to supervise the work performed by California workers.

IN ANOTHER MINOR VICTORY FOR EMPLOYERS ON THE ISSUE OF REST AND MEAL BREAKS, A CALIFORNIA COURT OF APPEAL HOLDS THAT AN EMPLOYER ONLY NEEDS TO MAKE BREAKS AVAILABLE FOR EMPLOYEES; IT DOES NOT NEED TO ENSURE THAT THE BREAKS ARE TAKEN

by Colleen A. Déziel

In *Hernandez v. Chipotle Mexican Grill, Inc.*, the California Court of Appeal recently held that employers must ***provide*** employees with breaks, but need not ***ensure*** employees take the breaks. This decision is just the latest of several cases to come down on this topic in the last year or so. This ruling is consistent with prior appellate decisions in the *Brinker* and *Brinkley* cases, which currently are on appeal to the California Supreme Court.

EMPLOYER VICTORY! EMPLOYERS ONLY NEED MAKE BREAKS AVAILABLE TO EMPLOYEES

In so holding, the *Hernandez* court relied on various legal authorities which included Labor Code §226.7 and Labor Code §512. §226.7 provides that an employer shall not require an employee to work through a rest or meal break and §512 provides simply that employers must *provide* employees with meal period in specified situations. The *Hernandez* court reasoned that nothing in the language of these statutes required an employer to ensure that the employees actually took the breaks.

Similarly, the court relied on Wage Order 5-2001. This order governs restaurant workers like the Chipotle employees, and only requires employers to ***provide*** the breaks and to "***authorize and permit***" the breaks, and not to ***ensure*** that they are taken. (emphasis added.)

In addition to the above legal authority, the *Hernandez* court pointed out that such a position was consistent with the California Supreme Court's holding in *Murphy v. Kenneth Cole Prod., Inc.* (2007) 40 Cal.4th 1094, which reflects that the obligation on the employer was simply not to force employees to work through breaks.

The above reflects that even though the Supreme Court of California has yet to render its decision on this issue in *Brinker* and *Brinkley*, the appellate courts are continuing to hold that employers are not obligated to ensure that breaks are taken. The *Hernandez* court even pointed out that a contrary result would not be practical because it would place an undue burden on employers, especially those employers with numerous employees, or those who had employees who do not appear to remain in contact with the employer during the day. The court even rationalized that a contrary holding could also result in a perverse incentive which encouraged employees to violate company meal break policy in order to receive extra compensation under California wage and hour laws.

In a side note, the *Hernandez* court made mention of the fact that employers are required to keep a record of meal breaks, but not rest breaks.

WHAT DOES THIS MEAN FOR AN EMPLOYER?

The California appellate courts continue to come down in favor of the employer on this very important issue, which suggests that employers may no longer need to take steps to ensure, or to develop policies that would ensure that all required breaks are actually being taken by all employees. However, employers should be aware that the California Supreme Court has not weighed in on this issue as of yet, and as such, the current wave of favorable cases could become meaningless in the near future. If the Supreme Court comes down with decisions that are contrary to the way the appellate courts are deciding this issue, employers will indeed be faced with the laborious task of developing policies to monitor all employee breaks. We will continue to keep you informed on this very important topic.

SUCCESS FOR DOLLAR TREE, BUT DOLLAR TREE NOT A SUCCESSOR OF FACTORY 2 U

by Eric A. Schneider

Sullivan v. Dollar Stores, Inc. 2010 WL 3733576 (9th Cir. WA 2010) in a narrow sense considers the issue of successor liability in the context of FMLA, but in a broader sense addresses how courts should examine factors not specifically addressed in employment statutes as they arise.

Factory 2 U operated retail stores selling discount clothing. Christina Sullivan managed a Factory 2 U store in Pasco, Washington, but Factory 2 U went into Chapter 11 bankruptcy.

Dollar Tree is a chain of retail stores that sells a variety of items, including clothing, for one dollar. Dollar Tree purchased Factory 2 U's leasehold of the store it had operated in Pasco, and shortly thereafter the Factory 2 U store closed its doors.

CONTINUING EMPLOYEES OF NEW OWNER'S BUSINESS COULD HAVE MORE RIGHTS THAN YOU THINK

Dollar Tree opened for business at the same location four weeks later. During the interim, it reconfigured the store by remodeling the interior in accordance with Dollar Tree's specifications, and then a set-up team prepared the new inventory, stocking the shelves with Dollar Tree merchandise.

The plaintiff worked straight through, first training for two weeks at another store and then assisting with the set up work at the Pasco store. When the Pasco store opened, she began full time work as an assistant manager.

Within 12 months of the opening of the Dollar Tree store, the plaintiff took time off work to assist her mother who had experienced serious health problems. She subsequently brought a claim under the Family Medical Leave Act.

The sole issue in the case was whether Dollar Tree was a successor-in-interest such that Sullivan would have satisfied the requirement of having been employed there for at least 12 months.

The FMLA statute defines "employer" as a person or entity engaged in commerce with a minimum number of employees, and includes "any successor-in-interest of an employer." (29 U.S.C. §2611(4)(A)(2)(2)).

The term "successor-in-interest" however, is not defined in the FMLA statute. Its meaning had not heretofore been addressed by the Ninth Circuit Court of Appeals, but it had come up in the Sixth Circuit in several cases. The Sixth Circuit made use of a Department of Labor Regulation which set forth eight factors for consideration, finding that those factors assist in the inquiry, but the true test is the balancing of the equities. The latter should be analyzed in the context of a three-part test concerning the equities imposing a particular legal obligation on a successor:

1. The interest of the plaintiff-employee;
2. The interest of the defendant-employer; and
3. The federal policy goals of the statute.

