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# Labor & Employment Briefing

A Newsletter on Employment, Labor and Benefits Law for Clients and Friends of Anderson, McPharlin & Conners LLP

## "GIVE ME A BREAK" HAS A WHOLE NEW MEANING

*by Eric A. Schneider*

On April 12, 2012, the California Supreme Court handed down its eagerly awaited decision in *Brinker v. Superior Court*, holding:

1. That "an employer's duty with respect to meal breaks … is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duties, relinquishes control over their activities and permits them a reasonable opportunity to take a 30-minute break, and does not impede or discourage them from doing so. …"

"…, [T]he employer is not obligated to police meal breaks and ensure that no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay. …"

2. That timing of the meal period is up to the employer so long as the first meal period is provided no later than the end of the employee's fifth hour of work, and a second meal period is provided no later than the end of the employee's 10th hour of work.

3. That rest periods are not required for shifts less than three and a half hours in length, that there be one 10 minute break for shifts between three and a half and six hours, that there be two 10 minute breaks for shifts between six and ten hours, and that there be three 10 minute breaks for shifts between 10 and 14 hours; and

4. That "in the context of an eight-hour shift, 'as a general matter,' one rest break should fall on either side of the meal break. … Shorter or longer shifts and other factors that render such scheduling impracticable may alter this general rule."

**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**

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

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

**Leila M. Rossetti, Esq.**
**Senior Associate**
**213.236.1642**
**lmr@amclaw.com**

**WHAT CAN EMPLOYERS TAKE FROM THIS CASE?**

While on its face it only directly impacts meal and rest period issues, the Court's reasoning could have broader implications. The Court chose to examine the precise language of the meal and rest period Wage Orders and Labor Code section rather than interpreting all possible ambiguities in favor of employees. That shift could have a positive effect in the interpretation of other wage and hour statutes and regulations.

In so doing, the Court provided a level of certainty and common sense. For example, while it would not be a difficult matter for a manufacturing plant with an assembly line to turn the belt off for scheduled breaks, many non-manufacturing employers would be hard-pressed to ensure that employees ostensibly on break were not actually performing work. For example, a secretary at a law firm could choose to spend his/her break at his/her desk. If he/she made a phone call, his/her supervisor would have to eavesdrop to ascertain whether he/she was making a business or personal call, and still might not know whether he/she was talking to a court clerk about scheduling a motion (work that should not be performed by a worker on break) instead chatting with a buddy about what time they would be playing golf (personal activity appropriate for being off the clock). Or, a dispatcher would not necessarily know whether drivers were headed to McDonald's for their coffee breaks or on their way to delivery stops.

The timing of meal breaks is particularly important in the hospitality and financial services industries. Restaurants often would prefer scheduling servers' meal breaks before the noon rush even if the breaks would fall within the first hour of the shift, and similarly banks would generally not want their tellers to be off from noon to 1:00 p.m., a time of high customer traffic.

*Brinker*, however, does not provide employers with "get out of jail free" cards, releasing them from potential liability for any meal or rest break rule violations. If a worker is deprived of his or her uninterrupted meal or rest break by way of a request from the employer, even a minor one that does not entail much time or effort on the part of the employee, the employer has violated the Wage Order or wage and hour statutes and will be required to pay the employee for an additional hour (under California statutory law) even if the task was brief.

Nevertheless, *Brinker* is clearly a positive development for employers who can now have a higher degree of confidence that when they examine the Labor Code sections and Wage Orders on meal and rest breaks, overtime, etc., and make all reasonable efforts to comply, they will actually be in compliance.

**FILING A COMPLAINT OF SEXUAL HARASSMENT IS PROTECTED ACTIVITY UNDER FEHA, FILING A "FALSE" COMPLAINT IS NOT**

*by Vanessa A. Davila*

In *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, plaintiff Richard Joaquin, a Los Angeles Police Department officer, complained of sexual harassment by Sergeant James Sands in 2005. After an investigation, the department found Joaquin's complaint unfounded. Sands then pursued a complaint against Joaquin for his false sexual harassment charge. Internal Affairs investigated Sands's complaint, and finding that Joaquin's charge lacked foundation, recommended the matter be adjudicated by a Board of Rights. The Board of Rights found Joaquin's charge to have been fabricated and recommended he be terminated. The Chief of Police adopted the recommendation and fired Joaquin effective March 2006. Joaquin filed a writ of mandate which the superior court granted ordering Joaquin's reinstatement following its findings that the Board of Rights' findings were not supported by the weight of the evidence.

