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

WHAT IN THE WORLD IS ASSOCIATIONAL DISABILITY DISCRIMINATION? IS IT FOR REAL? YOU BETCHA! ANOTHER CASE OF BAD FACTS LEADING TO EXPANDED LAW

By Colleen A. Déziel

Employers know, or should know that it is unlawful for an employer "because of the …physical disability…of any person,…to discharge the person from employment...or to discriminate against the person…in terms, conditions, or privileges of employment." But what about a situation where the employee is not disabled, but is associated with a person who has a physical disability? Well, the able-bodied employee too is protected as Dependable Highway Express, Inc. found out recently in *Luis Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 246 Cal.App.4th 180, reh'g granted, opinion not citable (Apr. 27, 2016). This issue is not litigated very often, but according to an appellate courts, the Fair Employment and Housing Act (FEHA) statutes are very clear that FEHA forbids discrimination based on a person's association with another who has a disability. (See *Government Code* section 12926(o).) We do not agree with this court's interpretation, but for now that is the law.

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Plaintiff Ramirez has a son who is in need of a kidney transplant, and who requires daily home dialysis treatments. The plaintiff is the only person in the household who knows how to operate the dialysis machine for his son, and he actually took a class to learn how to operate it. During the plaintiff's first three years of employment at Dependable Highway Express, Inc. (DHE) as a truck driver, the plaintiff's supervisors accommodated the plaintiff's request that he be scheduled on the earlier routes, so that he could be home by 8:00 or 9:00 p.m. to connect his son to the dialysis machine. There were times when he could be home a bit later (i.e., if his son was doing well that day), but for the most part, his son needed to be connected to the machine for 10-12 hours, which required the plaintiff to be home earlier (i.e., by 8:00 p.m.)

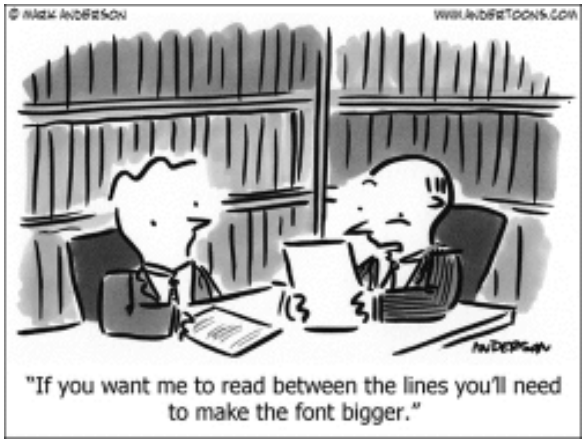
Sometime in March of 2013, the plaintiff was assigned a new supervisor after his existing supervisor was promoted. The new supervisor "Junior," was informed by the plaintiff's old supervisor that he needed to "work with" the plaintiff. Well, that didn't happen. Instead of continuing to set the plaintiff's routes in the early morning, Junior thought it would be a grand idea to schedule the plaintiff on the later routes, which would result in the plaintiff arriving home around 10:00 p.m. or later. The plaintiff explained to Junior that this was too late for him to be able to connect his son to the machine. Junior's response was that if he did not accept the route, he would be fired. The plaintiff declined the route and Junior told him to return the next day to sign termination paperwork. It

did not help the defendant's position that Junior scheduled eight other employees in the earlier shifts, and also lied when he told the plaintiff that a DHE customer who needed an early delivery did not want to work with the plaintiff. In fact, the opposite was true; the customer specifically requested that the plaintiff be the one to deliver his products, and deliver them early.

It should be noted that the plaintiff never used the words "disability discrimination," "accommodation," "retaliation" or "harassment," but instead complained to his supervisors about his schedule change and about the reasons for his need to be home by a certain hour of the day.

After his termination, the plaintiff filed the instant action. The trial court granted DHE's motion for summary judgment ruling that the "plaintiff's evidence at best showed that Junior was unwilling to provide accommodation to the same extent as plaintiff's previous supervisor" (i.e., the plaintiff's complaints were not specific and detailed enough.) The court found no evidence to show the termination decision was based on the plaintiff's association with his child, or in retaliation for his scheduling requests. The plaintiff filed a timely appeal, and the Court of Appeal reversed.

Essentially, after a rather lengthy analysis the Court of Appeal held that the "plain language" of FEHA imposes a duty on employers to provide reasonable accommodations to employees who are associated with a disabled person. The court pointed to the definition of "physical disability" within FEHA in coming to its decision. The court noted that the phrase "physical disability" includes "a perception…that the person is associated with a person who has, or is perceived to have" a physical disability. It thereby concluded that FEHA forbids discrimination based on a person's association with a disabled person.