The Ninth Circuit adopted that analysis.

The Department of Labor had issued the following regulation:

(a) For purposes of FMLA, and determining whether an employer is covered because it is a "successor-in-interest" to a covered employer, the factors used under Title II of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Act will be considered. However, unlike Title VII, whether the successor has notice of the employee's claim is not a consideration. Notice may be relevant, however, in determining successor of liability for violations of the predecessor. The factors to be considered include:

   1. Substantial continuity of the same business operations;

   2. Use of the same plant;

   3. Continuity of the workforce;

4. Similarity of jobs and working conditions;

5. Similarity of supervisory personnel;

6. Similarity in machinery, equipment and production methods;

7. Similarity of products or services; and,

8. The ability of the predecessor to provide relief.

(b) A determination of whether or not a "successor-in-interest" exists is not determined by the application of any single criterion, but rather the entire circumstances are to be viewed in their totality.

The Ninth Circuit then went about applying the eight factors.

With respect to the "substantial continuity of the same business operations" factor, the court observed that Dollar Tree operated a completely different retail establishment, with the only common factor being the use of the same building. It found that this factor strongly supported a conclusion that Dollar Tree was not a successor to Factory 2 U.

The court found that the "use of the same plant" factored to be neutral because although the two businesses used the same building, the interior had been substantially renovated.

The plaintiff had asserted that the "continuity of the workforce" factor favored her because she had submitted an affidavit stating that most of the Dollar Tree employees had been Factory 2 U employees. The court, however, disregarded the conclusory statement because Dollar Tree had submitted more precise evidence that when the store opened, only the plaintiff and one other Factory 2 U employee went to work when Dollar Tree reopened the store.

The court found that the "similarity of jobs and working conditions" to favor the plaintiff slightly because the nature of both businesses entailed cashiers, shelf stockers and managers.

The "similarity of supervisory personnel" factor suggested no successorship because Dollar Tree employed a new manager at the Pasco store, and there was no overlap in upper management between Factory 2 U and Dollar Tree.

The "similarity in machinery, equipment and production methods" slightly favored the plaintiff because both stores likely used cash registers, hand trucks and other equipment usually associated with a retail business chain.

The plaintiff had argued that "the similarity of products or services" went her way, but the court disagreed because while Factory 2 U was a clothing store, and Dollar Tree sold some clothing, Dollar Tree sold at a particular price point whereas Factory 2 U sold its clothing at a range of prices. Further, Dollar Tree did not purchase any of Factory 2 U's inventory.

The final factor, "the ability of the predecessor to provide relief" inherently favors a finding of no successor-in-interest because the former employee cannot possibly grant leave to a person no longer employed by it.

In sum, the factors as a whole favor a finding of no successor liability.

The court next examined legislative intent. After discussing various possibilities of what Congress intended, it observed that "the provision as written plainly requires 12 months of employment by an employer (either in its present form or as a successor-in-interest) to establish liability for FMLA benefits. A finding of no successorship advances Congress' purpose of having all employees wait 12 months to obtain FMLA coverage."

The court affirmed the summary judgment rendered in favor of the employer.

WHAT CAN EMPLOYERS TAKE AWAY FROM THIS?

When taking over another business, and when retaining personnel from the seller's business, keep in mind that the continuing employees could have more rights than would a new employee. When evaluating this, keep the above factors used by the court in mind, and consult an attorney if you are uncertain as to the result.

CALIFORNIA COURT RULES THAT FORMER EMPLOYEE IS NOT ALLOWED TO HAVE HIS ATTORNEY PRESENT DURING EMPLOYEE'S MENTAL EXAMINATION BECAUSE EMPLOYEE'S ANSWERS MAY BE TAINTED BY THE DESIRE TO PLEASE HIS COUNSEL

by Michelle T. Harrington

The plaintiff Steven Braun, a former employee, sued Toyota Motor Sales, U.S.A. and Randall Bauer for, among other things, gender discrimination and sexual harassment. Braun alleged that while working for Toyota as a manager, he was sexually harassed by Bauer who was a corporate manager to whom Braun reported. After Braun spurned Bauer's advances, Bauer and Toyota retaliated against Braun by issuing false reprimands and other adverse actions, thereby forcing him to quit.

During the litigation, Toyota and Bauer moved to compel Braun to submit to an independent psychiatric examination. The trial court granted the motion, but upon Braun's request, permitted his attorney to be present in an adjoining room during the examination in order to monitor it. Toyota and Bauer filed a petition with the California Court of Appeal to set aside the portion of the trial court's order allowing his attorney to monitor the examination. Toyota and Bauer contend that by allowing the presence of counsel was error because the experts retained for the examination believed counsel's presence would interfere with the validity of the exam and Braun made no evidentiary showing that his counsel's presence in an adjoining room was essential to protect his privacy.

The Court of Appeal concluded that the trial court erred in permitting Braun's attorney to attend the psychiatric exam (even though not in the exam room) so as to listen to and monitor the exam. The Court based its ruling on the grounds that Toyota's experts established that the presence of Braun's counsel would interfere with the validity of the exam, that such experts might refuse to perform the exam under such circumstances, and that Braun made no evidentiary showing that his counsel's presence in an adjoining room was necessary to protect his privacy.

While the high court recognized the existence of California law allowing courts to fashion some means of protecting an examinee from intrusive or offensive probing by overzealous defense experts, the employee must first make a showing that the circumstances warranted such protection. Because Braun failed to make such a showing, he was not entitled to have his attorney present to monitor his examination. Thus, absent evidence that Toyota's examiners were unscrupulous or evidence otherwise establishing Braun's need to have his counsel present, the Court of Appeal was not persuaded.

