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Labor & Employment Briefing

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

"BRINKER IN ACTION*"*

by Eric A. Schneider

In *Flores v. Lamps Plus, Inc.*, 209 Cal.App. 4th 35, three non-exempt Lamps Plus employees filed a putative class action seeking damages and restitution for unpaid overtime, failure to pay minimum wage, failure to provide meal and rest breaks, defective wage statements and late payment of wages following termination.

The trial court denied their motion for class certification on the bases that the evidence showed that the employer directed the workers to take meal and rest breaks, that the individual issues predominated over the common issues as to those breaks, that commonality had not been established as to the remaining claims such that they required individual assessment, and that there was no evidence of any illegal company-wide policy.

The plaintiffs filed their appeal, and the Second District panel affirmed, holding that the employer must provide the breaks but need not ensure that the employees take them, that the individual disputes dominated all of the claims and that the class representatives were inadequate.

The initial appellate decision in this matter was handed down at a time when *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, was pending. In *Brinker* earlier this year, and as we reported in the preceding issue of our newsletter, the California Supreme Court approved the concept of providing the breaks but not ensuring that they be taken. That Court also granted review of this matter and then remanded it with directions to vacate the Second District's prior opinion and rescinding it in light of *Brinker*.

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The appellate court thus did so. With regard to the breaks, it stated the following:

> "And, any debate about an employer's obligation regarding meal breaks has been squarely addressed by *Brinker*. In *Brinker*, the Supreme Court determined that 'an employer's duty with respect to meal breaks under both [Labor Code] Section 512, subdivision (a) and Wage Order No. 5 is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. On the other hand, the employer is not obligated to police meal breaks and ensure 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 from premium pay under Wage Order No. 5, subdivision 11(B) and Labor Code Section 2267, subdivision (b).'" (*Brinker*, *supra*, 53 Cal.4th at pp. 1040-1041.)

In applying *Brinker*, the court emphasized that Lamps Plus's policies allowed and encouraged meal periods; it required the employees to acknowledge the meal break policy in writing; and that it disciplined employees for non-compliance.

With regard to failure to pay wages upon termination, the court found such inconsistencies in the evidence presented such that individualized determinations, inconsistent with prosecution on a class, would have to be made.

The court also made short work of the plaintiffs' claims that there were deficiencies in their wage statements affirming the trial court's finding that the plaintiffs showed no damages. Even if the wage statements were in some way defective, the plaintiffs must show some element of harm to establish a claim.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

The prudent employer not only provides for meal and rest breaks, but takes affirmative steps to encourage its employees to make use of them:

(1) Meal and rest breaks are not only covered in the employee handbook but are set forth in a separate policy which the employees acknowledge in writing;

(2) The employer disciplines employees who do not comply with policy; and

(3) The employer does not interfere with the employees when they are on their meal or rest breaks by asking their employees on break to perform tasks, no matter how minimal, or even ask them questions during their breaks.

Commission Advances Not Considered Wages Under Labor Code

by Leila M. Rossetti

In *DeLeon v. Verizon Wireless, LLC*, (2012) Cal. App. 4th 800, plaintiff Saul DeLeon on behalf of himself and other aggrieved employees, challenged the legality of the "compensation plan" implemented by defendant Verizon Wireless. The appellate court upheld the lower court's granting of summary judgment in favor of the employer, finding that the compensation plan, which included a commission structure with a "chargeback" period, did not violate the Labor Code because employers may legally advance commission payments prior to the completion of all conditions required for the payment of said commissions.

"Commission advances are not wages under the Labor Code."

DeLeon worked for Verizon Wireless as a retail sales representative from August 2004 to April 2005. Upon his hire, DeLeon attended a new hire orientation, where all new employees were provided with a written copy of the applicable compensation plan which was reviewed with them and they were further provided with training on how the plan operates. Each year, Verizon provided training on the compensation plan effective for the particular year. Verizon's compensation plan included a section entitled "Acknowledgment Form," which in 2004 stated: "My signature below and/or my continuing work on and after the effective date of the Plan indicates that I have received and read the Verizon Wireless Sales Compensation Plan . . . and that the terms and conditions of the applicable plan will govern how sales commissions and incentives are advanced, earned and issued to me." DeLeon read and received copies of the 2004 and 2005 compensation plans, but Verizon did not present copies of the acknowledgment page signed by DeLeon for either 2004 or 2005 to the court.

Verizon's compensation plan provided for a base hourly wage plus monthly commissions. The commissions on the sale of cell phone service plans were paid in advance, but not earned until the expiration of the period within which the customer may cancel the service. The compensation plan clearly outlined this payment structure, and stated (in 2004) that "Verizon Wireless has a policy of advancing commission dollars, if certain requirements are met, for the sale of commission-eligible services" and (in 2005) that employees' commission, "is not earned and the sale does not 'vest' until . . . your customer satisfies his or her contract during the applicable chargeback period." If a customer cancelled the contract during a chargeback period, the salesperson's future commission advances would be reduced by the original amount advanced for the sale.