As for the retaliation cause of action, DHE alleged that the plaintiff did not engage in protected activity and that he could not show a causal link between any such activity and the adverse employment action. The Court of Appeal found that there was a triable issue of fact concerning whether the plaintiff had shown opposition to a practice forbidden by FEHA when he complained about the changes to his work schedule. The appellate court then went so far as to conclude that the plaintiff's request for a reasonable accommodation in his work hours did constitute protected activity sufficient to sustain such a claim.

Given all of the above, summary judgment in DHE's favor was improper.

What can employers take away from this case?

This case shows how bad facts can lead to bad law. Because Junior decided, for whatever reason, to make the plaintiff's life difficult, the law concerning the duty to provide reasonable accommodations has been expanded to include those employees who are not themselves disabled, but who take care of disabled family members. At this juncture, employers would be best served by reviewing and revamping their disability policies to include reasonable accommodations for those employees who need to take care of a disabled person with whom they are associated. We take strong issue with the court's interpretation of this aspect of the FEHA, but for now it is the law. Bottom line, employers need to be very careful when making decisions on whether to terminate employees, or whether to grant requests for accommodations. If in doubt, it is best to seek the advice of an employment specialist.

INADEQUATE DISABILITY JURY INSTRUCTION RESULTS IN REVERSAL

By Eric A. Schneider

In a recent case, *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, Dennis Wallace had served as a deputy sheriff with the County of Stanislaus for ten years when he injured his knee in October, 2007. He then intermittently worked various light duty positions and spent time on medical leave. For the period April 9, 2010 until January 5, 2011 he worked as a bailiff. His evaluation report featured an above average rating.

In October, 2010 one of his physicians issued a report setting forth a number of restrictions. The brass concluded that Wallace presented a danger to himself and others and on that basis removed him from his bailiff position and placed him on unpaid leave. No one however asked Wallace's direct supervisors if he were able to perform the job. Wallace himself said that he not only could perform the functions of a bailiff but that he could also work as a detective or a school resource officer. Nevertheless, he remained on medical leave until January, 2013 when he was returned to full duty as a patrol officer.

Well before that, in May, 2013, Wallace filed suit bringing claims under the California Fair Employment and Housing Act (FEHA) for disability discrimination, failure to accommodate his disability, failure to engage in the interactive process, and failure to prevent discrimination.

The first time the case was tried, the jury found for the County as to the disability discrimination cause of action and deadlocked as to the other three claims. With regard to disability discrimination, the jury answered "no" to the question as to whether the County regarded or treated the plaintiff as having a disability in order to discriminate.

Following the first trial, both sides moved for summary adjudication. The trial court granted the County's motion and dismissed the fourth cause of action (for failure to prevent discrimination).

The jury at the second trial then found for the County on the remaining two causes of action.

The plaintiff appealed.

The Fifth District Court of Appeal overturned the jury verdict on the basis of an improper jury instruction. The court noted in that regard:

> The primary legal issue presented in this appeal is how to instruct a jury on the employer's intent to discriminate against a disabled employee and, more specifically, what role 'animus' plays in defining that intent. The trial court believed proof of animus or ill will was required and modified the version of California jury instruction (CACI) No. 2540 in effect at the time to include a requirement that Wallace prove county regarded or treated him "as having a disability in order to discriminate."

"The jury will disregard the defendant's disclaimer."

The appellate court observed:

> The proper standard regarding employer intent or motivation was decided by our Supreme Court in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203 (*Harris*). Under *Harris*, Wallace could prove the requisite discriminatory intent by showing his actual or perceived disability with a 'substantial motivating factor/reason' for County's decision to place him on a leave of absence. California law does not require an employee with an actual or perceived disability to prove that the employer's adverse employment action was motivated by animosity or ill will against the employee. Instead, California's statutory scheme protects employees from an employer's erroneous or mistaken beliefs about the employee's physical condition. In short, the Legislature decided that the financial consequences of an employer's mistaken belief that an employee is unable to safely perform a job's essential functions would be borne by the employer, not the employee, even if the employer's mistake was reasonable and made in good faith.

What can employers take away from this case?

In one respect, the case should not affect employers: when they are acting on the basis of a mistaken belief, they do not know that they are doing so. Nevertheless, the language within the decision regarding the failure to accommodate as a basis for liability even where the employer bears no ill will or animosity toward the employee should induce employers to be extra careful in disability cases. All employers know that race, religion, and sexual orientation (in California) cannot be legitimate bases for discrimination, but this court rightly points out that the employee still has to be able to perform the essential functions of his or her job, with or without accommodation. Reasonable accommodations cannot always be made, regardless of hardship: blind bus drivers cannot drive buses.

