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

DENIAL OF CERTIFICATION OF CLASS ACTION FOR EMPLOYEES SEEKING REIMBURSEMENT OF JOB RELATED CELL PHONE EXPENSE

by Eric A. Schneider

Colin Cochran worked as a service manager for Schwan's Home Service, Inc. As part of his job, he was required to use his personal cell phone for business calls. He brought suit on behalf of himself and 1,500 other service managers seeking reimbursement under Labor Code 2802 of that portion of the employees' cell phone bills arising out of business usage.

The trial court denied his motion for certification. It first determined that the elements of the section 2802 claim were:

1 That there were expenditures by the service managers;
2 That the expenditures were necessarily incurred in the discharge of their duties;
3 That the employer knew or had reason to know of the expenditures; and
4 That Schwan's did not exercise diligence in reimbursement of the expenses.

Next, the court found that as to Issues 2, 3, 4, common questions predominated. It concluded however that Issue 1 entailed individual inquiry "because many people now have unlimited data plans for which they do not actually incur an additional expense when they use their cell phone. In order to determine whether an expense was incurred for [a class member's] business use will require an examination of each

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member's cell phone plan." And, because in a failure to reimburse claim the showing of an actual expenditure pertains to liability and not damages, the court sought additional briefing from Cochran as to a means of examining those questions. The trial court also noted that there was an issue as to whether Cochran himself or his girlfriend paid the cell phone bill.

Cochran then employed an expert in the fields of economics and statistics who came up with two methods for establishing both liability and damages. Either he could assume daily damages of $2 or he could conduct a lengthy survey of the service managers to ascertain the expenditures. The court then conducted a second hearing. The judge denied class certification both because the employer would have to make inquiry of each service manager as to the nature of his or her cell phone plan and because Cochran and every other service manager would have to be examined to determine whether the employee or a third person paid the cell phone bill.

The Second Appellate District Court of Appeal reversed the denial of class certification. Firstly, it cited authority to support the proposition that if liability can be determined by facts common to all of the claims, a class would be certified even if the class members must individually prove their damages.

In this case, the appellate court pointed out that the purpose of section 2802 was to prevent employers from shifting their operating expenses onto their employees. In so doing, it cited case law quoting the legislative history from an amendment of the statute: "In calculating the reimbursement amount due under section 2802, the employer may consider not only the actual expenses that the employee incurred, but also whether each of those expenses was 'necessary' which in turn depends on the reasonableness of the employee's choices."

The court then stated: The threshold question in this case is this: Does an employer always have to reimburse an employee for the reasonable expense of the mandatory use of a personal cell phone, or is the reimbursement obligation limited to the situation in which the employee incurred an extra expense that he or she would not have otherwise incurred ABSENT the job? The answer is that reimbursement is always required. Otherwise, the employer would receive a windfall because it would be passing its operating expense onto the employee. Thus, to be in compliance with section 2802, the employer must pay some reasonable percentage of the employee's cell phone bill. Because of the differences in cell phone plans and work-related scenarios, the calculation of reimbursement must be left to the trial court parties in each particular case.

The court dismissed the question of who paid Cochran's personal bill as being irrelevant as was the question of whether the employee changed plans to accommodate work-related usage.

<u>What can employers take away from this case?</u>

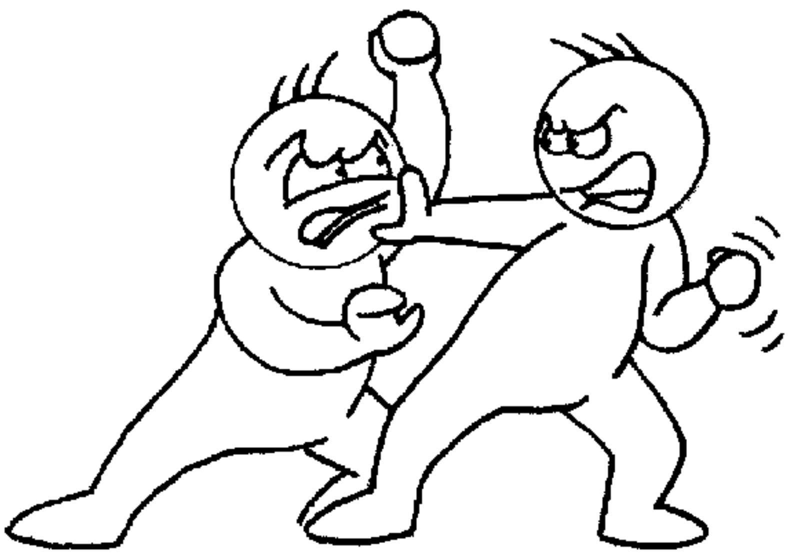
Employers have long recognized that they were responsible for reimbursing their employees for mileage when the employees used their personal vehicles for job related tasks, but the concept of sharing the employees' cell phone bills may have seemed different, particularly where the business usage did not increase the employees' phone bills because of the nature of some of their plans. This case signals that employers may have similar reimbursement obligations arising out of their employees' use of home computers. Enterprising employees who work from home may also claim that their employers bear an obligation to pitch in vis-à-vis the rent or mortgage.