After resigning from his position with Verizon, DeLeon filed a complaint alleging violations of various sections of the California Labor Code, all of which alleged violations stemming from the allegation that the compensation plan violated Labor Code section 223, which prohibits employers from "secretly" paying a lower wage than that outlined in the terms of an employment agreement.

Verizon Wireless moved for summary judgment, which motion was granted by the trial court and the case was dismissed in its entirety. DeLeon appealed, and the Court of Appeal affirmed the lower court's decision in granting summary judgment and dismissing the case. The Court found that, although commissions are wages pursuant to the Labor Code, in this case it was not commissions at issue but rather advances on commissions. Commission *advances* are not wages under the Labor Code. Moreover, because the compensation plan clearly stated that commissions did not vest, and thus were not earned until the end of the chargeback period, Verizon's practice did not constitute secretly paying less wages than provided for in the contract, because the contract was clear as to how these commissions were to be paid and charged back. The commissions were paid, and charged back, exactly as outlined in the compensation plan and, accordingly, this practice was compliant with Labor Code section 223.

The Court also held that the fact that Verizon did not produce acknowledgment forms signed by DeLeon did not undermine Verizon's position. Rather, the Court found that the acknowledgement form specifically stated that continued performance by an employee after being notified of the terms of compensation indicated the employee's consent to the terms thereof. Because DeLeon received copies of the compensation plans, received training on how the chargeback provision was implemented and received commission statements setting forth his commission advances and chargebacks, DeLeon understood and consented to the terms of his compensation and the chargeback provision was not unconscionable.

The Court further noted that its holding was consistent with the interests of employees because, were the Court to find that advances on commission payments were wages which could not be charged back, the likely result would either be that employers such as Verizon would eliminate commissions for sales representatives or else require the employees to wait until the commission was vested (i.e., wait for up to a year), before obtaining their commission payments.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

If employees are being paid commissions in advance, with the vesting of such commissions contingent upon a particular outcome, such payment plans should be clearly set forth in writing and communicated to employees. Furthermore, while this court found that the lack of a signed acknowledgment was not fatal to the employer's position, it is good practice to obtain and keep employees' signatures on forms acknowledging the employees' understanding of the policies and rules which control the employment relationship. Finally, to the extent signed acknowledgments can be misplaced or overlooked, including language in your policies and procedures which provides that the employee's continued work illustrates acceptance of the company rules and policies also may prove useful in the wake of litigation.

NO TERMINATION RESULTS FROM TOUCHSTONE'S FAILURE TO EXERCISE AN OPTION TO RENEW NICOLLETTE SHERIDAN'S CONTRACT

by Colleen A. Déziel

In *Touchstone Television Productions v. The Superior Court of Los Angeles* (2012) 208 Cal.App.4th 676, Nicollette Sheridan alleged that Touchstone Television's failure to renew her contract for season 6 of Desperate Housewives was the direct result of her complaining to the company of a battery committed against her by the show's creator, Mark Cherry. She alleged that it was only after she made her complaint that she was notified that her character would be killed off the show in Season 5. Her character was killed in an auto accident shortly thereafter, and Touchstone paid her for the entire fifth season.

At the end of Season 5, Sheridan filed a complaint for wrongful termination in violation of public policy, battery and breach of the covenant of good faith and fair dealing. During the trial, the court granted a directed verdict (i.e., essentially found for Touchstone), on the battery cause of action finding that the claim should have been brought within the workers' compensation system, and Sheridan voluntarily dismissed the breach of the covenant of good faith and fair dealing cause of action. At the end of the presentation of the evidence on the wrongful termination claim, the jury deadlocked (i.e., not enough jurors found for either party. At least nine jurors had to find in favor of either Touchtone or Sheridan.) The court declared a mistrial and denied Touchstone's motion for a directed verdict on the wrongful termination claim. Touchstone's argument was essentially that no termination can result from a failure to exercise an option to renew a contract, and therefore, it should win on the wrongful termination claim. Sheridan moved to amend her complaint to add a cause of action for violation of Labor Code section 6310. This section permits an action for damages if an employee is discharged, threatened with discharge, or discriminated against by his or her employer because of the employee's complaints about unsafe working conditions. The trial court denied the motion for leave to amend.

The issues on the wrongful termination cause of action and the motion for leave to amend were presented to the appellate court. The appellate court found that the law does not allow a plaintiff to sue for wrongful termination based upon an employer's refusal to renew an employment contract, and therefore the directed verdict in favor of Touchstone should have been granted. However, the appellate court also found that Sheridan did have a viable cause of action under Labor Code section 6310, and therefore reversed the trial court's order which denied Sheridan's motion for leave to amend.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Employers can rest assured that their refusal to renew an option in an employment contract will not support a wrongful termination claim. However, employers also need to be aware that if they refuse to renew contracts based upon an employee's complaint about unsafe working conditions, that employee will be able to support a claim against the employer for violation of Labor Code section 6310. Bottom line, it is never a good idea to retaliate against an employee.