WHAT HAPPENS WHEN BOTH PARTIES QUALIFY AS THE "PREVAILING PARTY" UNDER CODE OF CIVIL PROCEDURE SECTION 1032(a)(4)?

By Colleen A. Déziel

For purposes of determining which party is entitled to costs and potentially attorney's fees in any given matter, courts look at the definition outlined in Code of Civil Procedure section 1032(a)(4). Therein, "prevailing party" includes "the party with a net monetary recovery" and "a defendant in whose favor a dismissal is entered." This seems straightforward enough and easy to apply. However, what happens when a plaintiff voluntarily dismisses an action after losing various motions to the defendant and after entering into a monetary settlement with that same defendant? In such a situation, the plaintiff has received a net monetary recovery, but the defendant also obtained a voluntary dismissal. The Supreme Court in *DeSaulles v. Community Hospital of the Monterey Peninsula* (2016) 62 Cal.4th 1140 has answered that question, although we note that the dissent's position makes sense as well.

In this case, the plaintiff sued on various grounds based on her alleged disability, which included "susceptibility to infection as a result of cancer." She also brought claims for wrongful termination, retaliation, negligent and intentional infliction of emotional distress and breach of implicit conditions of employment and the implied covenant of good faith and fair dealing. The defendant filed several successful motions which gutted the plaintiff's case (leaving only the two breach of contract based claims), and this ultimately led to a settlement in the matter. The defendant agreed to pay the plaintiff $23,500. Thereafter, the trial court determined that the defendant had obtained a "judgment" as to most of

the claims and "a dismissal" as to the two remaining claims, and thus, was the prevailing party. It awarded the defendant its costs.

The Court of Appeal reversed, and the Supreme Court affirmed the appellate court's decision. Essentially, the appellate court and Supreme Court held that when an employer pays an employee money in settlement, the employee obtains "a net monetary recovery" and is the prevailing party under Code of Civil Procedure section 1032(a)(4). Where a settlement agreement is silent as to the recovery of costs, the employee is entitled to recover his or her costs as a matter of right. The employer is not entitled to recover its costs, even though it technically obtained a dismissal or judgment denying the plaintiff any relief, which would ordinarily make the defendant the "prevailing party." The Court of Appeal and Supreme Court reasoned that the motion for summary adjudication and the motion in limine did not end the action and that the case ended without a trial on the merits because the plaintiff agreed to settle the two remaining causes of action.

As noted above, a well written dissent authored by Justice Kruger and joined in by Justice Werdegar supports the trial court's decision. The dissent reflects that when both parties qualify as the prevailing party under the 1032(a)(4) definition, the matter should be covered by the next sentence in the provision which permits the trial court, "in situations other than as specified," to determine which party has in fact prevailed and to allocate costs accordingly. The dissent found that the trial court should have been permitted to take into account special circumstances that may render an award of costs inequitable or unjust. In the instant matter, the defendant prevailed on all but two claims via a motion for summary adjudication and a motion in limine. And, in regard to the remaining two claims, there was a nominal settlement along with a dismissal with prejudice. Under these circumstances the trial court should have been able to determine whether an award of costs was equitable and just, and if so, to whom they should be awarded. The majority opinion noted that such a holding would not "simpli[fy] procedures for determining costs and easing judicial workload."

What can employers take away from this case?

This is yet another California decision in favor of employees. Even though it was not equitable or just for the plaintiff under these circumstances to be awarded her costs, the Court of Appeal and Supreme Court found otherwise. One way to avoid such a ruling is for employers to ensure that any settlement agreement they enter includes a provision regarding the award of fees and costs and/or a designation of who is the "prevailing party" under Code of Civil Procedure section 1032(a)(4).

CALIFORNIA SUPREME COURT OUTLINES REQUIREMENTS FOR PROVIDING SEATS FOR EMPLOYEES DURING WORK HOURS

By Leila M. Rossetti

In the consolidated cases of *Kilby v. CVS Pharmacy, Inc.* (9th Cir., June 8, 2016, No. 12-56130) 2016 WL 3212264 , the California Supreme Court recently issued an opinion clarifying when employers are required to provide seats for their employees, analyzing and interpreting two Industrial Wage Orders issued by the Industrial Welfare Commission ("IWC") as they pertain to two separate cases. In *Kilby v. CVS Pharmacy*, plaintiff Nykeya Kilby complained that CVS's requirement that she stand during her entire shift, including while working at the cash register, violated the IWC Wage Order requirement that reasonable seating be provided for employees. Similarly, in *Henderson v. JPMorgan Chase Bank NA* (9th Cir., June 8, 2016, No. 13-56095) 2016 WL 3212260, four bank tellers filed suit complaining of lack of access to suitable seating.