Following his reinstatement, Joaquin sued the City of Los Angeles alleging that his termination had been in retaliation for his filing a sexual harassment complaint in violation of the Fair Employment and Housing Act (FEHA). The matter was tried before a jury. The jury agreed with Joaquin and issued a verdict awarding him over $2 million in damages for lost wages and emotional distress.

The City of Los Angeles appealed the jury's verdict contending that it was unsupported by substantial evidence. The Court of Appeal reversed, finding that the jury's verdict was not supported by the evidence as Joaquin had failed to present substantial evidence that his termination was motivated by retaliatory animus, a required element of his claim.

Although Joaquin had been able to show that he was fired shortly after he filed his complaint, he had not been able to show that members of the Board of Rights had any retaliatory intent. Moreover, even if Joaquin had been able to show retaliatory intent by the Board's members, there was no evidence that Sands had any influence over the Board's investigation into the matter or at the hearing that followed.

**WHAT CAN EMPLOYERS TAKE FROM THIS CASE?**

This case shows that an employer is well within its rights to terminate or otherwise discipline an employee who makes up a sexual harassment claim. Although under normal circumstances, the act of filing a complaint, in and of itself, or the bringing of a harassment charge falls within FEHA's definition of a protected activity, the filing of a false or fabricated complaint does not.

## COURT RULES FRANCHISOR NOT LIABLE FOR UNFAIR COMPETITION

*by Michelle T. Harrington*

Plaintiff Kimberly Aleksick worked as a clerk at a 7-Eleven store. She sued 7-Eleven, the franchisor of the store where she was employed, for violation of the Unfair Competition Law (UCL). Aleksick alleged on behalf of a class that 7-Eleven, which provides payroll services to its franchisees, violated the UCL by converting any partial hour worked in a pay period from minutes to hundredths of an hour, which sometimes docked employees a few seconds of time and, therefore, shorted their commensurate pay. The trial court granted 7-Eleven's summary judgment motion on the ground that Aleksick had failed to allege any statutory predicate for her UCL claim and the Labor Code wage statutes govern the employer / employee relationship and it was undisputed that 7-Eleven was not the employer of Aleksick or the other class members.

The Court of Appeal affirmed the trial court's ruling and held that raising a UCL claim based on "unlawful" conduct required Aleksick to point to a particular statute that 7-Eleven had violated since the UCL "borrows" violations of other laws and treats them as "unlawful practices." Because Aleksick failed to do so, she forfeited her argument under the Labor Code wage statutes. The Court further held that even had Aleksick alleged violations of the wage statutes, she still did not have a viable claim because the Labor Code governs the employer-employee relationship, and 7-Eleven was not her employer. Finally, the Court held Aleksick failed to establish "unfair" conduct on the part of 7-Eleven under the UCL. The Court explained where an act is predicated on public policy, the public policy must be tethered to specific constitutional, statutory, or regulatory provisions. Aleksick argued that 7-Eleven's payroll practices are tethered to the public policy in favor of full payment to employees for all time worked as codified in the wage statutes. However, since 7-Eleven was not Aleksick's employer, the wage statutes did not apply to it.

***"IT PAYS TO PAY EMPLOYEES ALL WAGES DUE FOR ALL TIME WORKED"***

**WHAT CAN EMPLOYERS TAKE FROM THIS CASE?**

The gist of this ruling is simply that 7-Eleven was not the employer and, therefore, could not be held liable for a UCL claim based on the violation of the wage statutes. However, the Court of Appeal did not rule on the issue of whether an employer could be held liable under the Labor Code wage statutes and the UCL for using the payroll practices that 7-Eleven used. Therefore, this ruling does not provide any guidance to employers as to whether the practice of converting partial hours worked from minutes to hundredths of an hour is allowed. As such, employers should continue the good practice of paying employees for all time worked.

## BOARD OF DIRECTORS VOTE TO TERMINATE MEMBER NOT AN EXERCISE OF FREE SPEECH

*by Leila M. Rosetti*

In *Donovan v. Dan Murphy Foundation*, the Second District Court of Appeals recently ruled that a suit for wrongful termination cannot be dismissed based upon the theory that the vote to terminate by the Board of Directors of a charitable institution was an exercise of free speech under the California and U.S. Constitutions.