ATTEMPTED VIOLATION OF EMPLOYER POLICY INSUFFICIENT TO CONSTITUTE "MISCONDUCT" FOR DENIAL OF UNEMPLOYMENT

by Leila M. Rossetti

The Court of Appeal recently reversed the decision of both the lower court and the Employment Development Department by finding that an employee terminated for attempting to violate an employer policy was not terminated for misconduct, and thus was entitled to unemployment benefits.

In the case of *Robles v. Employment Development Department*, (2012) Cal.App. 4th 1029, the appealing employee, Jose Robles, worked as a service technician for Liquid Environmental Solutions ("LES") for four years until his termination in January, 2010. As an employee of LES, Robles was provided with a yearly allowance of $150 with which to purchase "safety shoes." In January of 2010, Robles went to the designated shoe store with a friend and asked the salesperson to measure his friend's feet because Robles intended to give the shoes to his friend. The salesperson informed him that was not permissible.

On January 5, 2010, Robles was terminated because of this incident. Robles attempted to explain that his friend had recently suffered an accident in his home and was in need of shoes and that Robles had determined that his own shoes were in excellent condition and would last another year. Robles further explained that, while he knew the shoe allowance was for employees, he believed he could use it for a friend without harming anyone, since his shoes were in good condition and the company would not be harmed in any way by Robles assisting a friend in need. Furthermore, Robles never did purchase the shoes for his friend because, once he was informed it was against policy, he accepted that, apologized, and did not make any other attempt to buy shoes for his friend.

Robles applied to the Employment Development Department ("EDD") for unemployment benefits. The employer did not provide any information to the EDD in connection with Robles's claim for benefits, nor did the employer respond to the voicemail left by the EDD investigator. Nevertheless, the EDD determined that Robles was terminated for knowingly breaking a reasonable employer rule and, thus, his claim for benefits was denied.

A trial court upheld the administrative findings, and judgment was entered against Robles, who appealed the judgment to the Court of Appeal. The Court of Appeal analyzed whether the conduct in question constituted misconduct under the relevant statute, Unemployment Insurance Code section 1256, which provides that an employee is disqualified from receiving unemployment benefits if he or she was "discharged for misconduct connected with his or her most recent work." The court specified that a finding of fault for the purpose of unemployment benefits does not simply hinge on whether or not the termination was justified but rather requires evidence of culpability or bad faith on the part of the employee. A mere good faith error in judgment, even if it resulted in the undisputed refusal of an employee to abide by an employer's rule, is not sufficient to constitute misconduct under section 1256.

In this case, the appellate court held that the facts did not support a finding of misconduct because: i) Robles did not try to hide the fact that he was buying shoes for a friend; ii) it was undisputed that Robles sought to help a friend in need; iii) Robles had shoes for himself and thus honestly believed he would not be harming his employer's interests in any way with his actions; iv) when he was informed that what he was doing was contrary to company policy, he apologized and promised to comply; and v) Robles did not purchase the shoes for his friend. The court also noted that, under section 1256, it is the responsibility of the employer to provide information illustrating that the employee was in fact terminated for misconduct. Here, the employer did not even return the telephone call of the EDD investigator. Accordingly, the judgment was reversed and the EDD was directed to award unemployment benefits to Robles, with interest.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

California courts are very liberal in their interpretation of what constitutes misconduct for purposes of unemployment benefits, in the interests of reducing the hardship associated with the loss of employment. Thus, the *Robles* decision is an excellent example of a situation where, even though the employee was terminated for cause, it did not follow that he was terminated for misconduct and thus ineligible for unemployment benefits. Despite the fact that Robles was terminated for attempting to violate a clear company policy of which he was fully aware, because the facts did not illustrate any blatant disregard for the interests of his employer, Robles remained eligible for unemployment benefits.

This case also serves as a reminder that to the extent an employer decides it is in its best interest to oppose an award of such benefits, input from the employer can be vital to that legal determination. In the instant matter, by failing to even respond to the telephone call from the EDD investigator, the employer failed to satisfy the requirement of section 1256 that an employer must present evidence that the employee was terminated for misconduct.

With that said however, we remind employers that careful consideration needs to be made, on a case by case basis, as to whether, and to what extent, an employer should oppose an award of unemployment benefits. Employers must engage in a careful balancing of considerations because while providing a statement or other submissions to the EDD may serve to preclude an award of benefits, such statements and submissions can be used in civil actions. Bottom line, employers would be best served by consulting an attorney in an effort to learn of the potential unforeseen consequences of opposing these benefits.