"Have a seat, Flipmeyer... Let's chat about that project of yours."

IWC Wage Order 7-2001 provides, in relevant part, that "All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." It also provides that "when employees are not engaged in the active duties of their employment, and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area, and employees shall be permitted to use such seats when it does not interfere with the performance of their duties." The Supreme Court, in its decision, specifically addressed three questions as they pertained to the two wage orders and the two consolidated cases.

The first question addressed by the Court related to the meaning of the phrase "nature of the work" in the context of the wage order. The Court held that employers must consider all of the duties of their employees and, if the tasks at a particular location "reasonably permit sitting, and provision of a seat would not interfere with performance of any other tasks that may require standing," then an employer is required to provide a seat for the employee to use while completing those tasks. In other words, if most of an employee's various responsibilities require that the employee remain standing, but for two hours each day the employee has to complete certain tasks which can reasonably be completed while seated, then a seat must be available for the employee for those two hours in which sitting is reasonable, regardless of the fact that "most" of that employee's responsibilities require that he or she remain standing.

The next question addressed by the Court was what factors should be taken into consideration when deciding whether the nature of work "reasonably permits" the use of a seat. The Court held that this determination must be made considering all of the circumstances. While an employer's business judgment as to certain things, such as whether the "optics" are better when an employee is standing versus sitting, are taken into consideration, they are not the only considerations. Instead, whether the nature of the work "reasonably permits" the use of a seat is considered on an objective standard, rather than simply based upon the employer's own preferences. The employer's expectations must be balanced with the employees' needs for seating. Moreover, the particular characteristics of an employee are irrelevant—the Court pointed out that the law mandates that seats be permitted when the nature of the *work* requires seats, not the nature of the *worker*. (Please note that this does not take into consideration requirements regarding accommodations for disabled employees, which is an entirely separate issue and which must be strictly complied with in order to avoid claims of disability discrimination or failure to accommodate a disability.)

Lastly, the Court held that in cases where an employee alleges failure to provide seating, the burden is on the employer to show that providing seating for the employee in question was not feasible. It is not up to the employee to prove that he or she should have been provided a seat. Instead, once a case is filed by an employee or ex-employee, the employer is required to establish why a seat was not reasonable in the situation in question.

What can employers take away from this case?

Employers must pay careful attention to employees who are required to stand as part of their job responsibilities. For each such employee, employers must consider the nature of his or her work and his or her duties and make sure that there is seating available for them whenever it is reasonably possible in connection with the nature of the work to be performed. If there is any doubt as to whether or not seating must be made available, employers are advised to err on the side of caution and make seats available to employees whenever it is possible to do so without interfering with the employee's responsibilities. Employers with any doubts or concerns on this issue are advised to consult with an employment attorney or HR professional.

NINTH CIRCUIT RULES ROUNDING OF TIME DOES NOT REQUIRE EMPLOYEES TO GAIN OR BREAK EVEN

By Michelle T. Harrington

In a recent case, *Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership* ("Time Warner") (9th Cir. 2016) 821 F.3d 1069, the U.S. Court of Appeals for the Ninth Circuit held in a matter of first impression that both federal and California rounding regulations do not require all employees to gain or break even over every pay period, and that the purpose of the regulation is to calculate wages efficiently so that they average out over the long-term. The Ninth Circuit also held that an employer is not required to plead the de minimus doctrine as an affirmative defense.

Defendant Time Warner rounded its employees' work time when they punched in and out to the nearest 15-minute increment. For example, a punch of 8:07 was rounded down to 8:00, while a punch of 8:08 was rounded up to 8:15. Plaintiff Andre Corbin argued that this practice denied him earned wages because it was undisputed that over the relevant period Corbin was paid $15.02 less than he would be paid if Time Warner did not round his punches.

Corbin also alleged that Time Warner permitted employees to load auxiliary computer programs before clocking in and that this practice denied him full compensation for the single minute he spent each day so doing.