WHAT CAN EMPLOYERS TAKE AWAY FROM THIS CASE?

For any employer currently embroiled in litigation in which an employee psychiatric exam is at issue, the employer should ensure that any agreement or court order relating to the parameters of such exam contains explicit language prohibiting the employee from speaking with his counsel at anytime during the exam or from even having employee's counsel present. Such express prohibition would prevent the employee from being coached by his counsel during breaks in the exam. Without such express prohibition, a clever employee's attorney may be able to get around the rule established in this case by arguing that it was never part of the deal.

KEEPING A POOR PERFORMER CAN COST YOU MORE THAN YOU KNOW

by Eric A. Schneider

Anthoine v. North Central County's Consortium (2010 WL 2026040 (C.A. 9 Cal.)) tackles a situation where a low level public employee claims that he was fired in retaliation for having charged that his immediate supervisor had misrepresented the status of the employer's compliance with its legal obligations and further on the basis that he was a male terminated by a female. He also asserts wrongful termination in violation of public policy.

The court reversed the summary judgment in favor of the defendant employer as to the "whistle blowing" claim, but the court affirmed the judgment relative to the gender discrimination and wrongful termination claims.

Nelson Anthoine served as a program analyst for a public entity (NCCC) created by certain counties to administer a federal program known as the Workforce Investment Act (WIA). From 2002 through 2005 Anthoine had a number of performance issues, but less than two months before he was fired, he notified his boss, his boss' supervisor, and others that, in his view, one of the programs that he (Anthoine) monitored was misusing a portion of its NCCC funds in violation of the WIA.

In its analysis, the 9th Circuit Court of Appeals employed the five-step test annunciated in *Garcetti v. Ceballos* (2006) 547 U.S. 410, *Eng v. Cooley* 552 F.3d 1062, 1070 (9th Cir. 2009), and *Huppert v. City of Pittsburg* 574 F.3d 696, 702 (9th Cir. 2009):

1. Whether the subject is a manner of public concern;

2. Whether the plaintiff spoke as a private citizen or a public employee;

3. Whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action;

4. Whether the state had an adequate justification for treating the employee differently from other members of the general public; and,

5. Whether the state would have taken the adverse employment action even absent the protected speech.

First, the court held that Anthoine's speech qualified as a matter of public concern because a report regarding the agency's failure to comply with its legal obligations is clearly relevant to the public's evaluation of NCCC's performance. That Anthoine aired his concerns privately rather than publicly was not germane.

Next, the defendant made no showing that Anthoine statements were pursuant to his official duties.

The third consideration, that as to whether the speech constituted a substantial or motivating factor for the adverse employment action is purely a question of fact. In this case, Anthoine provided evidence of a very close temporal link between his statements and his discharge. Proximity in time may support an inference of retaliation sufficient to survive a summary judgment. Moreover, Anthoine had provided evidence showing that the proffered explanations for the adverse employment action were false and pretextual. Interestingly, he had long been a poor employee, but his termination came about only after he had "blown the whistle," thus there was evidence to support an inference of retaliatory motive.

Where the plaintiff has satisfied the first three steps, the burden shifts to the defendant to show that it had an adequate justification for treating the employee differently from any member of the general public. Here, the defendant had not attempted to show that Anthoine's statements caused any disruption or could have been predicted to cause a disruption.

Finally, even if the defendant fails to carry its burden as to the fourth part of the test, it would be entitled to summary judgment if it could demonstrate that the same employment decision would have been made even in the absence of the protected conduct. Here, the defendant asserted that Anthoine had not carried his burden in showing that his statements were a substantial or motivating factor, but it never addressed the related question as to whether it had carried its own burden of showing that the statements were not a but-for cause of the adverse actions. Accordingly, summary judgment was not appropriate, and therefore the trial court ruling was reversed.

With regard to his gender discrimination, the court applied the familiar *McDonnell Douglas* formulation. To establish a prima facie case under *McDonnell Douglas*, a plaintiff must demonstrate that:

1. He belonged to a protected class;

2. He was qualified for his job;

3. He was subjected to an adverse employment action; and,

4. Similarly situated employees not in his protected class received more favorable treatment.

Then, if the plaintiff makes out a prima facie case, the burden shifts to the defendants to prove nondiscriminatory reasons for the adverse action. If they do so, the prima facie case "drops out of the picture," and a court evaluates the evidence to determine whether a reasonable jury could conclude that the defendant's discriminated against the plaintiff based on gender.

Here, the defendants did not challenge the prima facie case, and Anthoine did not dispute that the defendants have articulated non-discriminatory reasons for the adverse employment action.

Anthoine sought to show discriminatory motive by arguing that the defendants fired the only three males it employed on the same day and that his supervisor used different tones of voice and nonverbal behaviors when speaking with male and female employees. He, however, had not offered any specific evidence about the circumstances in which the other men were terminated, and as a consequence, he failed to carry his burden of showing that the employer's explanation was unworthy of credence.

Finally, Anthoine's wrongful discharge claim failed because pursuant to Government Code Claims Act §815, a public entity is not liable for injury except otherwise provided by statute.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

The defendants here carried a poor performer for many years and discharged him only after he brought up an issue of potential public concern. First and foremost, it is obviously not a good idea to keep poor performing employees. That poor judgment should not then be exacerbated by waiting until the employee squawks about a matter of public concern before considering termination.

EMPLOYEE GOT DISABILITY?? ACCOMMODATE, ACCOMMODATE, ACCOMMODATE

by Eric A. Schneider

In *United Stated Equal Employment Opportunity Commission v. UPS Supply Chain Solutions*, 2010 WL 3366356 (9th Cir. CA), the EEOC filed suit on behalf of deaf employee, Mauricio Centeno, under the Americans With Disabilities Act alleging that UPS had failed to accommodate Centeno with a sign language interpreter for certain staff meetings, disciplinary sessions, and training. The District Court granted summary judgment on behalf of the employer, and the EEOC appealed.