Circumstances did not Warrant Enforcement of Unsigned Arbitration Agreement

by Leila M. Rossetti

In *Gorlach v. Sports Club Co.* (2012) 209 Cal.App. 4th 1497, defendant Sports Club Company revised its "team member handbook" in 2010 to include a provision requiring employees to sign an arbitration agreement as a condition of employment. At the time, plaintiff Susan Gorlach was the human resources director for Sports Club and the person tasked with presenting the new handbook to all Sports Club employees and obtaining and maintaining the signed arbitration agreements.

Employers must ensure that all employees, including human resources directors, follow their policies and procedures.

In June and July of 2010, Gorlach conducted general meetings about the handbook and collected employee signatures and provided updates on this process to, among others, Sports Club's president, chief executive officer, and chief operating officer. When asked on several occasions, Gorlach informed Sport Club executives that all of the corporate employees (which included Gorlach) had signed the agreement, omitting to mention that she had not done so. On July 30, 2010, Gorlach sent an e-mail to four Sports Club executives informing them that some employees had not signed and were inquiring as to the ramifications of their refusal to sign. Gorlach's e-mail further noted that they "needed to think about how [they were] going to proceed when an active team member does not sign the Arbitration Agreement."

On August 6, 2010, Gorlach resigned her position with Sports Club and thereafter filed suit against Sports Club and five of its officers for wrongful termination and other claims. Sports Club filed a motion with the court to compel arbitration, which was denied by the trial court. Sports Club appealed, contending that Gorlach should be bound by the arbitration agreement because: i) her deceptive conduct in leading Sports Club executives to believe she had signed the agreement, together with her role as human resources director, caused Sports Club to rely on Gorlach's representation to its detriment and thus Gorlach was equitably estopped from contending that the agreement did not apply to her; and ii) Gorlach's continued work for Sports Club despite her knowledge that signing the agreement was a condition of her employment resulted in an implied-in-fact arbitration contract between Gorlach and Sports Club. The Court rejected both of these arguments and held that the arbitration agreement was not binding on Gorlach.

The Court found that the doctrine of equitable estoppel (which prevents someone from benefiting, to the detriment of another, as a result of false statements or conduct) did not apply because Sports Club could not illustrate any resulting detriment from Gorlach's leading the executives to believe she had signed the arbitration agreement because Sports Club was still in the process of obtaining everyone's signatures and had not yet decided how to address those employees who refused to sign the agreement. Accordingly, the Court held that there was no evidence that Sports Club would have acted any differently had it known, during June and July of 2010, that Gorlach had not yet signed the agreement.

The Court also rejected the argument that there was an implied-in-fact contract, finding that not only did Gorlach not impliedly agree to the arbitration agreement, she did not sign the agreement, inquired as to the consequences of not signing the agreement, and then promptly resigned. Accordingly, there was no mutual intent to agree to arbitrate.

The Court distinguished the case from those where a handbook contains an arbitration clause and acknowledging receipt of the handbook or working under the policies of the handbook may indicate acceptance of an arbitration clause, because in this instance the handbook did not contain an arbitration *clause*, but rather a provision that *signing an* arbitration *agreement* was a condition of employment. Accordingly, the Court found that the very language of the handbook confirmed that employees would not be bound by the arbitration clause unless they actually signed the agreement. Because Gorlach never signed the agreement, the motion to compel arbitration was denied.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

This case presents the interesting scenario of a suit brought by the very team member charged with preventing and handling such issues, namely the human resources director. It serves as a reminder to employers that even those employees charged with managing others and/or handling administrative tasks must not be overlooked in connection with enforcement of company policies and procedures. It further points out the difference between an arbitration clause and a requirement to enter into an arbitration agreement. If an employer wishes to handle disputes by way of arbitration, and implements a policy requiring employees to sign an arbitration agreement, such a provision in and of itself is insufficient and must be accompanied by an agreement signed by the employee.

"HONEST BELIEF" IS NO DEFENSE TO FAMILY LEAVE CLAIM

by Michelle T. Harrington

In *Richey v. AutoNation, Inc*. (2012) 210 Cal.App. 4th 1516, plaintiff Avery Richey sued his former employer, Power Toyota and its parent companies (collectively "AutoNation") for interfering with his leave rights under the California Family Rights Act (CFRA). Richey worked as a car salesman until he injured his back rendering him unable to perform his duties at Power Toyota. He went on a medical leave and was informed in writing of the company's policy barring other employment including self-employment while on such a leave. The prior year, while working full-time at Power Toyota, Richey had started a family seaside restaurant. After he went on the leave, Richey continued to perform some work at his restaurant, such as taking orders, handling the register and answering the telephone. Power Toyota learned that he was working at his restaurant and fired Richey before his leave expired and while he was still out on leave. The company cited its policy prohibiting other employment while on leave as the basis for his termination. Richey filed suit alleging that the employer interfered with his leave rights by not reinstating his employment.