The Ninth Circuit held that federal regulations expressly permit the nearest 15-minute rounding practice used by Time Warner and that California law adopts that federal standard. The Court noted that Time Warner's practice was compliant because its rounding methodology was facially neutral (it neither favored the employer or employee nor led to systematic under compensation) and was neutral in its application. The Court rejected Corbin's argument that demonstrating a net underpayment of $15.02 was sufficient to survive summary judgment because "mandating that every employee must gain or break even over every pay period" would "vitiate[] the purpose and effectiveness of using rounding as a timekeeping method."

As for Corbin's single minute of daily auxiliary computer time for which he sought compensation, the Ninth Circuit held that such time was de minimus and therefore not compensable. The Court also found that Time Warner was not required to plead the de minimus doctrine as an affirmative defense.

What can employers take away from this case?

Employers that implement time rounding policies should evaluate whether or not such policies are neutral on their face and as applied to individual employees. For example, employers should ensure that such policies not only round time down but also round time up. A policy that only rounds down would result in a systematic underpayment to employees and, therefore, not comply with the law.

EMPLOYER PUSHES ARBITRATION ENVELOPE WAY TOO FAR

By Eric A. Schneider

Carbajal v. CWPSC, Inc. (2016) 245 Cal.App.4th 227 illustrates why even in a legal environment that currently favors arbitration agreements, employers still have to factor in some level of fairness to their employees. In *Carbajal*, a Fourth District Court of Appeal panel found an employer drafted arbitration agreement to be too one-sided to be enforceable.

CW Painting provides residential painting services for homeowners. It hires college students as interns to sell its services and to manage its painting crews and requires its interns to sign seasonal employment agreements which include an arbitration provision.

Martha Carbajal took on an intern position. After Carbajal quit, she brought suit in Orange County Superior Court presenting a class action stating various wage and hour causes of action. CW Painting then moved to compel arbitration.

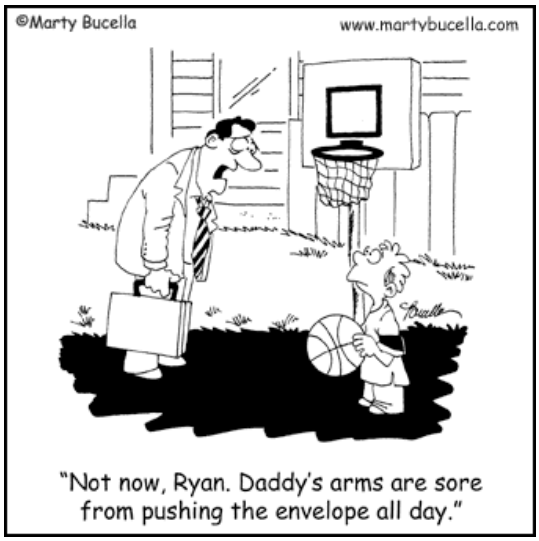
The plaintiff opposed the motion on the following bases:

1. There was no enforceable arbitration agreement because CW Painting never signed the agreement;

2. The Federal Arbitration Act (FAA) did not apply because CW Painting failed to present any evidence to show that the agreement involved interstate commerce;

3. Labor Code Section 229 invalidated any private agreement to arbitrate labor code claims for unpaid wages; and

4. The agreement was procedurally and substantively unconscionable.



The trial court denied CW Painting's motion on the basis that the arbitration provision indeed was both procedurally and substantively unconscionable. Because neither party had requested a statement of decision, the trial court did not set forth the basis of its ruling.

The Court of Appeal first addressed the FAA's applicability. Generally speaking, establishing that a transaction affect interstate commerce is not a difficult threshold for a party to meet. CW Painting however introduced no evidence to establish interstate commerce. It tried to do so after the fact in its reply brief, but the trial court was empowered with the discretion not to consider such new evidence, and it did not do so.

The Court next examined the question of unconscionability. In evaluating the enforceability of arbitration clauses, courts weigh unconscionability both procedurally and substantively. Both have to be present before a court can refuse to enforce an arbitration provision based on unconscionability. Courts use a sliding scale to assess those elements. "In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa. (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 655-656.)

It seems counterintuitive that a term regarded as unconscionable, meaning "extremely bad, unfair, or wrong" or "going far beyond what [is] usual or proper" could be enforceable at all, but courts indeed enforce them so long as there is not a "double dose" of unconscionability as to both procedure and substance.

With regard to the procedural aspect, Carbajal asserted:

1. That the arbitration provision was adhesive in nature;

2. That it did not identify which of the American Arbitration Association's (AAA) many different rules would govern this arbitration; and

3. That CW Painting neither provided her with a copy of the governing rules nor gave her an opportunity to review them before requiring her to sign the agreement.

