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

THE POWER OF REQUESTS FOR ADMISSIONS

By Eric A. Schneider

*Grace v. Mansouria*n (2015) 240 Cal.App.4th 523, is not an employment case, but its holding has significant ramifications relevant to any California state court litigation, including employment matters. The resourceful plaintiff attorney took advantage of the power of requests for admission.

Timothy Grace and his wife sued driver Lebik Mansourian and the vehicle's owner alleging that Mansourian ran a red light and crashed into Grace causing him to suffer significant ankle, back and neck injuries.[1] Mansourian represented that the light was yellow when he entered the intersection, but significant evidence stacked up against him:

1. An independent eye witness testified that Mansourian ran the red light;

2. The investigating police office determined that Mansourian ran the red light; and

3. The plaintiff's accident reconstruction expert testified that Mansourian ran the red light.

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Other than his own testimony, Mansourian presented no evidence with regard to liability, and he did not depose the plaintiff's accident reconstruction expert.

The jury found in the plaintiffs' favor with no deduction for any comparative negligence on Grace's part. Grace was awarded $410,000, and his wife was awarded $30,000 for loss of consortium.

The plaintiffs had served requests for admissions on the defendants asking them to admit that Mansourian had failed to stop at the red light; that the failure to stop at the red light was negligent; and that the failure to stop at the red light was the actual and legal cause of the accident. Mansourian denied those requests.

[1] In the same action Grace's wife claimed loss of consortium.

Following trial, the Graces moved to recover those expenses (including attorney fees) incurred in proving-up those liability issues. The court denied the motion, concluding that the defendants had a reasonable basis for denying those requests. The judge deemed the denials proper because Mansourian reasonably believed that he could prevail based upon his memory that he did not run a red light.

The Court of Appeal viewed the situation quite differently:

> In light of all of [the] evidence, defendant's belief, however firmly held, was not reasonable. The question is not whether the defendant reasonably believed he did not run the red light but whether he reasonably believed he would prevail on that issue at trial. In light of the substantial evidence defendant ran the red light, it was not reasonable for him to believe he would. We do not quarrel with the general proposition defendants cite that the testimony of even one credible witness can be substantial evidence. But again, that is not the issue.

The Appellate Court cited cases including *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618: "and the mere fact defendants presented evidence at trial is not an automatic justification for denial of the request. Rather, the issue is whether, in light of that evidence, defendants could reasonably believe they would prevail."

The Appellate Court further stated:

> To justify denial of the request, a party must have '*reasonable* ground' to believe he would prevail on the issue . . . that means more than a hope or a role of the dice. In light of the substantial evidence defendant was at fault, plus defendants' apparent understanding of the weakness of their position, as evidenced in their opening statement, defendants' sole reliance on defendant's perception he entered the intersection on the yellow light was not a reasonable basis to believe they would prevail.

'And don't you dare play the race card.'

The Court of Appeal likewise found that the defendants' denial of request for admission relative to causation of the injuries and the necessity of the treatment was also unreasonable. The case was remanded back to trial court to determine the amount to which the plaintiff was entitled to prove things that they should not have had to have proved.

<u>What Can Employers Take Away From This Case?</u>

There are times when employers believe in their own minds that they did not unlawfully discriminate on the basis that "I told him he was a credit to his race" or "black people do not react the same way to chokeholds as normal

people,"[2] but should they refuse to admit liability when faced with a request for admission, they run a risk that costs and fees could be ordered against them.

Please note, however, that this situation will not adversely face employers in the vast majority of cases because successful plaintiffs are entitled to fees in Title VII, FEHA, CFRA/FMLA, and wage an hour cases by statute anyway. Still, there are cases where plaintiff fees are not recoverable either because the plaintiff had to limit his or her claims to common law causes of action because an administrative claim was not timely filed or alternatively, the plaintiff relies on a whistle blower theory, which is not statutory in nature and does not give rise to fee shifting.

However, employers can use requests for admissions to their own advantage. While attorney fee awards against plaintiffs often are not recoverable because those plaintiffs lack the wherewithal to pay them, employers can still exact some degree of leverage through requests for admissions both because abstracts of judgment, which affect credit ratings and serve as liens on real property, can be maintained for up to 20 years, and fee awards can serve to reduce the amounts on judgments in cases where the plaintiff has otherwise prevailed.