The case was arbitrated and the arbitrator ruled in favor of the employer. The arbitrator, relying on cases from outside California, focused on the "honest belief" defense, which provides that an employer who honestly believes that it is discharging an employee for misusing leave is not liable even if the employer is mistaken. Adopting that rule, the arbitrator (and the subsequent trial court who reviewed that decision) decided that Power Toyota, acting on a "superficial" investigation, had terminated Richey's employment based on its "honest belief" that he was abusing his medical leave.

The Court of Appeal reversed this decision outright rejecting the "honest belief" defense. The Court explained that although an employer may terminate an employee and deny reinstatement when the employment would have otherwise ended, the CFRA makes clear that, in such a situation, the employer bears the burden of establishing that the employee would not otherwise have been employed at the time of reinstatement. The Court further explained that the "honest belief" analysis impermissibly places the burden on the employee to prove he or she was not abusing his or her leave.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

This ruling is an important reminder that employers need to tread carefully when dealing with employees out on protected leave. As Power Toyota discovered, honest belief is not good enough. On the bright side, employers may still refuse to reinstate or to terminate employees who abuse their leave provided the employers have sufficient facts to support such a defense.

SWEET RESULT FOR SEE'S CANDY AND CALIFORNIA EMPLOYERS ON TIME ROUNDING POLICY

by Michelle T. Harrington

In *See's Candy Shops*, *Inc. v. Superior Court (Silva)*, 210 Cal.App. 4th 889, plaintiff Pamela Silva brought a wage and hour class action complaint against her former employer, See's Candy Shops, Inc. Silva alleged on behalf of a class that See's Candy's timekeeping policy that rounds employee punch in/out times to the nearest one-tenth of an hour ("nearest tenth rounding policy") violated California wage and hour law by failing to pay for all work performed, including any overtime. Under the nearest tenth rounding policy, in and out punches are rounded (up or down) to the nearest tenth of an hour (every six minutes beginning with the hour mark). The time punches are rounded to the nearest three-minute. For example, if an employee clocks in at 7:58 a.m., the system rounds up the time to 8:00 a.m. If the employee clocks in at 8:02 a.m., the system rounds down the entry to 8:00 a.m. The trial court granted Silva's summary adjudication motion of See's Candy's affirmative defenses pertaining to its nearest tenth rounding policy, namely that such policy did not deny Silva or the class members "full and accurate compensation" for payment of wages and overtime.

The Court of Appeal overruled the trial court's order and held that an employer may use a nearest-tenth rounding policy if the rounding policy is "fair and neutral on its face" and "is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." The Court further explained that if the employer applies a consistent rounding policy that on average favors neither overpayment nor underpayment it complies with the U.S. Department of Labor (DOL) and the California Division of Labor Standards Enforcement (DLSE) standard for purpose of analyzing rounding policies, which the Court adopted. On the other hand, if the policy systematically undercompensates employees by, for example, always rounding down, it does not comply with the law. The Court appeared persuaded by the fact that a rounding practice had long been adopted by employers throughout the country and to hold otherwise would prevent California employers from adopting and maintaining rounding practices available to employers throughout the rest of the country. The Court, therefore, ordered the trial court to deny summary adjudication on See's rounding affirmative defenses.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

It is important to recognize that this decision does not validate the blanket use of rounding policies. Rather, the Court only addressed the one-tenth rounding policy and further explained that rounding policies must meet the "facially fair and neutral" standard, and may not over time fail to compensate employees for all of the time that they have worked. Employers should review their timekeeping policies and/or systems to verify that they are facially neutral and do not favor the employer by, for example, only rounding the time down.

California Strikes Down Yet Another Covenant Not To Compete Contained Within An Employment Agreement

by Colleen A. Déziel

Generally, covenants not to compete are unenforceable in California. There are limited exceptions however. One such exception occurs where a covenant not to compete is used in conjunction with the sale of a business. The theory is that the covenant not to compete is needed in order to help protect an acquired business' goodwill. In the case of the sale of the goodwill of a business, it is "unfair" for the seller to engage in competition which diminishes the value of the asset he sold. But what happens when there is a covenant not to compete in both the purchase agreement and the related employment agreement (i.e., the seller of the business is retained as an employee of the acquired business), and the covenants are different or inconsistent? Is either enforceable? If so, which one? These are the issues that the appellate court addressed in *Fillpoint v. Maas, LLC* (2012) 208 Cal.App. 4th 1170.

In *Fillpoint*, Maas sold his stock to Handleman Company and signed a stock purchase agreement which contained a three-year covenant not to compete. As part of the purchase, Maas also signed an employment agreement containing a one-year covenant not to compete, which would become operative when Maas's employment with the company was terminated. Maas resigned from the company three years after the purchase, and approximately six months later began working for a competitor.