Plaintiff Donovan filed suit for wrongful removal and declaratory relief alleging he was wrongfully removed as a director of the Dan Murphy Foundation (the "Foundation") after voicing his concerns regarding the governance and financial oversight of the Foundation. He asked the Court to issue an order prohibiting the board of directors of the Foundation (the "Board") from removing him as a director and also seeking the appointment of a third party to monitor the activities of the Board.

The Foundation filed a special motion to strike Donovan's complaint pursuant to the provisions in *California Code of Civil Procedure* ("CCP") Section 425.16, known as the "Anti-SLAPP" statute (SLAPP is an acronym for Strategic Lawsuit Against Public Participation), which prohibits lawsuits which infringe on rights of petition and free speech under both the California and the United States Constitutions, in connection with a "public issue." The Foundation argued that the vote of the Board to remove Donovan as a director of the foundation was an act of free speech and that the matter was a public issue because the Foundation is one of the largest charitable organizations in Southern California, which donates millions of dollars each year which affect millions of members of the public, and because the Foundation is subject to oversight by the attorney general and the voting procedures of the Board of Directors are authorized by the Corporations Code. Donovan opposed the motion by pointing out that he did not challenge any actual statement or writing by any director, but that rather, he was suing for wrongful termination and that the simple act of a vote does not convert a termination into an act of free speech. The trial court granted the Foundation's motion and dismissed the case; the appellate court agreed with Donovan and reversed the trial court's decision.

The decision was reversed on the basis that the mere act of voting, even if authorized by statute, does not necessarily constitute an exercise of free speech or right to petition. The court distinguished other cases where a voting procedure was held to constitute free speech by pointing out that in those cases, the defendant was a governmental entity or the voting process was subject to judicial review. In contrast, the court compared this case to a case pertaining to the sexual harassment grievance protocol of a private company, in that both matters involved a procedure authorized by statute but for which actual implementation was left to the private organizations.

The court further held that this matter did not constitute a public issue, as required by CCP §425.16, because the defendant failed to present any news articles or any other evidence that the public was actually interested in the dispute among the directors of the Foundation. Indeed, the court found that the mere fact that the Foundation is in the public eye and donates large sums of money to "persons and entities that affect millions of Southern Californians" insufficient to illustrate that this case concerned a public issue, finding that, "[w]ere the law otherwise, every act of the governing body of a large organization would constitute a matter of public interest." Thus, because it found that the facts in Donovan's complaint did not involve constitutionally protected free speech or petitioning rights, and because it decided that the matter was not a public issue, the court held that the vote of the Board to remove Donovan as a director was not protected as free speech or petition under the California or U.S. Constitutions and thus the dismissal of the case was reversed.

### WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Simply because an employee is terminated pursuant to an authorized procedure, including a proper vote by the Board of Directors, does not make the termination protected from litigation. Thus, while the termination may have been for cause and the employer may be the prevailing party at the end of the day, the case still must be litigated in the same manner as other cases and may not necessarily be disposed of in the first instance due to constitutional protections of speech and petitioning activity.

## ANOTHER ARBITRATION AGREEMENT SHOT DOWN BY AN APPELLATE COURT

*by Colleen A. Déziel*

In yet another case, *Salome Samaniego et al., v. Empire Today, LLC,* a California appellate court has refused to compel contractual arbitration of claims brought by employees on wage and hour issues. Specifically, the appellate court agreed with the trial court in finding that the arbitration clause in issue was both procedurally and substantively unconscionable.

More specifically, after the plaintiffs were hired, but before they began work, and then again during their employment, they were provided with form contracts and told to sign them if they wanted to work for Empire. The contracts were presented in English, although one plaintiff could not read English and the other could read very little English, and were offered as non-negotiable. There was little or no time for review of the agreements, and they consisted of 11 single spaced pages of small-font text and were "riddled with complex legal terminology" and no headings.

***CAREFULLY WORDED ARBITRATION AGREEMENTS ARE THE ORDER OF THE DAY***

Additionally, there was a shortened six-month statute of limitations clause, a unilateral fee-shifting provision in favor of the employer, and although the agreement reflected that the arbitration would be governed by the commercial rules of the American Arbitration Association, those rules were not attached or provided to the plaintiffs. Neither plaintiff was provided with a copy of the agreement.