Cochran v. Schwan's Home Service, Inc., 228 Cal. App. 4th 1137 (2014)

THE CALIFORNIA SUPREME COURT WEIGHS IN ON WHEN A FRANCHISOR CAN BE HELD VICARIOUSLY LIABLE TO THE EMPLOYEES OF FRANCHISEES

by Colleen A Déziel

On August 28, 2014 in the matter of *Patterson v. Domino's Pizza, LLC, et.al.,* 60 Cal. 4th 474 (2014), the Supreme Court decided a "novel" question dividing the lower courts, which is "does a franchisor stand in an employment or agency relationship with the franchisee and its employees for purposes of holding it vicariously liable for workplace injuries allegedly inflicted by one employee of a franchisee while supervising another employee of the franchisee?" The answer is: it depends on the inherent nature of the franchise relationship itself.



The various Courts of Appeal previously have used the traditional "agency" terminology in reaching various and contradictory answers to this question. The appellate courts mainly focused on the degree to which a particular franchisor exercised general "control" over the "means and manner" of the franchisee's operations.

However, the Supreme Court recognized that franchising has seen massive growth over the last 50 years, and that it is necessary for the franchisor to impose comprehensive and meticulous standards for marketing its trademarked brand and operating its franchises in a uniform way. This does reflect control over the enterprise/operations. Despite this, the Supreme Court also recognized that the imposition of a uniform marketing and operational plan cannot automatically saddle the franchisor with responsibility for employees of the franchisee who injure each other on the job when the franchisee retains autonomy as a manager and employer.

Essentially, when a franchisee makes the day-to-day decisions involving the hiring, supervision, and disciplining of its employees consistent with its own personnel policies, and when nothing contractually requires or allows the franchisor to intrude into this process, then the franchisor cannot be held vicariously liable for the misdeeds committed by the franchisee's employees.

In applying the facts of the *Patterson* case to the applicable law, the court concluded that Domino's (the franchisor) was not responsible for the acts committed by the franchisee's employees. The facts the Court found significant were as follows:

1) The franchise contract states that the franchisee is solely responsible for recruiting and hiring, and that those hired "shall be [franchisee] employees, and not [Domino's] agents or employees."

2) The franchise contract removed from Domino's any right or duty to implement a training program for employees, or to instruct them about matters of safety and security in the store or the delivery service program. And, the franchisee actually implemented its own sexual harassment policy.

3) The franchise contract dictated that the franchisee controlled the work schedules, supervision and payment of wages to the franchisee employees.

4) The franchise contract specifically stated that there was no principal-agency relationship between Domino's and the franchisee owner.

5) The franchisee is the one who actually hired all of the franchisee's employees; without any input from the franchisor.

6) Training with respect to how employees are to treat each other at work, and how to avoid sexual harassment was actually controlled by the franchisee. This included the right to impose discipline for any violations, and in the instant matter, the franchisee's manager imposed such discipline on his own.

7) The franchisee employees were told to report complaints to the franchisee.

8) The franchisor had no procedure for monitoring or reporting sexual harassment complaints between the employees of franchisees.

What can employers take away from this case?

If you are a franchisor, or thinking about creating a franchise from your existing business, then you need to take steps to ensure that you are not held accountable for the injurious acts of the franchisee's workers against others. This includes taking special care in the drafting of the franchise agreement, and in the actual exercise of control, or the lack of exercise of control over the day to day operations of the franchisee's business. Specific duties related to the day to day operations of the franchisee (i.e., employee hiring and firing, employee scheduling, training of employees, supervision and both the creation and enforcement of employment policies) all should be retained by the franchisee or the franchisor runs the risk of being vicariously liable for the acts of the franchise's employees.