Fillpoint, which had acquired the business from Handleman Company, sued Maas for breach of the employment agreement. The court granted Maas a nonsuit, and Fillpoint appealed.

In coming to its decision, the appellate court first determined that the two agreements must be read together. Both referenced each other, both were the product of a single transaction–the purchase of the company, and a blank form employment agreement was even attached as an exhibit to the purchase agreement.

Second, the court determined that when a purchase agreement and an employment agreement are the product of a single transaction and are read together, it does not matter which document contains the covenant not to compete. Thus, a covenant not to compete will be enforced irrespective of which document it is contained in, and if there is a covenant contained in both, both will be enforced if they are consistent with each other and if they are both designed to protect the goodwill of the business.

Third, where the covenants contained in both a purchase agreement and an employment agreement are inconsistent, the court will enforce the one that is designed to protect the goodwill of the company, as opposed to targeting an employee's fundamental right to pursue his or her profession (i.e., it will enforce the one that is consistent with the exceptions outlined in the Business & Professions Code section 16600, which generally prohibits covenants not to compete.)

In this case, the court analyzed the covenants contained in both agreements. It determined that the wording of the covenant in the purchase agreement made it clear that the parties were attempting to protect the goodwill of the company (i.e., preventing Maas from competing with the company, which included setting up a business to compete against the company or assisting someone else to set up or continue a business in competition with the company.) However, the wording in the covenant contained within the employment agreement was much broader. It prevented Maas from making sales to customers or *potential* customers, working for or owning an interest in any business that was the same business as, or would compete with the acquired company, or employing or soliciting for employment *any* of the acquired company's employees or consultants. This

"Consistency of covenants not to compete in purchase and employment agreements is key."

covenant essentially affected Maas's rights to be employed in the future, and contained an unnecessarily broad non-solicitation clause. This the court would not allow.

The court ruled that Maas satisfied his covenant not to compete for the three year term under the purchase agreement, and that the additional one year term contained under the employment agreement was unenforceable. The court reasoned that the broad non-solicitation agreement and the language affecting Maas's right to be employed in the future could not be reconciled with California's strong public policy permitting employees the right to pursue a lawful occupation of their own choice.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Employers are reminded that generally covenants not to compete are unenforceable in California. However, as noted above, there are a few exceptions. So, if employers are going to try to fall within these limited exceptions, for example by using covenants not to compete in conjunction with the purchase of a company, they should ensure that the covenant(s) is/are tailored for the specific purpose of protecting the acquired company's goodwill, and not be written in an overly broad manner. Also, if the employer intends to include a covenant in both a purchase agreement and an employment agreement, it should make sure that the covenants are consistent with each other, that the purchase and employment agreements cross-reference each other, and that the purpose of the covenants in each agreement is clearly stated.

JUDICIALLY MANDATED AFFIRMATIVE ACTION FOR LAYOFFS?

by Eric A. Schneider

Sheppard v. David Evans and Assoc. (9th Cir.) 2012 694 F3d. 1045 is a rather frightening case for employers. The Ninth Circuit overturned a District Court ruling granting a motion to dismiss under FRCP 12(b)(6) strictly on the basis that the employer fired an employee over 40 years of age who was performing at an acceptable level rather than any of five younger employees with no allegation that any of the other five were performing at either an unacceptable level or not as well as the plaintiff. The appellate court found that the allegations that she was over 40 and received "consistently good reviews" but was "nevertheless terminated from employment while younger workers kept their jobs" represented an "entirely plausible scenario" of employment discrimination.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

This court may have essentially created an affirmative action policy in that an employer can be held to have unlawfully discriminated on the basis of age even if the employer chose to lay off the weakest of six adequately performing employees. It must be pointed out though that the opinion was silent as to whether the termination was part of a layoff or whether plaintiff was replaced by a younger worker. Careful documentation and metrics (where possible) should be employed whenever an employee who falls into a protected class is laid off when others who do not fall into that protected class are kept on.

WRONGFUL TERMINATION SUIT CANNOT BE BASED ON A WORKERS' COMPENSATION FILING

by Michelle T. Harrington

In Dutra v. Mercy Medical Center Mt. Shasta, (2012) 209 Cal.App. 4th 750, plaintiff Michelle Dutra brought suit against her former employer Mercy Medical Center for wrongful termination in violation of public policy based on California Labor Code section 132a (prohibiting discrimination against an employee who has filed a workers' compensation claim). After a jury was selected, the trial court granted Mercy's motion to dismiss the wrongful termination cause of action on the grounds that the Workers' Compensation Appeals Board (WCAB) has exclusive jurisdiction to adjudicate claims under section 132a.