Requests for admissions can be a powerful tool. Employers must exercise caution in responding to requests for admissions, and at the same time should look to the advantages that they can provide.

CALIFORNIA WORKERS' COMPENSATION APPEALS BOARD EXERTS JURISDICTION OVER NEW YORK KNICKERBOCKERS, THE ATLANTA HAWKS AND THE LOS ANGELES CLIPPERS….HUH?

By Colleen A. Déziel

In the case of *New York Knickerbockers v. Workers' Compensation Appeals Board* (2015) 240 Cal.App.4th 1229, former NBA basketball player Durand Macklin filed a claim with the California Workers' Compensation Appeals Board (WCAB) wherein he alleged that he suffered a cumulative trauma injury arising out of and occurring during the course of his employment as a professional basketball player while employed by multiple NBA teams (Atlanta Hawks, Los Angeles Clippers and New York Knickerbockers.) The cumulative trauma period runs from August 17, 1981 through November 15, 1985.

During the time that he was employed by each team, he played games, attended practices and/or participated in warm-ups in California, among other states. His career ended when he was released from the Los Angeles Clippers on October 24, 1984. He filed his workers' compensation claim 27 years later in 2011.

As the title suggests, this case is about whether the California WCAB has jurisdiction over the claim filed by Macklin. We note a second minor issue of *Macklin* is the fact that he was able to file a claim *27 years after the fact*. The NBA teams each argued that there was an insufficient relationship between California and the injuries suffered and the lack of a legitimate interest in the matter to determine that California workers' compensation law should apply.

Essentially, in regard to the timing/statute of limitations issue, the WCAB found that Macklin had never been advised by any of the NBA teams about his right to file for workers' compensation benefits while

[2] Former and now deceased Los Angeles Police Chief Daryl Gates actually made such a statement.

he was playing. He first learned of those rights in June of 2011 from another NBA player, and around that same time learned for the first time that his back injuries were related to his employment as a basketball player. Given this, the appellate court held that Macklin could bring his claim 27 years later.

As for the jurisdiction issue, the court held that there was subject matter jurisdiction over Macklin's cumulative trauma injury because at least a portion of the injury occurred within the state of California. It found that the effect of the applicant's work in California while employed by the Clippers, along with the effect of his work within the state while employed by the Hawks and the Knickerbockers establishes more than a de minimis connection between the injury and California. It further held that it had personal jurisdiction over the three NBA teams, because each had engaged in business activities within California.

What Can Employers Take Away From This Case?

This case establishes several things. First is the necessity of informing your employees of their rights. Some employers may argue that this will only encourage employees to act on those rights by filing claims and lawsuits. However, even if an employee does not learn of their rights from the employer, you can rest assured that they will find out about those rights from other sources (i.e., other employees, lawyers, the internet, television, etc…). And, this could result in the employer having to defend a matter years down the road when evidence and witnesses may be compromised, missing or long gone.

Secondly, employers need to understand that not having an office in California does not necessarily mean that they will not have to worry about the California workers' compensation system. An employee who works even for a short period of time in California may be entitled to file a claim within the California's workers' compensation laws if such employee's injuries occurred, at least in part, within that state. The courts will look at a number of factors in determining whether a state may award relief to a person under the workers' compensation laws. These include the following: (1) did the injury occur within the state; (2) is the employment principally located in the state; (3) did the employer supervise the employee's activities from a place of business in the state; (4) did the parties agree in the contract of employment or otherwise that their rights should be determined under the workers' compensation act of the state; (5) does the state have some other reasonable relationship to the occurrence, the parties, and the employment; and (6) is the state the most significant relationship to the contract of employment with respect to the issue of workers' compensation.

If you are unsure as to whether the California workers' compensation laws apply, consult with an HR specialist or employment lawyer.

FACIALLY NEUTRAL EMPLOYMENT POLICY FAILS TO ACCOMMODATE RELIGIOUS PRACTICE

By Leila M. Rossetti

In the case of *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.* (2015) 135 S.Ct. 2028, the United States Supreme Court held that clothing retailer Abercrombie & Fitch unlawfully discriminated against prospective employee Samantha Elauf when it failed to hire her because the head scarf she wore as a practicing Muslim did not comport with Abercrombie & Fitch's "Look Policy."