In finding that this clause was both procedurally and substantively unconscionable the appellate court found all of the above outlined facts important. The court further found that the offending provisions of the agreement could not be severed.

### WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

If an employer decides that it is in its best interests to have an arbitration agreement with its employees, it needs to be aware that there are many things that it must consider when drafting the agreement. For example, the employer must consider whether its employees can read and understand English and whether it is prudent to have the agreement in languages other than English. The employer must consider the size of the font used for the text, the length of the agreement, whether headings are used and how the agreement is worded. As for the substance of the agreement, the employer needs to ensure that there are no unilateral fee or cost shifting provisions that favor it and not the employee, and that the provisions of the agreement do not undermine statutory protections afforded employees. Bottom line, it behooves the employer to have the agreement drafted and/or reviewed by an attorney before asking its employees to sign it.

## FRANCHISORS BEWARE! EXERCISING CONTROL OVER LOCAL FRANCHISEE'S EMPLOYMENT DECISIONS CAN RESULT IN FRANCHISOR LIABILITY

*by Colleen A. Déziel*

In *Patterson v. Domino's Pizza, LLC* 2012 Cal.App. LEXIS 753, Patterson, a teenage employee of a local Domino's franchisee, sued both the franchisee and the franchisor for sexual harassment, failure to prevent discrimination, retaliation for exercising rights, wrongful termination, assault, battery and emotional distress after the assistant manager of the franchisee allegedly harassed and assaulted Patterson at work. The franchisor relied upon one particular paragraph within the franchise agreement, which essentially reflected that the franchisee was solely responsible for employee issues, when it claimed that it was not the employer of Patterson and that there was no agency relationship between the franchisor and the franchisee. While the lower court agreed with the franchisor and granted its motion for summary judgment, the appellate court reversed this ruling finding that certain provisions of the franchise agreement reflected otherwise, as did the actual control that was exerted by the franchisor's "area leader" over the franchisee's employee issues.

Generally, whether a franchisor is vicariously liable for injuries to a franchisee's employee depends on the nature of the franchise relationship. The general rule is where a franchise agreement gives the franchisor the right to complete or substantial control over the franchisee, an agency relationship exists. However, a franchisee may be found to be an agent of the franchisor even where the franchise agreement states that it is an independent contractor, if the franchisor has exercised substantial control over the local operations of the franchisee (i.e., where the franchisor assumes substantial control over the franchisee's management-employee relations or employee discipline).

In the instant matter, while the franchise agreement provided in relevant part that the franchisee "shall be solely responsible for recruiting, hiring, training, scheduling for work, supervising and paying the persons who work in the Store and those persons shall be your employees, and not [the franchisor's] agents or employees," the appellate court found other provisions of the agreement limited or qualified this language in that the other provisions vested substantial control in the franchisor.

For example, there were provisions wherein the franchisor set the "qualifications" for the franchisee's employees, hiring requirements and the standards for their "demeanor." Also, certain provisions of the agreement mandated that the franchisee utilize a specific computer system for training all employees, that certain documents be included in a personnel file, and that certain specified standards for hair, jewelry and clothing of employees be followed.

Further, the franchisor determined the store's hours of operation, its advertising, the handling of customer complaints, signage, email capabilities, the equipment, the furniture, the fixtures, the method and manner of payment by customers, the liability insurance obtained by the franchisee, the method of bookkeeping and bank deposits, the location of the franchisee's store and whether it can relocate, the type of credit card that can be accepted from customers, mobile phone use, store closing procedures, refuse removal, security, web site, holiday closings and "in store conversations." The franchisor also had the right to send inspectors to the franchisee's store at any time to ensure compliance with every aspect of the franchise agreement.

The above coupled with the fact that the franchisor's "area leader" dictated which employees were to be terminated and when, and the fact that the franchisee's owner felt he had no option but to do as directed by the area leader led the appellate court to conclude that there was a reasonable inference supporting Patterson's claim that there was an agency relationship between the franchisor and franchisee.

### WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

While it is important for a franchisor to control its trademarks, products and the quality of its services, franchisors need to very carefully evaluate the actions of its employees *vis-a-vis* the daily operations of franchisees, or it may find itself being held liable for the actions of the franchisee's employees. The *Patterson* case reminds us that while the franchise agreement may indicate that the franchisee is to be solely responsible for recruiting, hiring, training, supervision, firing etc., such language alone may not insulate the franchisor from employment claims brought by the franchisee's employees. Courts are also going to look at the actions of the franchisor's employees towards the franchisee during the time frame in issue as well as other provisions of the franchise agreement which could suggest more control being exerted by the franchisor over the daily operations of the franchisee.

## PHARMACEUTICAL REPRESENTATIVES ARE "OUTSIDE SALESMEN" NOT ENTITLED TO OVERTIME PAY

*by Leila M. Rosetti*

The United States Supreme Court recently clarified the definition of "outside salesmen" under the Fair Labor Standards Act (FLSA), holding that pharmaceutical sales representatives constitute "outside salesmen" under the FLSA and thus are not entitled to overtime pay.

In the case of *Christopher v. SmithKline Beecham Corp.*, 2012 DJDAR 8040, the petitioner employees were pharmaceutical sales representatives for SmithKline Beecham Corp. Their primary objective was to obtain nonbinding agreements from physicians to prescribe the company's products in appropriate cases. The petitioners worked about 40 hours per week calling on physicians in the field, and an additional 10-20 hours per week on other work-related tasks such as attending events for promotional purposes. They were paid a base salary plus incentivized commissions, and their average yearly earnings were more than $70,000. They were not paid any additional wages for overtime hours worked.

The employees sued, claiming that the employer's failure to compensate them for overtime hours worked was a violation of the FLSA. The employers moved to dismiss the lawsuit, claiming that the employees were exempt from the requirement for overtime pay based upon an exemption provided in the FLSA for "outside salesmen." The Department of Labor ("DOL") had previously defined an "outside salesman" as "any employee whose primary duty is making sales." The DOL had previously further defined a "sale" as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."

In support of this particular case before the Supreme Court, however, the DOL filed a brief setting forth the position that, "a 'sale' for the purposes of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought."

The Supreme Court, while acknowledging that the general rule provides for deference to the interpretations of the DOL in cases brought under the FLSA, held that to hold that the DOL's newly stated position on the meaning of "outside salesmen" to apply to employers would constitute "unfair surprise" considering the DOL's previous definitions of "outside salesmen" and "sale." The Court further noted that the DOL's new position appeared to be in conflict with the fact that the DOL had never previously raised the issue of overtime pay for pharmaceutical representatives.

Instead, the Court provided its own analysis of the issue taking into consideration all of the DOL's previous interpretations. After doing so, the Court found that, because the DOL's definition of a sale includes "other dispositions," such a definition would include the nonbinding commitments obtained by the pharmaceutical representatives in this case, who would thus be considered "outside salesmen" exempt from the requirements of overtime pay. The Court also noted that this ruling is in keeping with the purpose of the FLSA exemption, which is based upon the premise that employees who earn salaries well above minimum wage "are hardly the kind of employees that the FLSA was intended to protect." Thus, the Court ruled that pharmaceutical representatives such as the petitioners in this case were exempt as "outside salesmen" from the overtime pay requirements contained in the FLSA.

### WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

This holding is good news for employers. The specific ruling is clearly favorable to employers in this industry, namely pharmaceutical employers and others employing similar types of sales people, who can rest assured that their sales representatives are not owed overtime wages based upon the exemption of "outside employees." However, this ruling has a broader reach as well. Specifically, this ruling signals to employers that they should not be held liable for interpretations of the law of which they did not have proper notice. In other words, if, as an employer, you are taking all steps to ensure that your employees are being properly compensated and treated in compliance with all applicable laws, you should not later be found liable based upon interpretations of the law which were not in existence at the time you enacted your employment policies. While navigating the world of employment law is inherently nuanced, the Supreme Court's denouncement of unfair surprises in the enforcement of employment laws is a victory for employers across the country.

## PAYMENT OF PARTIAL REVENUE RECEIVED BY EMPLOYER FOR EMPLOYEES' SUCCESSFUL PLACEMENTS EXEMPTS EMPLOYEES FROM OVERTIME PAY

*by Vanessa A. Davila*

In *Muldrow v. Surrex Solutions Corporation* (2012) 202 Cal.App.4th 1232, plaintiff Muldrow filed a lawsuit against his employer on behalf of himself and a class of current and former employees in which claims were asserted for, among other things, failure to pay overtime wages pursuant to *Labor Code* § 501. At a bench trial, Surrex asserted that it was not required to pay overtime to the class members because they were commissioned employees and thus exempted. Cal. *Code. Regs.* tit. 8, § 11070, subd. (3)(D). The trial court agreed and entered judgment in favor of Surrex. An appeal was taken by the class members claiming that the trial court erred in determining that the commissioned employees exemption applied to them and that they were therefore not entitled to overtime.