The Court of Appeal affirmed the dismissal and held that section 132a does not provide a basis for a common law wrongful termination claim because "allowing plaintiff to pursue a tort cause of action based on a violation of section 132a would impermissibly give her broader remedies and procedures than that provided by the statute."

The plaintiff argued that she was entitled to seek recovery for the wrong purportedly committed against her because her termination fell outside of the "compensation bargain" of a normal employment relationship and, therefore, she is not subject to the workers' compensation exclusivity rule. The Court agreed with plaintiff that a section 132a claim was not her exclusive remedy for redressing her grievance. However, by not alleging any other claims aside from the common law tort of wrongful termination, she foreclosed all possible remedies except those that may be obtained through the WCAB.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

This decision is a win for employers because it limits the remedies of a claim of violation of Labor Code section 132a to those prescribed by that statute, namely increased workers' compensation benefits not to exceed $10,000, the employee's costs and expenses not to exceed $250, reimbursement for lost wages and benefits, and reinstatement. Thus, general damages (emotional distress) and punitive damages, which may be significant and normally recoverable in a common law wrongful termination claim are not allowed under section 132a. To state the obvious however, employers should not discriminate against or retaliate against employees who are injured on the job or who file workers' compensation claims.

SUCCESSOR LIABILITY RELATING TO CAR WASHES AND OTHER EMPLOYERS

by Eric A. Schneider

People ex. rel Harris v. Sunset Car Wash, LLC (2012) 205 Cal.App.4th 1433, explores an employer's potential liability for its predecessor's wage and hour violations. Kamala D. Harris and others worked for Auto Spa Express, Inc. In a proceeding prosecuted by the California Attorney General, the People and Auto Spa Express' successor in interest stipulated to a judgment stayed pending appeal. Sunset Car Wash disputed that it was a successor for purpose of Labor Code Section 2066 (relating to successor liability) and whether liability would violate due process of law.

Sunset Car Wash asserted that successor liability in this context should be determined in the same manner as it is for tort liability pursuant to such cases as *Ray v. Alad Corp.* (1977) 19 Cal.3d 22. The People contended that the statute contains a self-executing definition such that resorting to external definitions would be unnecessary.

The court agreed with the People and followed the rule of construction that when a statute is clear in its face there is no need to look beyond that language to ascertain the interest of the legislature, since the language in Section 2066 is clear and unambiguous.

A successor that is engaged in car washing and polishing that owed wages and penalties to the predecessor's former employee or employees is liable for these wages and penalties if the successor meets any of the following criteria:

> "(a) Uses substantially the same facilities or workforce to offer substantially the same services as the predecessor employer.
>
> (b) Shares in the ownership, management, control of the labor relations, or interrelations of business operations with the predecessor employer.
>
> (c) Employs in a managerial capacity any person who directly or indirectly controlled the wages, hours, or working conditions of the affected employees of the predecessor employer.
>
> (d) Is an immediate family member of any owner, partner, officer, or director of the predecessor employer of any person who had a financial interest in the predecessor employer."

Notwithstanding the clear meaning of the statute, Sunset Car Wash argued that the final bill analysis of Labor Code Section 250 (which is part of the same statutory scheme) stated that bill supporters believe that it would create a system similar to that protecting garment workers. As a consequence, Sunset Car Wash posits successor liability requires that there can be no liability where it could not discover violations because the predecessor was out of business as Auto Spa was.

The court rejected that argument for four reasons:

1. First and foremost, the plain language of Section 2066 dictates its interpretation;
2. "Supporters believe" does not equate to legislative intent;
3. Section 2030 involved only registration and bonds and not successor liability; and
4. There is no actual statement of legislative interest as there was in the statutory scheme pertaining to the garment workers.

The court's determination that the express language of Section 2066 would control ended the inquiry because it was undisputed that Sunset Car Wash occupied substantially the same facilities and offered substantially the same services as Auto Spa.

The court also summarily rejected the due process argument.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

Obviously most businesses do not wash cars and would not be subject to the provisions of Section 2066. There are however other circumstances where an employer can bear liability for wage and hour violations committed by its predecessor. (*See*, Sullivan *v. Dollar* Tree *Stores, Inc*. (9th Cir. 2010) 623 F.3d 770, AMC Employment Law Newsletter, Winter, 2010.) Due diligence should therefore include an audit of the predecessor's wage and hour policies and practices.