An Abercrombie assistant manager interviewed Ms. Elauf and determined that she met Abercrombie's rating standards. However, as part of its image and brand, Abercrombie has a Look Policy which prohibits employees from wearing "caps" (a term not defined in any of the store's policies), on the basis that they are too informal for the image Abercrombie wishes to present. The assistant manager checked with both the store manager and the district manager to determine whether Ms. Elauf's headscarf would violate the Look Policy, specifically informing the district manager that she believed Ms. Elauf wore the headscarf because of her faith. The district manager

responded that the head scarf, regardless of whether it was worn for religious reasons, violated the Look Policy and directed the assistant manager not to hire her.

Abercrombie argued that the decision not to hire Ms. Elauf was not discriminatory because the Look Policy was implemented without regard for anyone's religious beliefs and Ms. Elauf never affirmatively informed anyone at the company that she needed any manner of religious accommodation. The Supreme Court, in a decision by Justice Scalia, rejected Abercrombie's position. Specifically, the Court held that Title VII of the Civil Rights Act of 1964 does not require that an employer have any manner of knowledge of the need for accommodation, but rather that the test for whether an act is discriminatory lies solely in the motive, and that to establish discrimination an employee or applicant must only show that the need for an accommodation was a motivating factor in the adverse employment decision. The Court specified that "Motive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his motive."

The Court further held that "Title VII does not demand mere neutrality with regard to religious practices . . . Title VII requires otherwise-neutral policies to give way to the need for an accommodation." In a footnote, the Court clarified that this decision does not address the situation in which an employer has no knowledge whatsoever of any need for accommodation, but suggested that a finding of discrimination likely requires the employer to know or at least suspect that the practice in question is a religious practice. Here, while the Court did not directly address the issue of whether the facts were sufficient to illustrate that Abercrombie had notice of the need for a religious accommodation, the facts indicate that Abercrombie at least suspected that Ms. Elauf wore her headscarf for religious reasons, given that the assistant manager informed the district manager that she believed that that was the case and the district manager specifically directed her that the policy applied to all headgear and directed her not to hire Ms. Elauf. Accordingly, the Court imputed knowledge of a need for a religious accommodation based upon these facts.

'Thankfully I'll no longer have to hide my lucky rabbit's foot.'

What Can Employers Take Away From This Case?

The Court specifically cautioned employers that they "may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." Under Title VII, considering a religious practice is not permitted unless the practice in question would pose an undue hardship. The decision uses the example that an employer may not refuse to hire an applicant that it suspects to be an orthodox Jew solely because it does not want to accommodate an employee who cannot work on Saturdays due to observing the Sabbath. An exception to such an example, however, could be if the job in question is only for work to be conducted on weekends such that hiring an employee who is unable to work Saturdays would pose an undue hardship for the employer.

Navigating the specific requirements of Title VII on a federal level, and its state-law counterpart the Fair Employment and Housing Act (FEHA) here in California can be tricky. To be safe, employers should be very careful and cognizant of the applicable laws when making employment decisions with regard to hiring, firing, or any other decision that affects the terms and conditions of employment for employees and/or prospective employees. Given the substantial costs associated with defending discrimination suits, employers would be wise to discuss any decision which could have an adverse impact on an employee or applicant with an employment attorney or HR professional.

NINTH CIRCUIT RULING ABYSMAL FOR ARBITRATION

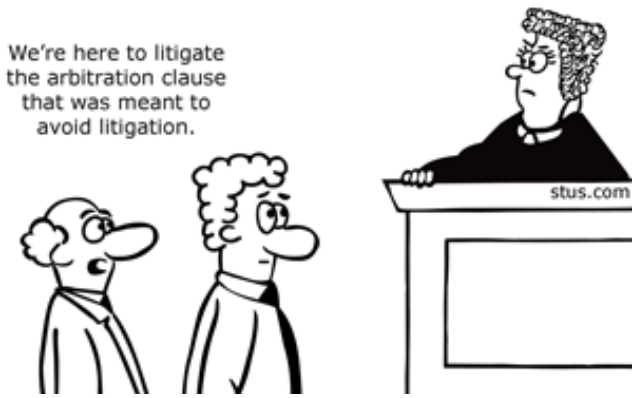
By Michelle T. Harrington

In a recent case, *Sakkab v. Luxottica Retail North America, Inc.* (9th Cir. 2015) 803 F.3d 425, the Ninth Circuit Court of Appeal refused to enforce an arbitration agreement that requires employees to waive their rights to bring representative claims under the California Private Attorneys General Act (PAGA).