In its analysis, the Court of Appeals discussed California Industrial Welfare Commission (IWC) Wage Order No. 7-2001 which exempts from the statutory overtime compensation scheme set forth in *Labor Code* § 510 "any employee whose earnings exceed one and one-half (1 ½) times the minimum wage if more than half of that employee's compensation represents commissions." See, Cal. *Code. Regs* tit. 8, § 11070, subd. (3)(D). After an extensive analysis of Wage Order 7-2001, the Court of Appeals applied the two prong test first identified in the case of *Keyes Motors, Inc. v. Division of Labor Standards Enforcement* (1987) 197 Cal.App.3d 557, to the class members. The first prong requires an employee to be principally involved in the selling of a product or service, as opposed to making the product or rendering the service. The second prong requires the amount of the employee's compensation to be a percent of the price of the product or service. *Id.* at p. 563.

In applying the two prong test to the facts in *Muldrow*, the Court of Appeals found that as employment recruiters, the class members job duties and responsibilities were closely akin to those of salespersons. Specifically, the employees were required to "sell" a potential candidate on the available job and they had to "sell" the employer that the potential candidate was a right match for the job. Therefore, the first prong of the test was easily satisfied.

The Court then considered whether Surrex's commissions were sufficiently related to the price of services sold so as to constitute commissions for purposes of the commissioned employees exemption. Surrex placed candidates with clients in one of two ways. Some candidates were directly hired by the employer clients while others were hired on as consultants through Surrex. The appellants conceded that the payments they received when candidates were directly placed with employers were commissions equal to a percentage of the placement fee Surrex received from the client.

However, as to the consultants, the appellants received a percentage of the adjusted gross profit received by Surrex for placement of the consultants after having deducted the cost to Surrex of employing the consultant (hourly rate plus any benefits and expenses paid to the consultant, as well as an overhead adjustment factor). Appellants argued that this commission formula was far too complex to fall within the exemption as it was based on several cost-related factors in addition to price. The Court disagreed as Surrex's commission formula was clearly set forth in its employment agreements and noted that there were no California precedents requiring such a narrow interpretation of the Wage Order.

The Court refused to adopt appellants' interpretation which would effectively only allow commissions to fall within the overtime exemption if they were solely based on service price. In so doing, the Court of Appeals affirmed the trial court's decision and found that it had properly held in favor of Surrex as the class members fell within the commissioned employees exception.

### WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

In order to avoid the pitfalls of misclassifying commissioned employees as exempt from overtime, when determining commissioned pay structures, employers should make certain that the two prong test, first set forth in *Keyes* and adopted here by the Court of Appeals in *Muldrow*, are met and that: (1) the employees are primarily engaged in "sales," and, (2) although other factors may be utilized, the primary factor relied on to set the commissions is service price.

## STATISTICAL EVIDENCE OF EMPLOYMENT DISCRIMINATION CAN ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION DESPITE THE FAILURE OF THE STATISTICAL ANALYSIS TO ACCOUNT FOR THE EMPLOYER'S NON-DISCRIMINATORY REASONS FOR TERMINATION

*by Leila M. Rosetti*

*Schechner and Lobertini v. KPIX-TV et al*, 2012 U.S. App. LEXIS 10766 addresses the role of statistical evidence of discrimination in cases brought under the California Fair Employment and Housing Act ("FEHA").

William Schechner, age sixty-six, and John Lobertini, age forty-seven, were news reporters for the television station KPIX-TV, an affiliate of CBS Broadcasting, Inc. Both men were distinguished reporters who had recently signed short-term contract extensions with the station. In 2008, CBS issued a directive requiring a ten percent budget reduction by all affiliate stations, as a result of which Schechner and Lobertini were laid off and, thereafter, sued for wrongful termination on the basis of age discrimination.