EMPLOYEE REQUESTS FOR ACCOMMODATIONS THAT COMPROMISE EMPLOYER'S PERFORMANCE QUALITY ARE NOT "REASONABLE"

by Vanessa S. Davila

In *Samper v. Providence St. Vincent Medical Center* (9th Cir. 2012), 675 F.3d 1233, the Court of Appeal affirmed the District Court's grant of summary judgment in favor of Samper's former employer Providence St. Vincent Medical Center (the "Center") holding that an employer "need not provide accommodations that compromise performance quality." Monika Samper was a neo-natal intensive care unit nurse for the Center and suffered from disabilities caused by fibromyalgia. At times, her fibromyalgia pain was so intense that she was unable to work her regular work shift and, as a result, was frequently absent from work. The Center had an established attendance policy that permitted only five unplanned absences by its employees for any given 12-month period. Samper regularly exceeded the unplanned absences permissible under the Center's attendance policy. In an attempt to provide her with reasonable accommodations, the Center allowed Samper to call in sick when she was having a particularly bad day as a result of her fibromyalgia and her work shift would be moved to another day within that same week. As a further accommodation, the Center agreed not to schedule Samper's two shifts per week on consecutive days. However, despite the Center's accommodations, Samper's attendance problems continued until she was eventually terminated for, among other reasons, having accrued seven absences in a 12-month period and for her general attendance problems.

Samper sued the Center citing violations of the Americans with Disabilities Act. As indicated above, the District granted the Center's motion for summary judgment and Samper appealed to the Ninth Circuit. The Court of Appeal affirmed noting that it was "common-sense" that the nature of Samper's job as a neo-natal intensive care unit nurse required "on-site regular attendance" as an "essential job function." Samper's request that she be given a waiver from the Center's five day unplanned absence limit as an accommodation of her fibromyalgia was simply unreasonable under the circumstances. The Ninth Circuit held an that employer is under no obligation to provide an employee with accommodations that would compromise its performance quality.

WHAT CAN EMPLOYERS TAKE FROM THIS CASE?

This case should be viewed by employers as a victory. The holding in this case, if nothing else, permits employers to consider and evaluate the potential effects an employee's requested accommodation would have on the employer's ability to operate its business and maintain performance quality without fearing liability exposure should it refuse to accommodate unreasonable requests from disabled employees. Remember not every request for accommodation must be met; the facts and circumstances of an employee's situation, disability, ability to perform essential job functions, the requested accommodation and the impact of such accommodation on the employer's business will inevitably vary on a case by case basis, and an employer's determination as to whether a particular request is a "reasonable" one must necessarily take all of these factors into account.

> "..no obligation to provide an accommodation that compromises quality of performance."

WAS DISCRIMINATION "A" REASON OR "THE" REASON YOU FIRED YOUR EMPLOYEE?

by Vanessa S. Davila

In *Alamo v. Practice Management Information Corp*. (2012) 210 Cal.App. 4th 95, Lorena Alamo was terminated from her employment as a collections clerk for Practice Management Information Corporation (PMIC) on the day she returned to work following maternity leave because of poor performance issues PMIC had discovered while she was on her protected leave of absence. During Alamo's leave, PMIC learned that prior to her maternity leave Alamo had been ignoring certain customer accounts which, as a result of large invoices left uncollected, caused PMIC to lose money. PMIC terminated her employment and she sued them alleging various causes of action including, but not limited to, pregnancy discrimination under FEHA and wrongful termination. Following a trial on the merits, the jury returned a verdict in favor of Alamo. PMIC appealed claiming that the trial court committed a reversible error in not instructing the jury on a "mixed-motive" defense. PMIC argued that it could have avoided liability under a mixed-motive defense by proving that it would have fired Alamo regardless of whether there was a discriminatory or retaliatory motive because of her poor performance. The Court Appeal disagreed with PMIC, noting that the case had been tried on a "single-motive" theory not a mixed-motive theory and it affirmed the lower court's holding.

During the appeal, PMIC argued that the mixed-motive defense should have been available to it in connection with Alamo's pregnancy discrimination claim under FEHA. Under a mixed-motive defense, if it were shown that PMIC had terminated Alamos based on both permissible and impermissible factors (i.e. poor performance and pregnancy-related leave), and that PMIC would have made the decision to terminate Alamo even if it had not taken into account her protected status (i.e. pregnancy-related leave), then it could have avoided liability. In order to avoid liability, an employer with a mixed-motive defense only needs to show that the decision to terminate was a result of a number of factors but that among those many factors, there was at least one which was legitimate and non-discriminatory. Instead, by instructing the jury only on a "single-motive" defense, the trial court essentially eased Alamo's burden, as she only had to establish that her pregnancy-related leave was a "motivating" factor or reason for her termination, rather than her having to show that it was the only true motive behind the decision.

<u>WHAT CAN EMPLOYERS TAKE FROM THIS CASE?</u>

It should be noted that the California Supreme Court has yet to issue its ruling in the *Harris v. City of Santa Monica* case (2010) 181 Cal.App. 4^{th} 1094, presently pending before it, regarding the availability of a mixed-motive defense in FEHA based claims. As such, the proper standard for causation remains unclear. Nevertheless, employers should take every precaution before terminating an employee for poor job performance if the employee has only recently returned from protected leave as this may subject the employer to potential discrimination liability based on the employee's protected status.

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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