CALIFORNIA'S UNFAIR COMPETITION LAW PREEMPTED BY FEDERAL OSHA

by Michelle T. Harrington

In a victory for employers, the California Court of Appeal ruled that a state prosecutor cannot rely on the Unfair Competition Law (UCL) to provide an additional means of penalizing an employer for its violation of workplace safety issues. (*Solus Indus. Innovations, LLC v. Superior Court*, 229 Cal. App. 4th 1291 (2014), as modified on denial of reh'g (Oct. 16, 2014), review filed (Nov. 3, 2014)). Solus Industrial Innovations, LLC (Solus) is a plastics manufacturer. In 2007, Solus installed a residential water heater at its commercial facility. In 2009, the water heater exploded killing two workers. California's Division of Occupational Safety and Health (Cal/OSHA) investigated and fined Solus. Because deaths were involved, Cal/OSHA referred the case to the district attorney who prosecuted company officials and also brought a civil action against Solus for penalties under the UCL of $2,500 per day, per employee from November 2007 through March 2009. That represents a potential penalty in excess of $1 million per employee per each cause of action. The UCL penalties are cumulative and would be assessed in addition to those provided for under the Labor Codes for the same violations.

"We finally figured out how to get the upper hand on our competition: we want you to go work for them."

The company demurred on the ground that the claims were preempted by Fed/OSHA because a state prosecutor's pursuit of civil penalties under the UCL is not part of California's workplace safety plan approved by the United States Secretary of Labor. The trial court overruled the demurrer, and Solus appealed.

The Court of Appeal reversed the trial court's decision, noting the UCL was not even in effect when the Secretary of Labor approved the Cal/OSHA plan. As a result, there was no basis to infer that the Secretary of Labor contemplated the UCL in approving Cal/OSHA. The Court further noted that the district attorney failed to demonstrate that civil penalties available under various Civil Codes were considered or approved by the Secretary of Labor when Cal/OSHA was approved. Nor did the state demonstrate that such statutes had ever been used by a state prosecutor to impose civil penalties against a defendant for workplace safety issues. The Court therefore held that "the district attorney cannot presently rely on the UCL to provide an additional means of penalizing an employer for its violation of workplace safety standards."

What can employers take away from this case?

While this ruling is currently a win for employers, the Court of Appeal is suggesting that if California were to modify its workplace safety laws to include the penalties under the UCL and such a modification were to be approved by the Secretary of Labor, there would no longer be a preemption defense to such UCL claims.

ARBITRATION PROPONENTS SEEM TO BE WINNING THE WAR

by Eric A. Schneider

Galen v. Redfin Corporation, 227 Cal. App. 4th 1525, reh'g denied (Aug. 20, 2014), review granted and opinion superseded sub nom. Galen v. Redfin Corp., 337 P.3d 493 (Cal. 2014) is yet another recent case addressing the enforcement of arbitration agreements in the context of employment litigation. In this case, the First District Court of Appeal held that the terms of the agreement between a putative employee and his putative employer in what the agreement stated was an independent contractor relationship mandated arbitration where the terms were not found to be so unconscionable as to preclude arbitration. The court further determined that the agreement was neither procedurally nor substantively unconscionable.

Scott Galen entered into a "Field Agent Independent Contractor Agreement" with Redfin which is in the business of providing residential and real estate brokerage services for home buyers and sellers. Galen's responsibilities included showing homes, providing access for home inspections and appraisers, and carting prospective buyers to the homes. His work was performed partly in an office and partly in the field.

Terms of importance within the Agreement included:

1. That he was denominated an independent contractor rather than an employee;
2. That all disputes "arising out of or relating to this Agreement … shall be resolved by binding arbitration within the State of Washington[1]"
3. That arbitration be conducted in accordance with the rules of the American Arbitration Association; and
4. That the prevailing party is entitled to recover attorney fees and costs, although the actual costs of the arbitration (presumably the arbitrator's fees and the site costs) were to be borne by the employer.