The Court of Appeal agreed in all respects. In and of itself the adhesion aspect (i.e., "take it or leave" with no opportunity for the employee to negotiate) presents only a modest degree of unconscionability, but not when juxtaposed with the employer's failure to identify the AAA rules in play or direct Carbajal as to where she can find them. Furthermore, CW Painting gave Carbajal only a very limited period of time in which to consider the arbitration provision.

CW Painting fared no better with respect to substantive unconscionability. Carbajal contended that the agreement was substantively unconscionable because:

1. It allowed CW Painting to seek injunctive relief in court while limiting her relief to arbitration;

2. It allowed CW Painting to obtain such injunctive relief without posting a bond or other security;

3. It required that Carbajal waive her statutory right to attorney fees if she were to prevail on her labor code claims; and

4. It provided CW Painting the unilateral right to appeal any relief or determination that an arbitrator might make in contravention of the agreement's class action waiver.

5. The court regarded the first three considerations as sufficient to render the arbitration provision substantively unconscionable.

What can employers take away from this case?

Firstly, any motion to compel arbitration which relies upon the Federal Arbitration Act must necessarily be supported by evidence that interstate commerce is involved. That entails a very low threshold, but there has to be something. CW Painting made the mistake of introducing absolutely no evidence in that regard.

Secondly, don't be greedy. CW Painting also erred in making the provisions so grossly unfair both procedurally and substantively that neither the trial court nor the Court of Appeal could countenance enforcement. The employer should focus on its primary concerns which presumably would entail the class action waiver and the particular arbitral forum.

SUPREME COURT RULES THAT EMPLOYEE'S CONSTRUCTIVE DISCHARGE CLAIM BEGINS TO RUN WHEN EMPLOYEE GIVES NOTICE OF RESIGNATION

By Michelle T. Harrington

In *Green v. Brennan* (2016) 136 S.Ct. 1769, the Supreme Court of the United States held that a constructive discharge claim accrues and the limitations period starts to run when the employee gives notice of his resignation, and not when he signs a contract either to resign or to accept a transfer, or on the effective date of his resignation.

Marvin Green worked for the U.S. Postal Service. He alleged that he was passed over for a promotion because of his race. Shortly thereafter, two of his supervisors accused him of intentionally delaying the mail, a criminal offense. A few days later on December 16, 2009, Green and the Postal Service entered into an agreement under which the Postal Service promised not to pursue criminal charges in exchange for Green's promise either to retire or to start working at a different office at a lower salary. Green chose to retire and submitted his resignation papers on February 9, 2010, with an effective resignation date of March 31, 2010.

On March 22, 2010, 96 days after signing the settlement agreement and 41 days after submitting his resignation papers, Green contacted an Equal Employment Opportunity (EEO) counselor to report an unlawful constructive discharge. Green alleged that the choice the Postal Service had given him effectively forced his resignation and was in retaliation for his complaint about race discrimination. He filed suit in District Court for violation of Title VII.

As a federal employee, Green was required to contact an EEO counselor within 45 days of the "matter alleged to be discriminatory." If the "matter alleged to be discriminatory" was his execution of the settlement agreement, he was untimely. But if the triggering event was the submission of his resignation papers, he was timely.

The District Court granted summary judgment to the Postal Service agreeing that Green failed to make timely contact with the EEO counselor within 45 days of the "matter alleged to be discriminatory." The Tenth Circuit affirmed, holding that the matter alleged to be discriminatory was only the Postal Service's discriminatory actions in December 2009 when both parties signed the settlement agreement, and not Green's submission of resignation paperwork two months later.

The Supreme Court reversed. The Court relied on the "standard rule" for limitations period under which a limitations period starts to run only when the plaintiff has a complete and present cause of action upon which he can file suit and obtain relief. The Court concluded that under such standard rule, the phrase "matter alleged to be discriminatory" includes the employee's resignation, not just the employer's alleged wrongful conduct that prompted that resignation.

The Court explained that a constructive discharge claim has two elements: (1) discrimination such that a reasonable person in the plaintiff's position would have felt compelled to resign; and (2) actual resignation. As such, Green's resignation was "an essential part of his constructive discharge claim" and, as a result, was part of the "complete and present cause of action" that was necessary to trigger the limitation period.

The Court also held that the limitations period started running when Green gave "notice" of his resignation, and not on the date his resignation became effective (i.e., his last day at work). The Postal Service asserted that Green gave notice when he signed the settlement agreement in December but Green argued he did not give notice until he submitted his resignation papers in February. The Court remanded the case to the Tenth Circuit to determine the precise date on which Green gave notice of his resignation.