Sakkab was a former employee of Lenscrafters, which is owned by Luxottica. He filed a wage and hour class action in state court alleging claims for unlawful business practices, failure to pay overtime compensation, failure to provide accurate itemized wage statements, and failure to pay wages when due. After the case was removed to the federal district court, the plaintiff filed an amended complaint adding a representative claim for penalties under the PAGA. Pursuant to the PAGA, employees may sue their employers for certain workplace violations on behalf of themselves, as well as other employees, in representative lawsuits akin to class actions.

Luxottica filed a motion to compel arbitration based on Sakkab's acceptance of the company's arbitration agreement. The agreement provided that the parties would not file class, collective or representative actions against each other.

Prior to the California Supreme Court's ruling in *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348, the district court granted Luxottica's motion to compel arbitration rejecting the employee's argument that he could not waive the right to bring a representative PAGA claim. Sakkab appealed. By that time, the California Supreme Court ruled in *Iskanian* that mandatory PAGA waivers are unenforceable under California law.



The Ninth Circuit then reversed the district court's order. While the Court acknowledged that the Federal Arbitration Act (FAA) would preempt any state law that singled out arbitration agreements for special treatment, the *Iskanian* rule "bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." As such, the Ninth Circuit followed the *Iskanian* decision in holding that an arbitration agreement that requires individual arbitration of all claims arising out of employment is unenforceable as applied to PAGA claims.

What Can Employers Take Away From This Case?

This decision and its dissent wherein Judge N. R. Smith criticized the majority for failing to follow the U.S. Supreme Court's ruling in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, and recognize that any state rule that prohibits class action waivers is preempted by the FAA highlight the ongoing struggles California employers encounter in dealing with enforcement of arbitration agreements. Judge Smith argued that because class action suits are identical to representative actions where both allow an individual (who can normally only raise his or her own

individual claims) to bring an action on behalf of other people or entities, the FAA preempts the *Iskanian* state rule barring PAGA waivers. Due to Judge Smith's strongly worded dissent, this decision is not likely to be the last word on this topic. Stay tuned.

OOPS: OVERREACHING EMPLOYER SACRIFICES FORUM CLAUSE BY REFUSING TO STIPULATE THAT CALIFORNIA SUBSTANTIVE LAW APPLIES

By Eric A. Schneider

In the case of *Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal.App.4th 141, as modified on denial of reh'g (June 25, 2015), Rachel Verdugo held the grandiose title of "Associate Director" for AlliantGroup, which provides specialty tax consulting services to businesses throughout the United States. Its corporate offices are located in Harris County, Texas. Verdugo worked in AlliantGroup's Irvine office in California. Verdugo brought suit against AlliantGroup in Orange County Superior Court, alleging various statutory wage and hour claims under California statutes.

AlliantGroup moved to dismiss or stay the action based on the forum selection clause in the Employment Agreement with Verdugo. The trial court granted the motion and stayed the action, finding that the forum selection clause was enforceable. Verdugo appealed.

The Fourth District Court of Appeal first noted that California favors contractual forum selection clauses so long as they are both entered into freely and voluntarily and their enforcement would not be unreasonable.

One might expect that forcing a California employee to litigate her wage claims in Texas would be inherently unreasonable. Such, however, is not the case. The court cited *Berg v. MTC Electronics Technologies Co.* (1998) 61 Cal.App.4th 349, at 358: "Mere inconvenience or additional expense is not the test of unreasonableness ..." for a mandatory forum selection clause. "A clause is reasonable if it has a logical connection with at least one of the parties over their transaction." (187 Cal.Rptr. 3d 613, 618.)