Centeno worked as a junior clerk in the accounts payable division of the accounting department. He was able to complete his job duties without the assistance of an American Sign Language (ASL) interpreter. He, however, asked for, but was not granted, the use of an ASL interpreter for weekly department meetings, broad based training meetings for such things as sexual harassment, and at his evaluations and disciplinary proceedings. For the most part, UPS declined. It instead, at times, would have his supervisor send him e-mails after these events to explain what had happened, and at other times the company would have someone write notes to him during the course of the various meetings.

Centeno was very dissatisfied with that approach because he could not meaningfully participate in the meetings, and he could only read at a fourth or fifth grade level such that he did not always understand what had been written.

Somewhat remarkably, UPS at no point contended that providing Centeno with an ASL interpreter would have presented a hardship. It instead asserted that the means of accommodation which it provided were satisfactory.

The Ninth Circuit reversed the summary judgment on the basis that the EEOC had raised triable issues of facts as to whether UPS had provided Centeno with reasonable accommodations and as to whether UPS knew or should have known that its modifications were ineffective.

WHAT CAN AN EMPLOYER TAKE AWAY FROM THIS CASE?

Given the fact that UPS denied that the providing of the interpreter would have represented a hardship, it is difficult to understand why it would have declined to provide the interpreter given that at a minimum, its employee found the other modifications to be wholly ineffective. As a consequence, he did not understand what was presented at the department meetings, he did not understand the sexual harassment policy, and he could not grasp the full benefit of what was being communicated to him by way of his evaluations and disciplinary proceedings.

One would expect that if the company found the various presentations to be of value to its workforce, it would want all of its employees to benefit from them. Furthermore, on a more practical level, its conduct bought them a wholly unnecessary lawsuit.

CALIFORNIA SUPREME COURT DEALS TIE BREAKER ON CONFLICT AS TO WHETHER LABOR CODE PROVIDES A PRIVATE RIGHT OF ACTION FOR EMPLOYEES TO RECOVER MISAPPROPRIATED TIPS FROM EMPLOYERS

by Michelle T. Harrington

In the matter of *Lu v. Hawaiian Gardens Casino, Inc.*, the plaintiff Louie Hung Kwei Lu sued his former employer, the defendant Hawaiian Gardens Casino, Inc., challenging the legality of the casino's policy of requiring dealers to contribute part of the gratuities they received to a tip pool for employees who provided service to casino patrons. A tip pool is a pool into which employees place some or all of the gratuities they receive to be redistributed among themselves or other employees.

The casino's tip pool policy required dealers to set aside 15 to 20 percent of the tips they received on each shift. The casino then deposited the pooled tips in a tip pool bank account for later dissemination to designated employees who provided service to customers, such as chip runners, hosts, concierges, tournament coordinators and floor persons. The tip pool policy specifically prohibited employers, managers and supervisors from receiving any money from the tip pool.

Lu filed a class action lawsuit against the casino on behalf of himself and other casino dealers claiming that the casino's tip pooling policy amounted to a conversion of his tips, and violated Labor Code §351, among others. Lu also alleged that the casino's conduct constituted an unfair business practice under California's Unfair Competition Law (UCL).

The casino filed a motion for judgment on the pleadings of the claim for violation of Labor Code §351 to get such claim dismissed on the ground that there is no private right to sue for violation of that statute. The trial court granted the casino's motion and also granted the casino's subsequent summary adjudication motions on the remaining causes of action and dismissed the case without a trial. Lu appealed.

The Court of Appeal held that Lu did not have a private right of action under §351. However, the appellate court further held that §351 may still serve as a basis for a UCL claim. Because the Court of Appeal found that Lu presented triable issues of fact about whether the casino's tip pool policy violated §351, it reversed the trial court's grant of summary judgment on the UCL claim but affirmed the judgment in all other respects.

Less than two months later, another Court of Appeal in the case of *Grodensky v. Artichoke Joe's Casino* expressly disagreed with the holding on §351 of the appellate court in *Lu*. The California Supreme Court granted review of *Grodensky* and *Lu* to resolve the conflict between the Courts of Appeal in each of these cases.

In holding that §351 does not provide employees with a private right of action, the California Supreme Court observed the general principle that the violation of a statute does not necessarily give rise to a private cause of action. Rather, whether a party has a right to sue depends on whether the Legislature has manifested an intent to create such a private cause of action under the statute. The Court noted that because §351 does not include explicit language regarding a private cause of action, it was therefore necessary to look to the statute's legislative history. In so doing, the Court concluded that there was no clear indication in such history that the Legislature intended to create a private cause of action in enacting §351. The legislative history simply affirmed what courts have long held, namely that gratuities ordinarily belonged to the waiter or waitress absent a contrary agreement, but did not evidence a legislative intent to give employees a new statutory remedy to recover any misappropriated gratuities.

Lu argued that the Legislature must have implicitly created a private right of action because it would be "absurd" for the Legislature to declare that gratuities belong to employees, yet deny them access to the courts to enforce those rights. The Court rejected this argument noting that to the extent an employee may be entitled to misappropriated tips, there is no reason why other remedies, such as a common law action for conversion, may not be available under appropriate circumstances. The Court also rejected Lu's argument that a violation of §351 is a per se violation of an employment agreement. Of note is the Court's failure to address whether §351 could serve as the predicate for a UCL claim.

WHAT CAN AN EMPLOYER TAKE AWAY FROM THIS CASE?