What can employers take away from this case?

In defending lawsuits alleging constructive discharge, employers should recognize that the limitations period starts to run from the date that the employee gives notice of his or her intention to quit. It does not run from the date of the employer's alleged wrongful conduct or the effective date of the employee's resignation.

EMPLOYEE'S POSITION A SIGNIFICANT FACTOR IN DETERMINING WHETHER AN EMPLOYER HAS BEEN PLACED ON NOTICE OF A COMPLAINT UNDER THE FAIR LABOR STANDARDS ACT

By Leila M. Rossetti

In *Rosenfield v. Globaltranz Enterprises, Inc.* (9th Cir. 2015) 811 F.3d 282, the Ninth Circuit addressed the issue of when an employer can be expected to be on notice that an employee has made a complaint protected from retaliation under the Fair

Labor Standards Act ("FLSA"). The Court refused to adopt any type of "bright line" rule, finding that such determinations are made on a case-by-case basis. It also held, however, that one of the important factors to consider is whether or not the complaining employee was in a managerial position.

Defendant GlobalTranz Enterprises, Inc. hired plaintiff Alla Rosenfield in April 2010 as Manager of Human Resources. Throughout her tenure with the company, Ms. Rosenfield repeatedly informed management, orally on at least eight occasions and in writing at least 27 times, that she believed many of the employees were misclassified and not being paid proper wages in accordance with the FLSA.

In March of 2011, Ms. Rosenfield's supervisor, who disapproved of her complaints, informed her that he would address her concerns, but also made it clear to her that "he did not want or expect her to determine whether the company was actually implementing" those changes. In May of 2011, after determining that the company had not implemented those changes, Ms. Rosenfield again complained to her supervisor that the company was not compliant with the FLSA. She was fired five days later (the opinion does not specify the reasons given for the termination).

The trial court granted summary judgment in favor of GlobalTranz, finding that Ms. Rosenfield had not made any complaint to the company which was protected under the FLSA. On appeal, the Ninth Circuit disagreed, finding that a reasonable jury *could* find that Ms. Rosenfield's complaints were protected under the FLSA.

The Court, citing to previous cases, noted that the FLSA requires that an employer have "fair notice that an employee is making a complaint that could subject the employer to a later claim of retaliation" and that "[t]o fall within the scope of the anti-retaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context," as a complaint protected from retaliation under the FLSA. The Court also acknowledged that when addressing a complaint from an employee, employers view complaints differently depending upon the position of the employee making the complaint. The Court specifically noted that a reasonable employer would not view a complaint regarding compliance with the FLSA as a protected complaint if it came from a managerial employee *whose job it was* to ensure compliance with the FLSA, since such a "complaint" would typically be seen as a manager simply doing his or her job.

In this case, however, even though Ms. Rosenfield was the Human Resources Manager, compliance with the FLSA was specifically excluded from her responsibilities. The Court relied heavily on this fact in determining that her complaints could be found to be protected under the FLSA.

What can employers take away from this case?

Whenever an employer is informed that any of its policies or practices are in violation of employment (or any) laws, such a complaint should not be taken lightly. In addition to facing suits of retaliation such as this case, employers can face lawsuits brought on other grounds, and possibly even suits brought as class actions, which can result in substantial cost to the employer. In addition, when terminating an employee, an employer should be cognizant of whether or not that employee has made any complaints or engaged in any protected activity (i.e. taking a leave of absence for disability purposes, taking maternity leave, complaining of harassment, etc.) which could possible lead to an allegation of retaliation. Moreover, if a management-level employee makes any complaints, the employer should be careful to determine whether or not the matters complained of are within the scope of that manager's duties. If they are not, with this opinion the Ninth Circuit has put employers on notice that such complaints may very well be protected from retaliation under the FLSA. As always, employers with any questions or doubts as to the legality of an employment action are advised to consult with an HR professional or an employment attorney prior to taking any such action.

COMPLEX ISSUES IN ARBITRATION CONTEXT=MAJOR EXPENSE FOR ALL CONCERNED

By Eric A. Schneider

We have written many times regarding the enforceability of arbitration clauses. *Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242 is an arbitration case where enforceability is *not* the issue.

Cynthia Ling worked as a floor manager for the defendant for 16 months until she was fired. Chang's had classified her as exempt and paid her on that basis.

Ling filed a civil action for statutory waiting time penalties[1], premium pay for failure to provide meal and rest periods[2], unpaid overtime wages, and unfair competition (under Business and Professions Code §§ 17200, et seq.), and she sought attorney fees and costs. Because of the arbitration provision, she incorporated into her complaint a demand for arbitration. The dispute was arbitrated by a JAMS arbitrator.