The court, however, cited *America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, at 12: "California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state's public policy." And while the party opposing enforcement of a forum selection clause ordinarily bears the burden of proving why the clause should not be enforced, "said burden, however, is reversed when the claims at issue are based on unwaivable rights created by California statutes. In that situation, the party seeking to enforce the forum selection clause bears the burden to show litigating the claims in the contractually-designated forum will not diminish in any way the substantive rights afforded under California law." (613 Cal.Rptr. 3d, 618 citing *Wimsatt v. Beverly Hills Weight, etc., International, Inc.* (1995) 32 Cal.App.4th 1511, 1520-24.)

In this case, all of Verdugo's claims arise under California wage and hour statutes under the Labor Code, or are otherwise grounded upon Labor Code provisions. Further, "the California legislature declared these rights cannot 'in any way be contravened or set aside' by a private agreement, whether written, oral, or implied." (Labor Code § 219, subd. (a); *Berg, supra*, 187 Cal.Rptr. 613, at 621.)

"It was a brilliant legal strategy. I think he borrowed it from either James Heiting or Perry Mason."

AlliantGroup argued that it was not a certainty that a Texas court would not apply California law. The court, however dismissed that argument, remarking that AlliantGroup

could have eliminated any uncertainty on which law would apply to Verdugo's claims by stipulating to have the Texas courts apply California law, but AlliantGroup did not do so. Instead, AlliantGroup preserved its ability to argue that Texas law should be applied. It asserted that a Texas court might apply California law while simultaneously minimizing the significance of the California statutory rights in which Verdugo bases her claims. AlliantGroup therefore has not shown Verdugo's unwaivable statutory rights will not be diminished." The court reversed and allowed Verdugo's claims to go forward in the Orange County Superior Court.

What Can Employers Take Away From This Case?

Out-of-state companies with agreements calling for disputes to be determined by courts in their home state should not also insist that employees sacrifice their ability to enforce California wage and hour statutes. The employer would gain a considerable advantage by being able to litigate in its home state even if compelled to submit to California law there. Such arrangements might also serve to deter employees from suing at all because they would have to retain out-of-state counsel and travel to the employer's home state to litigate.

DESPERATE HOUSEWIFE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES

By Colleen A. Déziel

The matter of *Sheridan v. Touchstone Television Productions*, LLC (2015) 241 Cal.App.4th 508, lives on even though the show, Desperate Housewives, was cancelled many moons ago. As you may recall, Touchstone hired Sheridan to play a role in the very popular television series, Desperate Housewives. During a rehearsal, Sheridan attempted to question the creator, Marc Cherry, about the script. He struck her. She complained about the battery to Touchstone, who promptly failed to renew her contract for another season. Sheridan sued.

In her initial complaint, Sheridan presented numerous causes of action. After many motions and a well-publicized mistrial, the plaintiff filed a second amended complaint charging that Touchstone retaliated against her in violation of Labor Code section 6310. This code section prohibits an employer from discriminating against an employee who makes an oral or written complaint concerning health or safety. Touchstone filed a demurrer arguing that Sheridan failed to exhaust her administrative remedies as purportedly required under Labor Code sections 98.7 and 6312 before filing the section 6310 cause of action.

In *Sheridan v. Touchstone Television Productions, LLC* (2015) 241 Cal.App.4th 508, the sole issue was whether Sheridan was required to exhaust her administrative remedies under sections 98.7 and 6312. The short answer is that the appellate court concluded that she was not required to do so.

Essentially, the court found that the statutes at issue, sections 98.7 and 6312, did not specifically require exhaustion. The statutes contain the word "may" instead of "shall" in referencing that a person "may" file a complaint with the Labor Commissioner or the Division of Labor Standards Enforcement. And, while the Legislature recently amended the Labor Code to reflect that individuals are not required to exhaust administrative remedies or procedures in order to bring a civil action, the court found that the amendment was a mere clarification of existing law such that there would be no issue of retroactive application. If an amendment merely clarifies existing law, no question of retroactivity is presented because the amendment would not have changed existing law. This is important to Sheridan because if the amendment changed existing law or was considered new law, then the appellate court could have found that it did not apply retroactively to her claim.

Based on all of the above, Sheridan gets another bite at the apple.

What Can Employers Take Away From This Case?