Lu is a significant case for employers who have tip pooling policies because it has gotten rid of at least one weapon in the employees' wage and hour class action arsenal. However, it still leaves a few questions unanswered, such as: Are gratuity pools lawful under §351? If they are lawful, who may participate in them? Can §351 serve as the basis for a UCL claim? Until the California Supreme Court addresses these questions, an employer will be well advised to err on the side of caution (e.g., favorably towards employees).

PREVAILING EMPLOYERS IN FEHA CASES MAY RECOVER THEIR EXPERT WITNESS FEES UNDER CODE OF CIVIL PROCEDURE §998 (STATUTORY OFFER TO COMPROMISE)

by Janet C. Song

In *Holman v. Altana Pharma US, Inc.* (2010 WL 2599337 (Cal.App. 1 Dist.)), the Court of Appeal decided the issue of whether a prevailing employer in a FEHA case is required to show that the employee's case was frivolous before it can recover expert witness fees under *Code of Civil Procedure* §998. The Court answered no. Even if the employee's claims are not frivolous, trial courts have discretion to award expert witness fees to prevailing employers pursuant to C.C.P. §998.

EMPLOYERS MAY BE ENTITLED TO EXPERT FEES EVEN IF THE PLAINTIFF'S CASE IS NOT FRIVOLOUS

Holman was a sales representative for Altana. She received field contact reports regarding her performance which were prepared by a district manager after going on a ride-along in the field. After receiving several positive reports, Holman raised concerns she had with a district manager, Berchem, during a ride-along. Holman told Berchem that she and others had observed that Berchem was preferring younger men for opportunities that she would have been interested in if she had known about them. After this discussion, Berchem allegedly became increasingly combative and Holman received negative reports.

Holman complained of harassment and a hostile environment to her superiors, and after investigating, Altana sent Holman a letter of warning, which stated that if Holman's performance did not improve, further action would be taken up to and including termination. Upon receipt of the letter, Holman took a medical leave of absence and never returned.

Holman sued Altana and Berchem for FEHA claims. Altana moved for summary judgment. The trial court denied the motion as to the retaliation claim, but granted the motion as to the harassment claim.

After a jury trial, Altana moved for nonsuit with regard to punitive damages and liability for retaliation, and won. Altana sought to recover its costs, including $128,925 for expert witness fees pursuant to C.C.P. §998.

Holman relied on the standard set forth in *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412,[1] in support of her argument that Altana was not entitled to expert fees unless it showed that Holman's action was frivolous.

The Court found that even if Holman's FEHA claims were not frivolous, the trial court was still required to consider Altana's request for expert fees under C.C.P. §998. The Court held that the trial court properly awarded Altana its expert witness fees.

However, the Court remanded for the limited purpose of allowing the trial court to consider reducing the amount of the award of expert witness fees given the relative resources of the parties. The Court concluded that in deciding whether the amount of an expert fee award is reasonable, trial courts must look at whether the fees were reasonably incurred and the economic resources of the offeree. If the latter is not considered, there is a risk that employees will be discouraged from litigating legitimate FEHA claims.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Employers should make offers to compromise under C.C.P. §998 before retaining experts. This tactic provides employers with leverage because it creates risk to the employee plaintiff that he or she may have to pay for the employer's expert witnesses. This may very well encourage a reevaluation of the employee's claims and hasten prompt settlement.

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[1] *Christiansburg* held that a district court has discretion to award attorney fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, even if not brought in bad faith. It should be noted that this standard must be satisfied before a prevailing employer in a FEHA case may recover attorney fees. However, the issue in *Holman* was whether this standard applies to the recovery of costs, including expert witness fees.

CALIFORNIA EMPLOYER MAY NOT TERMINATE A FORMER EMPLOYEE OF ITS COMPETITOR OUT OF RESPECT AND UNDERSTANDING FOR COLLEAGUES IN THE SAME INDUSTRY

by Michelle T. Harrington

Employee mobility and open competition continue to be upheld in California. In *Siguero v FST, et al.*, the plaintiff Rosemary Silguero began working for Floor Seal Technology (FST) in 2003 as a sales representative. She claimed that in August 2007, FST threatened to terminate her if she did not sign a confidentiality agreement that prohibited her from "all sales activities following either departure or termination." Though Silguero signed the contract, FST still terminated her in October 2007.

Thereafter, she became employed by Creteguard. FST then contacted Creteguard and "requested the cooperation and participation of [Creteguard] in enforcing the confidentiality agreement, including those provisions prohibiting Silguero from all sales activities for 18 months following Silguero's departure or termination from FST."

In November 2007, Creteguard's CEO informed Silguero in writing that although Creteguard believed that "non-compete clauses are not legally enforceable here in California," Creteguard desired "to keep the same respect and understanding with colleagues in the same industry" and that Silguero was being terminated effective November 14, 2007.

Subsequently, Silguero sued both FST and Creteguard for interference with contract, state antitrust law violations, and as against Creteguard wrongful termination in violation of public policy.

Creteguard filed a motion to dismiss Silguero's wrongful termination claim arguing that "there was no clearly delineated public policy prohibiting a subsequent employer from honoring a putatively valid non-compete confidentiality agreement entered into by an employee and a former employer." The trial court granted Creteguard's motion and dismissed the claim. Silguero appealed.

In holding that Silguero could bring a claim for wrongful termination in violation of public policy, the Court of Appeal observed that California Business and Professions Code §16600 evinces a legislative policy in favor of open competition and employee mobility. Thus, the Appellate Court concluded that Creteguard's termination of Silguero constituted a violation of that policy.