The arbitrator gutted the vast majority of her claims on the basis that she was in fact properly classified as exempt. He, however, found in her favor on the basis of missed meal periods during the first nine weeks of her employment when she attended off-site training because she was at that time non-exempt. The arbitrator found for the defendant on every other claim.

On the basis of his having had equitable discretion to determine which party prevailed based upon the entirety of the claims and defenses, the arbitrator awarded the defendant $29,046 in costs and $212,685 in attorney fees.

Ling petitioned the trial court to vacate the award in its entirety asserting that the arbitrator had exceeded his powers by awarding the attorney's fees and costs to the defendants and denying her attorney fees with regard to her missed meal period claim.

The trial court ruled that it lacked authority to disturb the arbitrator's findings as to the claimant's exempt status but directed the arbitrator to entertain a cost and attorney fee motion by the plaintiff. In so doing, the court recognized the public policy protecting an employee's right to bring an overtime claim without facing the prospect of financial ruin. It also determined that the plaintiff was entitled to attorney fees as the prevailing party on her missed meal periods claim.

The court also directed the plaintiff to identify the attorney fees and costs she incurred excluding amounts borne exclusively in bringing the unsuccessful overtime claim but allowing the amounts that were "inextricably intertwined" with that claim.

The arbitrator issued a second award. He denied the plaintiff attorney fees in reliance upon *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244 which had been issued after the court's remand. In *Kirby*, the Supreme Court held that attorney fees for missed meal periods are not governed either by Labor Code § 1194 or Labor Code § 218.5 and were thus not recoverable. The arbitrator, however, awarded her costs relative to the entire action because she had received a small monetary award for the missed meal period claim.

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[1] Under California law, an employee who is not paid all monies due him or her at the time of the termination is entitled to be paid for an additional 30 working days.

[2] Non-exempt employees are entitled to two paid rest periods and an unpaid meal period for a full work day.

Ling then filed a second trial court petition to vacate the arbitration award arguing that the arbitrator had exceeded his authority by denying her attorney fees contrary to the court's remand order and for denying her attorney fees for recovery under Labor Code § 203, the waiting time penalties.

The trial court determined that Ling was entitled to costs, but not attorney fees. Both parties then appealed.

The Sixth District Court of Appeal first addressed review of arbitration awards. In so doing it first relied upon Code of Civil Procedure § 1286.2 which allows a trial court to vacate an arbitration award only when the arbitrator has exceeded his or her powers, and the award cannot be corrected without affecting the merits of the decision. Likewise, Code of Civil Procedure § 1286.6 authorizes a court to correct an award if it determines that the arbitrator has exceeded his or her powers, but the award can be corrected without affecting the merits of the decision upon the controversy submitted.

It then noted a California Supreme Court decision to the effect that an arbitrator exceeds his or her powers by issuing an award that violates a party's unwaivable statutory rights or contravenes an explicit legislative expression of public policy. The standard of review in that regard is de novo.

The Appellate Court then turned to the specific issues in the case. Firstly, with regard to attorney's fees and costs in employment arbitrations, the court pointed to the *Kirby* case where the Supreme Court held that attorney fees are not recoverable in missed meal period claims because the statutes in question do not call for them. The plaintiff was still entitled to her costs however because she was the party with the net monetary recovery.

Next, the court held that as a matter of public policy, employers are not entitled to attorney fees in overtime cases. An award of such fees would exceed the arbitrator's power because it would contravene the express legislative declaration of public policy.

The court next ruled that the trial court did not err by failing to vacate the award in its entirety because the fee award, which was disallowed, did not affect the merits of the substantive dispute regarding the overtime and missed meal period claims.

The court next ruled that missed meal periods do not constitute claims for the non-payment of wages and thus cannot be the basis of the fee award when the underlying claim is not a claim for wages.

What can employers take away from this case?

1. The enforceability of arbitration provisions is not necessarily the only legal issue that can arise in connection with arbitration clauses;

2. This case involved the expense of hundreds of thousands of dollars to each of the parties. While ultimately it is instructive to others, the sheer totality of expense in the final analysis suggests P.F. Chang's economic interests would have been better served by means of settlement. Arbitration is not always the most expedient and economic means of dispute resolution; and

3. California's statutory scheme for missed meal and rest periods, the determination of exempt versus non-exempt status, and various other wage and hour issues is complex. Employers are well advised to make sure their human resources professionals are up to date on all developments and should consult with counsel when in doubt.

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