This is yet another victory for the plaintiffs/employees. While the statutes in question clearly seemed to indicate that an employee must proceed forward with a claim under 6310 before the Labor Commissioner before she can bring her case in court, the appellate court hung its hat on the word "may" to hold otherwise. Employers simply need to be aware that another defense to a civil lawsuit for retaliation under 6310 is gone. This signals again to employers that they need to make sure that they carefully consider all facts and circumstances in any given employment relationship before making the decision to end it. The Sheridan lawsuit has been going on for many years, and you can probably guess that Touchstone's attorney's fees at this point may very well have reached the seven figures level. A well-considered opinion from an HR specialist or employment lawyer could have saved Touchstone a lot in fees, costs, time, and angst.

PRIMER ON PENDING LITIGATION: THE UBER LAWSUIT AND ITS IMPLICATIONS FOR EMPLOYERS.

By Leila M. Rossetti

Douglas O'Conner et al v. Uber Technologies, Inc., No. 15-80169, (9th Circuit, September 16, 2015) is a pending lawsuit filed by and on behalf of Uber drivers claiming that Uber misclassifies its drivers as independent contractors and engages in unlawful practices with regard to the manner in which the drivers are paid gratuities.

At issue in the lawsuit is the fact that Uber designates its drivers as independent contractors, meaning that the protections provided to employees under California's Labor Code does not apply to the drivers. The drivers claim that they should not be classified as independent contractors but rather as regular employees entitled to benefits and reimbursement for expenses. The case is being closely watched on a national level, given that its outcome could have a significant impact on not only Uber and other ride-hailing services, but for numerous businesses who follow the "sharing economy" model in all areas.

Currently, Uber drivers supply their own vehicles, pay for their own gas, set their own schedules, and are responsible for any and all costs associated with their driving (i.e. traffic and parking tickets, repairs to their vehicles, etc.). Uber vets its drivers and their vehicles and makes them submit to a test of their knowledge of the city's geography, an interview and a background check. Once the driver contracts with Uber, he or she can drive as often or as seldom as he or she would like.

While there is no bright-line test for who is considered an independent contractor versus an employee in California, courts look at a variety of factors to determine how particular workers should be classified. Specifically, this court cited to the proposition that "the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." Included among the factors considered are the amount of control exercised over the worker, the ability to discharge the worker at will with or without cause, the skill required in the occupation, whether the principal or the worker provides the tools needed to perform the work, the method of payment, and whether the service rendered is an integral part of the principal's business.

The *Uber* plaintiffs contend that they should be considered employees because Uber unilaterally determines the fares charged and takes a percentage of the fare paid for each ride, Uber selects and pre-screens its potential drivers and further because Uber can terminate contracts with drivers at will, with or without cause. Uber claims that its drivers are

independent contractors because they set their own schedules, drive their own vehicles, decide when and whether to accept a potential customer for a ride and are generally subjected to very little direct supervision.

In March 2015, the judge denied Uber's motion for summary judgment. Uber sought to have the case dismissed on the basis that Uber drivers should be considered independent contractors as a matter of law, arguing that Uber is a "technology" company which simply connects drivers with passengers, and not a transportation service provider. The court rejected that argument by pointing out that Uber's entire business model, and income stream, are predicated upon the drivers actually providing rides to Uber customers, as opposed to just the use of the Uber app by potential ride-seekers. In denying Uber's motion, the court held that whether or not Uber drivers are employees or independent contractors is an issue which must be decided by the jury at trial.

Most recently, in September 2015 the judge granted class certification to the plaintiff Uber drivers, permitting the case to move forward as a class action lawsuit. Uber has appealed the Court's decision to allow the case to proceed as a class action. The appeal is pending.

In a noteworthy development in a different case, in June of 2015, the California Labor Commissioner found than an Uber driver was an employee to whom the Labor Code applied and ordered that Uber reimburse the former driver for expenses incurred.

What Can Employers Take Away From This Case?

The outcome of this case could have far-reaching implications for the future of the new "sharing economy." If the outcome of this case is that Uber drivers must in fact be treated as employees, Uber will be responsible for complying with the applicable employment laws, including reimbursement of expenses, payment of minimum wage and overtime, and provision of benefits. Such a result could lead to a change in the business model of companies like Uber, or possibly just an increase in fares to account for the increased expenses to the company.