The Court of Appeal rejected Creteguard's argument that nothing in §16600 reflects a legislative intent to impose third party liability to a former employee regarding the recognition by that third party of the validity of a non-compete agreement. The Appellate Court compared the understanding reached between FST and Creteguard to a "no hire agreement" previously disapproved of by the California Court of Appeal in *VL Systems, Inc. v. Unisen Inc.* The court reasoned that such an understanding would be void and unenforceable under §16600 because it "unfairly limits the mobility of an employee" and because FST "should not be allowed to accomplish by indirection that which it cannot accomplish directly."

The court also found that permitting a wrongful termination in violation of public policy claim against Creteguard furthers the interests of employees in their mobility and betterment.

WHAT CAN AN EMPLOYER TAKE AWAY FROM THIS CASE?

This case should serve as a reminder that when an employer sends or receives a letter threatening litigation based on a confidentiality or competition agreement that a current or former employee has signed, careful attention to whether the agreement is enforceable is paramount. This is particularly true where you have determined that the agreement the prospective employee has signed with a former employer is unenforceable. In such a situation, even a threat of litigation by that former employer will not necessarily insulate you from liability if you elect to "pass" on the prospectively employee solely to avoid the litigation quagmire.

For this same reason, it is equally important to inquire about and request disclosure of any confidentiality or competition agreements to which an employee may be subject so that you are aware of the potential risks associated with selecting a particular candidate.

A HIRER OF AN INDEPENDENT CONTRACTOR IS NOT VICARIOUSLY LIABLE FOR THE INDEPENDENT CONTRACTOR'S WORKPLACE INJURIES

by Janet C. Song

Tverberg v. Fillner Construction, Inc. (2010) 2010 WL 2557558(Cal.) involves the doctrine of peculiar risk and the extent of a hirer's vicarious liability to an independent contractor who is injured on the job. "Peculiar risk" means a special danger inherent in the work itself, which arises either from the nature or the location of the work and against which a reasonable person would take special precautions. "Vicarious liability" does not stem from one's own negligence, but rather is derivative.

By way of background, generally, a hirer of an independent contractor to perform inherently dangerous work is not liable to third parties for injuries resulting from that work. The peculiar risk doctrine is an exception to this rule.

In *Privette v. Sup. Ct.* (1993) 5 Cal.4th 689, the Supreme Court decided not to expand the peculiar risk doctrine, and held that the hirer of an independent contractor is not vicariously liable to the contractor's employee who is injured on the job due to a peculiar risk inherent in the work. The Court reasoned that such injuries are covered by workers' compensation insurance, the cost of which is generally included in the contract price for the work paid by the hirer.

In *Tverberg*, the issue was whether a hirer of an independent contractor is vicariously liable to the contractor who is injured on the job, under the peculiar risk doctrine. The Court answered no.

Defendant Fillner was the general contractor for a project to expand a commercial-fuel facility. The project required construction of a metal canopy over fuel-pumping units. To do that work, Fillner hired subcontractor Lane Supply, which delegated the work to subcontractor Perry Construction, which hired the plaintiff, an independent contractor, as the foreman of Perry's crew. As part of the project, Fillner also hired subcontractor Alexander Concrete Company to erect concrete posts to prevent cars from colliding with the fuel dispensers. Alexander dug holes for the concrete posts, which were next to the area where the plaintiff was supposed to build the metal canopy. The plaintiff asked Fillner twice to cover the holes, but Fillner did not do so. The plaintiff was later injured when he fell into one of the holes.

The plaintiff sued Fillner and Perry for negligence and premises liability. Fillner moved for summary judgment and won. The plaintiff appealed. The Court of Appeal reversed on the basis that because the plaintiff, as an independent contractor, was not required to have workers' compensation insurance, the general contractor could be held vicariously liable under the peculiar risk doctrine.

The Supreme Court disagreed and held that a hirer is not liable for an independent contractor's workplace injuries under the peculiar risk doctrine because an independent contractor has the authority to determine how he/she will perform the inherently dangerous work. The independent contractor assumes legal responsibility for doing the work, including taking safety precautions. Having assumed such responsibility, the independent contractor may not hold the hirer vicariously liable for injuries resulting from the contractor's own failure to safeguard against the risks. Because the holes were located next to the area where the plaintiff was to build the metal canopy, he assumed responsibility for safeguarding against the possibility of falling into one of the holes, which was an inherent risk of his work.

It should be noted that the Supreme Court did not decide whether the general contractor could be held directly liable on a theory that it retained control over safety conditions at the jobsite.

WHAT CAN EMPLOYERS TAKE AWAY FROM THIS CASE?

If you are an employer that engages in work with peculiar risks inherent in the work (such as construction), and an independent contractor hired for the project is injured on the job, you are not vicariously liable for the independent contractor's injuries. However, you may still be found directly liable if you, and not the independent contractor, retained control over the safety conditions at the jobsite. Since there is the potential for direct liability, employers should take steps to ensure safe working conditions.

WHEN EMPLOYERS SUBJECT TO THE FLSA CHANGE SHIFT SCHEDULES AT ITS EMPLOYEES' REQUEST, EMPLOYERS MAY REDUCE THE PAY RATE SO THAT EMPLOYEES ARE PAID THE SAME WAGES THEY RECEIVED UNDER THE FORMER SCHEDULE

by Janet C. Song

In a case of first impression, the court in *Parth v. Pomona Valley Hospital Medical Center* (2010 WL 4643846 (C.A.9 (Cal.))) decided whether an employer subject to the Fair Labor Standards Act (FLSA) may change the "regular rate[2]" of pay in order to provide employees a schedule they desire. The court held that when an employer changes its shift schedule to accommodate its employees' scheduling desires, the employer may reduce the pay rate to pay its employees the same wages they received under the former schedule, as long as the rate reduction is not designed to circumvent the FLSA requirements, including overtime pay.