The two people at KPIX responsible for hiring and firing decisions were Ronald Longinotti and Dan Rosenheim. To establish their non-discriminatory reasons for the layoff decisions, they testified that the layoff decisions were made based upon the following rationale: they decided not to lay off any news anchors, as they were the "face" of the station, and also not to lay off any "specialty reporters," meaning reporters who focused on a particular beat, because they were "promoting and pushing the brand of the station." Longinotti and Rosenheim decided to lay off general assignment reporters based upon the next date of contract expiration.

In support of their claim for age discrimination, the plaintiffs submitted the report of an expert statistician, which concluded that there was a statistically significant disparity between the ages of the individuals laid off and the ages of those who were not laid off and thus there was a close correlation between the ages of the employees and whether or not they were selected to be laid off. The statistician, however, admitted that his report assumed that all on-air talent had an equal opportunity to be laid-off (i.e. it did not take into consideration the fact that anchors and specialty reporters were determined to be non-expendable) and he further admitted that his report did not take date of contract expiration into account.

In analyzing claims of age discrimination under FEHA, California courts apply a three-part analysis. First, the employee must establish a preliminary (known in legalese as prima facie) case of age discrimination. If the employee succeeds in establishing this prima facie case, the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. If the employer provides such a reason, then the onus is shifted back to the employee to prove that the reason provided by the employer is merely a pretext for unlawful discrimination.

In this case, the district court granted the employer's motion for summary judgment and dismissed the case, holding that the plaintiffs failed to even establish a prima facie case of discrimination due to the fact that the statistical evidence presented by the plaintiffs failed to account for the employer's non-discriminatory reasons for their termination.

The Ninth Circuit Court of Appeals confirmed the dismissal of the case, but clarified that the statistical evidence, despite failing to account for the employer's non-discriminatory reasons for termination, was sufficient to establish a prima facie case of discrimination. However, the Court upheld the dismissal of the matter based upon the plaintiffs' failure to prove that the non-discriminatory reasons provided by the employer were pretexts for discrimination.

The Court supported this finding by relying on the "favorable same-actor inference." This rule is based on the presumption that where the same person is responsible for both the hiring and firing of an employee alleging discrimination, and both the hiring and firing occurred within a short period of time, there is a strong inference that there was not discriminatory motive for the adverse employment action. Thus, in this case, because both employees had recently been given contract extensions which KPIX was under no obligation to provide, the Court applied the same-actor inference and found that Schechner and Lobertini had failed to present sufficient evidence to illustrate that the non-discriminatory reasons provided by the employer were simply pretext for discrimination.

## WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

This case confirms the rule that an employee filing suit for discrimination need only provide minimal evidence of discrimination to pass the initial hurdle of presenting a *prima facie* case for employment discrimination. Specifically, it illustrates that statistical evidence of discriminatory treatment can be held sufficient to support a preliminary case of discrimination even if the statistician did not account for the employer's legitimate, non-discriminatory reasons for the action. However, it also provides solace to employers via a reminder that this minimal showing by the employee can be defeated by an employer who can illustrate a legitimate, non-discriminatory purpose for the employment decision, so long as that purpose is not shown by the employee to be merely pretext for unlawful discrimination.

It should be noted, however, that in this case the employees were laid off, as opposed to being terminated for cause. In those situations where an employer seeks to terminate an employee for performance-related issues, it behooves employers to maintain documentation of the performance issues and, ideally, any warnings or reprimands issued to the employee. Such documentation becomes invaluable if and when the employee files a lawsuit, because the employer can then use such evidence to illustrate the non-discriminatory reasons for the adverse action.

## MIXED MOTIVE DOES NOT ALWAYS RENDER LEGITIMATE, GOOD FAITH TERMINATION UNLAWFUL

*by Eric A. Schneider*

***Hypotethetical Scenario:*** Bogdan is a nightwatchman for American Widget Company. Bogdan is of Ukrainian descent.

Bogdan is caught on video stealing 12 widgets. Goran is American Widget Company's controller. Goran is of Croatian descent. Goran has made it widely known that he does not like people of Ukrainian descent.

As part of his job, Goran audits American Widget Company's inventory. He observed that there were 12 widgets unaccounted for in inventory. He conducted an exhaustive investigation. As part of his investigation, he showed Bogdan the video depicting his theft of the 12 missing widgets. Bogdan then admitted that he stole the widgets.