We will provide an update on the status of this case as it proceeds. However, as a general rule employers are reminded to be diligent in labelling workers as independent contractors as opposed to employees, or even exempt versus non-exempt employees. Misclassification of workers can lead to costly lawsuits which can come with penalties and, depending upon the size of the operation, can often lead to class-action suits in which the expense rises dramatically. Any doubts as to how to classify a worker should be discussed with an employment attorney or HR professional *before* the work commences to avoid the potential expense associated with such suits.

DEATH KNELL FOR CLASS ACTION WAIVER IN ARBITRATION AGREEMENT?

By Michelle T. Harrington

The California Court of Appeal held recently in *Garrido v. Air Liquide Industrial U.S. LP* (2015) 241 Cal.App.4th 833, that a class action waiver in an employment arbitration agreement signed by a truck driver is unenforceable because California, not federal, law applies to claims by transportation workers

After Garrido was fired, he filed a class action lawsuit against Air Liquide for denial of meal breaks, accurate wage statements, prompt payment of wages due upon termination, and unfair business practices. The company moved to compel arbitration pursuant to an arbitration agreement expressly providing that the Federal Arbitration Act (FAA) governed such agreement. The trial court denied Air Liquide's motion and the company appealed.

The Court of Appeal affirmed the trial court's ruling and held that the FAA did not apply to Garrido's dispute because the FAA does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," which includes "transportation workers." The Court found that Garrido was a transportation worker within the meaning of the FAA because he was a truck driver who transported

Air Liquide's products across state lines. Therefore, despite the arbitration agreement's invocation of the FAA, the FAA did not apply to Garrido.

"C is for class action suit..."

Because the FAA did not govern the arbitration agreement, the Court found that the agreement was governed by California's Arbitration Act (the "CAA").

In *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348, the California Supreme Court held that the rule in *Gentry v. Superior Court*, (2007) 42 Cal.4th 443, against class action waivers was preempted by the FAA and that Gentry was abrogated by the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333. Nevertheless, the Court in *Garrido* held that *Gentry* still controls in cases where the FAA does not apply.

In concluding that Air Liquide's class waiver was unenforceable, the Court found that the four factors in *Gentry* were met: (1) Garrido's potential recovery estimated at $11,000 was modest, (2) Garrido testified that had he known his rights under wage and hour law were being violated, he would not have been willing to file suit for fear of retaliation, (3) Garrido was not aware that his legal rights were violated, and (4) requiring each employee to file a separate suit would create real world obstacles to the vindication of class members' rights.

What Can Employers Take Away From This Case?

It is hardly shocking that a California Court has found a way to side step the law favoring arbitration and to hinder enforcement of class action waivers in employment arbitration agreements. This decision will make it more difficult for employers to enforce class action waivers against employees "engaged in foreign or interstate commerce." Pursuant to the U.S. Supreme Court's 2001 decision in *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, the "class of workers engaged in foreign or interstate commerce" that are excluded from the FAA's coverage is currently confined to transportation workers. However, this case establishes a slippery slope because the FAA's broadly worded exclusion could be interpreted in the future to include employees other than transportation workers.

EMPLOYER SLOTH AND MISREPRESENTATION FATAL TO EMPLOYER DEFENSE OF CLASS ACTION

By Eric A. Schneider

In the case of *Oregel v. PacPizza, LLC* (2015) 237 Cal.App.4th 342, Julio Oregel delivered pizzas for PacPizza. He felt that he and his colleagues were not being reimbursed for expenses incurred in using their private vehicles, so he brought a class action suit for seeking reimbursement of those expenses and for a determination that PacPizza's practices constituted a violation of California's Unfair Competition Law, Civil Code §§17200, et seq. PacPizza had potential defenses both to the matter proceeding in court rather than through arbitration and to the class claims, but its questionable litigation tactics precluded its having been able to assert either.


"What do you mean you didn't promote him because of his low I.Q.? Since when has being stupid kept someone from becoming an executive?"

Firstly, in its answer to the first amended complaint, the defendant asserted 15 affirmative defenses, but none referenced the mandatory arbitration provision in its job application form. Thereafter the court held two case management conferences, and again PacPizza was mum

with regard to arbitration. Moreover, PacPizza also stood by as the discovery schedule and the deadline for the plaintiff's certification motion were set without saying a word about asserting the arbitration provision or challenging Oregel's right to pursue class litigation.