A CALIFORNIA COURT HAS DETERMINED THAT AN EMPLOYER MAY ACCOMMODATE EMPLOYEES' DESIRE TO WORK DIFFERENT SHIFTS EVEN THOUGH IT COULD RESULT IN LESSER WAGES FOR THE EMPLOYEES

The nurses at the medical center (PVHMC) asked for 12-hour shift schedules in order to have more days off. PVHMC accommodated by creating an optional 12-hour shift and pay plan, which reduced the base hourly wage (but still exceeding the minimum wage required under FLSA), and time and a half pay for hours worked over 8 per day. If nurses voluntarily worked more than the 12-hour shift, they were paid double the regular rate. The end result was that nurses who chose to work the 12-hour shift made about the same amount as they did on the 8-hour shift schedule, worked the same number of hours over a 14-day period, and performed the same duties.

Parth opted to work the 12-hour shift and voluntarily agreed that PVHMC would reduce her base hourly wage from $22.83 to $19.57. She worked the 12-hour shift since 1993. The 12-hour shift schedule was later memorialized in a collective bargaining agreement between the nurses' union and PVHMC.

Parth then filed a class action lawsuit against PVHMC alleging that the use of different base hourly rates violated the FLSA because it denied unionized employees overtime pay. She argued that nurses who worked 12-hour shifts were paid a lower base hourly rate than nurses who worked 8-hour shifts. PVHMC moved for summary judgment and won. The Circuit Court agreed with PVHMC.

In reaching its decision, the Court looked at cases which held that the FLSA does not bar employers from contracting with employees to pay them the same wages they received before the FLSA, as long as the new rate equals or exceeds minimum wage. The Court also considered the purpose of the FLSA, which is to ensure that employees are protected from overwork and underpay. The Court also considered the fact that the 12-hour shift had been in place since 1989.

In evaluating the 12-hour shift and whether it violated the FLSA, the Court considered the fact that the shift was created at the nurses' request. Nurses who worked the 12-hour shift were paid more than minimum wage, and the pay plan ensured that nurses who worked over 8 hours in a day were paid time and a half. The pay plan also ensured that nurses who voluntarily worked more than 12 hours were paid double time pay.

The Court concluded that the pay practice protected the nurses from overwork and underpay, and also incentivized PVHMC from over-working its nurses. The Court found no authority stating that employees cannot be paid different rates for different shifts.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

If you are an employer subject to the FLSA, there is some flexibility with regard to setting the base pay rate in order to accommodate your employees' scheduling requests so that employees are receiving the same amount after the change in schedule as they did before. This can benefit both you and your employees because everyone gets what they want – your employees can work schedules they want which allows them to work fewer days but the same number of hours, which may promote productivity and boost morale, and you pay the same amount for the same work. However, employers still need to keep in mind the overtime pay requirements and the overall purpose of the FLSA in order to avoid violating its provisions. (continued on next page)

[2] A regular rate is the hourly rate actually paid for the normal, non-overtime work week.

The Court discussed several other FLSA requirements, which are good to keep in mind:

- Employers must pay its employees at one and a half times the employees' regular rate for any work in excess of eight hours per day and in excess of 80 hours per 14-day period;
- Employers cannot avoid paying overtime by setting an artificially low hourly rate upon which overtime pay is to be based and making up the additional compensation to the employee in other ways;
- Employers cannot adopt "split-day" plans where the employee's hours are arbitrarily divided in order to avoid overtime pay;
- Employers may not reduce the hourly rate in response to the number of hours worked by an employee during the week;
- Employers may not set the hourly rate for overtime hours at a rate lower than the regular rate, especially when the overtime work is the same as that performed during regular hours;
- Employers may not agree with employees that overtime hours worked do not count as hours worked;
- Employers may not set the hourly rate for regular work lower during the weeks when overtime is worked than it would in non-overtime weeks;
- Employers cannot enter into an agreement not to count hours over 40 in order to avoid paying for extra hours worked;
- Employers cannot pay employees the same amount each week (i.e., both non-overtime and overtime hours) without regard to the overtime worked.

EMPLOYEES HAVE THREE YEARS TO SUE FOR PENALTIES RESULTING FROM LATE PAID FINAL WAGES, REGARDLESS OF WHETHER THE SUIT ALSO INCLUDES A CLAIM FOR UNPAID WAGES

by Janet C. Song

In *Pineda v. Bank of America, N.A.* (2010 WL 4643834 (Cal.)), the California Supreme Court interpreted *Labor Code* §203, which requires employers to pay final wages immediately once employees are terminated or resign. §203 also states that if an employer willfully fails to timely pay final wages, the employee is entitled to receive a penalty in the amount of the wages continuing from the due date for the final wages, until the final wages are paid or until an action is commenced. However, the penalties are capped at no more than 30 days. The purpose of §203 is to compel prompt wage payment upon separation from employment.

In *Pineda*, Pineda resigned from the bank on May 11, 2006. The bank did not pay his final wages until May 15, four days late. Pineda sued for late payment of his final wages and sought penalties pursuant to §203. He also claimed that the late payment of his final wages violated the Unfair Competition Law (UCL) and sought restitution for the §203 penalties. The UCL prohibits any unlawful, unfair or fraudulent business practices. A private plaintiff's remedies under the UCL are generally limited to injunctive relief and restitution.