American Widget Company has a zero tolerance policy for theft, a policy that is clearly set forth in its employee handbook. It has always terminated any employee caught stealing product. Goran shared the result with Maria, the vice president of human resources for American Widget Company. Together, Goran and Maria decide to fire Bogdan and did so.

Bogdan brought suit in Los Angeles County Superior Court alleging that he was wrongfully terminated in violation of both public policy and the California Fair Employment & Housing Act. He acknowledged that he stole the widgets but alleged in his complaint that Goran had a mixed motive in participating in the decision to fire him—that while Bogdan did indeed steal the widgets, Goran was also motivated by his intense dislike for people of Ukrainian descent and made it a point to brag about having fired a person of Ukrainian descent on his anti-Ukrainian blog.

*Issue:* Does Goran's mixed motive preclude American Widget Company from obtaining summary judgment as to Bogdan's wrongful termination claim?

*Discussion:* California follows the traditional *McDonnell Douglas*[1] test: At trial, the plaintiff bears the initial burden of proving a prima facie case of discrimination. The burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse employment action. Then, should the defendant carry that burden, the plaintiff must prove that the legitimate reasons offered by the defendant were not its true reasons, but were instead a pretext for discrimination.

In this case, Bogdan can show that he is of Ukrainian descent, that he suffered an adverse employment action, and he may be able to show that there is some potential nexus between the two events based upon Goran's stated antipathy for those of Ukrainian descent.

[1] *McDonnell Douglas v. Green* (1973) 411 US 792

In response, American Widget Company asserted that it had a legitimate, nondiscriminatory reason for effecting the termination, i.e., that Bogdan stole the widgets.

Bogdan now argues that under California law, the McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination. Direct evidence of discrimination has been held to be evidence, which if believed, proves the fact of discriminatory animus without inference or presumption.

In this case, Bogdan can show such direct evidence based upon Goran's boast in his blog about having terminated a person of Ukrainian extraction.

If that were the end of the analysis, Bogdan and other Ukrainian-Americans[2] would have free rein to do whatever they wanted with no fear of reprisal, and for that matter, American businesses would then be at the mercy of anyone in a protected class[3] if they had the misfortune to employ supervisors or managers who had some point had exhibited bias toward anyone in a particular protected class.

Fortunately for employers as a whole, the mere existence of a bigot in a management position in and of itself does not per se give the protected class members a "pass": the plaintiff still has the burden of showing a causal connection between the comments and the adverse job action at issue.

And fortunately for American Widget Company, there does not appear to be evidence of the requisite nexus in that:

1. Bogdan's felonious conduct was not only captured on video, but he admitted the theft;
2. Goran conducted a thorough good faith investigation;
3. American Widget Company had a demonstrated zero tolerance policy for theft; and
4. American Widget Company can demonstrate that it has in every instance terminated employees caught stealing.

Further, in a mixed motive case such as this one, the employer would prevail if it could show that the employer would have been terminated even had there been no improper motive. In this case, American Widget Company would be able to prove that it would have fired Bogdan even had Goran not been biased against Bogdan because of his ethnicity.

**WHAT CAN EMPLOYERS TAKE FROM THIS CASE?**

It must be recognized that the facts in this hypothetical case are extreme in that evidence of the conduct giving rise to the termination was not in dispute, that there was a published policy mandating the consequences of theft, and there was a record of the employer's consistency in firing employees caught stealing. In practicality, the facts and circumstances surrounding such terminations more frequently entail gray area.

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[2] Most Ukrainian-Americans of course are law abiding citizens who would not engage in criminal conduct.

[3] For the most part, the only people not in a protected class are males who are Protestant, heterosexual, Caucasian, able-bodied and between 18 and 40 years of age.

### 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 EAS@amclaw.com or 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.

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LOS ANGELES, CALIFORNIA
ONTARIO, CALIFORNIA
SAN DIEGO, CALIFORNIA
LAS VEGAS, NEVADA
ANDERSON, MCPHARLIN & CONNERS LLP
LAWYERS
ESTABLISHED 1947

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

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

SAN DIEGO
4445 Eastgate Mall
Suite 200
San Diego, CA 92121
Main: 858-812-3070
Fax: 858-812-2001

LAS VEGAS
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

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

Vanessa S. Davila, Esq.
Senior Associate
909.481.1316. . . . .vsd@amclaw.com

Leila M. Rossetti, Esq.
Senior Associate
213.236.1642. . . . .lmr@amclaw.com