PacPizza responded to interrogatories inquiring about arbitration provisions by stating the Oregel had signed an arbitration agreement entailing all employee related claims be arbitrated, but it in no way indicated that it intended to enforce the arbitration agreement.

Extensive discovery ensued. The defendant responded to 226 interrogatories and produced 792 documents. Much of the discovery related to the class allegations and specifically as to the dates that the putative class members incurred expenses. PacPizza also deposed some 25 drivers who were putative class members.

Finally, some 17 months after Oregel had filed suit, the defense finally wrote to demand arbitration of the plaintiff's claims. Not surprisingly, the plaintiff attorney responded:

> That train left the station a long time ago. We have been actively litigating this case in court for well over a year, including law and motion practice, written discovery and many depositions, including the dozens of depositions your firm has taken over the past few weeks.

Four days later, PacPizza filed its petition to compel arbitration, stay the proceedings, and dismiss the class allegations.

PacPizza then exacerbated the situation by moving ex parte for an order to shorten time to hear a motion for a stay. After the court denied that request, PacPizza filed its opposition to the class certification motion supported by four declarations and over 1,000 pages of exhibits.

In reply, Oregel pointed out that in addition to the exhaustive discovery, the plaintiff counsel had spent more than 1,300 hours on the case, and the lodestar (hours worked times hourly rate) exceeded $500,000 plus out of pocket expense of $20,000.

Not surprisingly, the trial court issued a lengthy order detailing its finding by clear and convincing evidence (a burden greater than preponderance of evidence, i.e., more likely than not) that PacPizza had waived its right to arbitrate the claims. In so doing, it examined:

1. Whether the party's actions are inconsistent with the right to arbitrate;
2. Whether "the litigation machinery has been substantially invoked" and whether the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate;
3. Whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a say;
4. Whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings;
5. "Whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and
6. Whether the delay "affected, misled, or prejudiced" the opposing party.

(Citing *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, approved by the California Supreme Court in *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187.)

Key in its determination was that the plaintiff was seriously prejudiced in having had to engage in extensive class discovery and file its motion for certification, neither of which would play any part in an arbitration proceeding.

The First District Court of Appeal first addressed the standard of review. In so doing, it did not render a conclusion, instead relying on the holding in *St. Agnes*, *supra*, that where the facts are undisputed and only one inference can reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling. In this case there was no showing of an abuse of discretion, but the essential facts are not in dispute and only inference can be drawn, and inference that supports the trial court ruling.

The appellate court then undertook the same analysis of the *Sobremonte* case that the trial court had and affirmed.

Lastly, The Court of Appeal took the defense to task for its "less–than-candid" chronology of the events leading up to the appeal. Given that the defendant's conduct was at issue, suggesting that little had happened in the 17 months between the filing of the suit and the filing of the petition to compel arbitration when the opposite was clearly the case could not have advanced the defense's position on appeal.

What Can Employers Take Away From This Case?

First and foremost, employers should recognize that this case involves extremes. The defense did not conduct just a little discovery to facilitate its decision relative to assertion of its arbitration rights, it took **25** depositions, 24 of which would not have been necessary simply to address Oregel's individual claim. It did not include mandatory arbitration as an affirmative defense, something it should have done even if it had not decided to arbitrate. It gained no advantage by not asserting that affirmative defense when it answered, and certainly it was aware of the term because the defendant questioned Oregel about it. And as noted, 17 months had transpired between the filing of the suit and the first effort to compel arbitration.

Secondly, while arbitration may not always be the best way to defend employment cases generally, it is difficult to understand how it would not have been automatic when the arbitration agreement has an anti-class action provision and the case is filed as a class action.

Thirdly, being "less-than-candid" in describing the procedural events appears to have been asinine. Trial court and appellate jurists take a dim view of deceptive shenanigans, and that tactic likely would have pushed a court in the wrong direction in a close call. The employer could not reasonably have expected that the judiciary would not have recognized the clear misrepresentation of the record.

Finally and from a more big picture perspective, employers should make its arbitration provisions clear and unambiguous.[3] In our experience, applicants looking for jobs are not likely to turn down offers because disputes will be determined in arbitration.

[3] PacPizza did not deny that the arbitration agreement was in eight point type.

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