The trial court held that the one year statute of limitations applied in cases in which an employee sues only for §203 penalties, and not both the penalties and the unpaid wages. Thus, the trial court concluded that Pineda's suit was time barred. The Court of Appeal agreed. Pineda filed an appeal. After considering the legislative intent in enacting §203(b), the Supreme Court held that:

1. An employee has three years to sue for:
   a. Unpaid final wages and resulting penalties;
   b. Unpaid final wages only;
   c. Penalties only.
2. An employee can seek restitution of unpaid overtime wages via the UCL, but he/she cannot seek restitution of §203 penalties via the UCL because the employee does not have a vested interest in such penalties until awarded. In contrast, an employee has a vested interest in unpaid overtime wages once earned.

The Supreme Court found that having different statutes of limitations for actions under the same section would allow employers to "game the system" and control what limitations period governs their employees' §203 claims. The three year limitations period, as opposed to the one year period, provides additional incentive to encourage employers to pay final wages promptly. (Continued on next page)

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Employers can avoid any potential liability under §203, including substantial penalties, and liability for unpaid wages under the UCL, by promptly paying final wages to employees immediately upon termination of the employee or the employee's resignation. Otherwise, employers face the risk of getting sued within the limitations period of up to three years.

PREVENTING TROUBLE TOMORROW – PART I

by Kimberly M. Foster

In a busy workplace, it is easy to lose sight of the preventative measures an employer should take today to fend off trouble tomorrow. Below is part one in a two part series of things to keep in mind as you operate your businesses this year. They are by no means exhaustive lists. As always, the attorneys of Anderson, McPharlin & Conners LLP are available to respond to specific concerns you may have and to develop a checklist unique to your business.

HANDBOOK

1. Have an attorney review your employee handbook on an annual basis and update if necessary;

2. Have all employees acknowledge that they have reviewed the employee handbook upon their hire and every time it is updated; keep a copy of the acknowledgement they sign in their personnel file; keep a copy of the employee handbook in the break room;

3. Have all employees acknowledge their at-will employment status;

4. Make sure that company policy is evenly applied to all employees;

TRAINING

1. Train on the policies set forth in the employee handbook on an annual basis (separate sessions for the employees and supervisors—anyone with the authority to hire, fire, demote, etc.)—you may want to invite an attorney to train the supervisors;

2. Sexual harassment training for all employees and not just supervisors is ***strongly*** recommended. California law requires employers of more than 50 employees to attend 2 hours of interactive sexual harassment training every 2 years. Even if a company employees less than 50 people, we strongly encourage training to show that the company made every effort it could to communicate to its employees what type of conduct constitutes sexual harassment and further communicate that any allegation of sexual harassment will be investigated and dealt with immediately;

3. We recommend hiring an attorney or outside investigator to conduct an investigation of any allegation of sexual harassment, discrimination, or retaliation;

4. Post memos when there is a significant change to policy/practice and have employees and supervisors acknowledge their receipt of said training;

PAYROLL PRACTICES

1. Audit the employees' pay records on a quarterly basis;

2. Include verification that the employee received all wages owed each pay period;

3. Request employees who work less than 6 hours in a given day to sign meal period waiver forms;

4. Schedule breaks before busy hours and before the start of the employee's fifth hour of work;

5. Review time cards to monitor length of meal breaks;

6. Inquire about breaks that do not comply with company policy to discipline employees who took short, late, or did not record lunch breaks when they should have (business demands did not require them to work through lunch);

7. Avoid scheduling split shifts;

8. Pay one hour of premium pay when there is evidence of a split shift or unable to take a meal break due to business needs;

9. Pay reporting time pay (employers who schedule nonexempt employees for work on a non-work day, but fail to provide work when the employees report for duty must pay the minimum of either four hours or one-half their regular scheduled daily work day, whichever is greater, absent special extenuating circumstances);

10. Final Wages. Review the employee's payroll records and time cards prior to their last day of work to confirm all wages owed were paid. Must have the employee's last check on last day of work or if the employee resigns without notice, within 72 hours of receiving notice of the resignation;

RECORD RETENTION AND POSTING REQUIREMENTS

1. Keep for at least ***three years*** records of each employee's full name, home address, gender, occupation, social security number, birth date (if under 18), time records, meal periods, split shift intervals, total daily hours worked, wages paid, all gratuities or tips received; and other compensation furnished each payroll period, total hours worked each payroll period, applicable rates of pay; we further recommend that you retain every personnel file for at least three years;

2. Keep job applications for one year from date of submission; workers' compensation records for 5 years from date of injury or date on which compensation was last provided, whichever is later; unemployment insurance records for 4 years from the date the contributions become due; W-4 forms for as long as it is in effect plus four years; I-9 records (latter of 3 years or year after termination of employment); 1 year from date of personnel action that may be basis for discrimination or harassment claim;

3. Employers must make all required records available for inspection by employee on reasonable request (21 calendar days) and allow employee to make copies of what they signed, otherwise, employer is subject to a $750 fine;

4. Employers may not deduct wages for any cash shortage, breakage, or loss of equipment that was not caused by a dishonest or willful act or by gross negligence;

5. Consider purchasing an all inclusive poster in both English and Spanish that meets both California and federal posting requirements, of which there are several, including but not limited to: minimum wage order notice under FLSA and CA; pay day notice; federal and state discrimination notices (including, but not limited to DFEH 162); applicable wage order (5 for restaurants); describing sexual harassment (DFEH-185); Cal Osha form 200; information re workers' compensation benefits and safety notices (may be found online at www.dir.ca.gov/dlse/WorkplacePostings.htm); whistle-blower protection; leave laws (some of which require more than 50 employees).

Stay tuned for part two of this two-part series for information regarding counseling, discipline, and miscellaneous matters that employers are likely to face this year.

HAVE A QUESTION?

If you have H.R. problems or have questions regarding H.R. procedures, please call us or send them via email (to CAD@amclaw.com). We will be happy to provide comments or options on steps that can be taken in an effort to help you reach successful conclusions.

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.

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