Galen had filed suit in Alameda County (California) on behalf of himself and others similarly situated for unpaid overtime, missed meal and rest breaks, inaccurate and untimely wage statements, waiting time penalties, and unreimbursed business expenses. Redfin then moved to compel arbitration pursuant to the Agreement. The trial court denied that motion, and Redfin appealed.

[1] Galen resided in Danville, California and performed his services in California

The appellate court first tackled whether the plaintiff's claims fell under the scope of the arbitration provision. The plaintiff had argued that all of his claims arose out of the California Labor Code and not out of the Agreement. The Court of Appeal did not agree. It referenced the terms of the Agreement which specifically stated that disputes regarding the interpretation and enforcement of the Agreement would first be subject to mediation, and then if there were no resolution, to binding arbitration within the State of Washington.

Relying on *Perry v. Thomas,* 482 U.S. 483(1987) (which held that suits alleging Labor Code violations in disregard of a private agreement to arbitrate the dispute where interstate commerce is involved would be preempted by the Federal Arbitration Act), the court determined that Galen's Labor Code claims were also preempted by the FAA.

Galen also claimed that Redfin had misclassified him as an independent contractor. The Court of Appeal pointed out that it was the Agreement which defined him as such and which set forth the job duties that he claims rendered him an employee. As a consequence, the dispute concerning his status as an independent contractor or an employee necessarily arose out of the Agreement.

In connection with these issues, the court noted that the plaintiff had cited *Elijahjuan v. Superior Court,* 210 Cal. App. 4th 15 (2012) to support his position that California Courts have consistently held that actions involving misclassification claims fall outside the scope of arbitration provisions contained in independent contractor agreements. The appellate court distinguished *Elijahjuan* but also stated that to the extent that that case and others contradict its holding in this case, the court declines to follow those cases.

The court then turned to questions of unconscionability. Unconscionability has both substantive and procedural components. Both must be present in order for a court to decline to enforce arbitration provisions although they do not need to be present in the same degree.

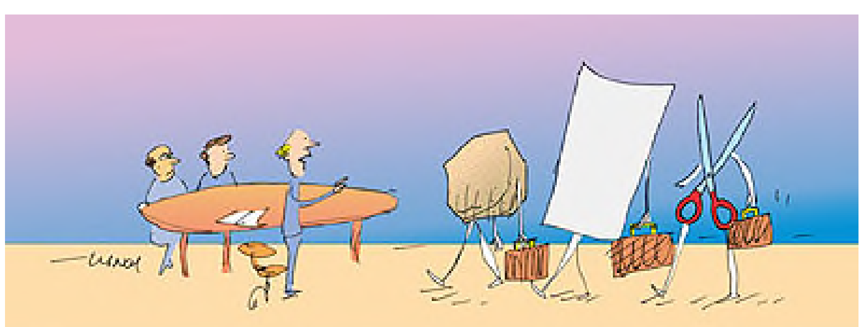
The trial court had found the arbitration provision to be procedurally unconscionable on several bases. First there was the adhesive nature of the provision. An adhesive contract is one drafted by the party which had superior bargaining power and which presented only a "take it or leave it" option to the other party. Adhesion however is not dispositive relative to procedural unconscionability. Where there is no surprise aspect, the degree of procedural unconscionability of an adhesive contract is low, and the arbitration provision will not be rendered unenforceable unless the degree of substantive unconscionability is high.

The trial court also found procedural unconscionability due to the rules of the AAA not being provided where there was evidence of more than one set of potentially applicable rules. The appellate court disagreed that that amounted to procedural unconscionability.

Next, the trial court found that the plaintiff having been told that the sooner he returned the signed agreement, the sooner he could start working and making money factored into unconscionability. Again the appellate court found otherwise because Redfin had not imposed an unreasonably short deadline for submission or threatened to withdraw the offer if he did not return the signed agreement immediately.

The appellate court also dismissed the argument that the arbitration provision was not highlighted in all capital letters or otherwise set out from the other terms of the Agreement. In that regard it stated:

"The dispute resolution portion of the contract takes up a full half-page of the three and a half page document. In short, on the issue of procedural unconscionability, all the evidence shows here is a relatively short agreement that plaintiff, presumably a well-educated



"Ahh! The arbitration team is here."

individual fluent in English and, as a real estate professional, familiar with contracts, had full opportunity to review. In sum, the factors relied on by the trial court and argued here by plaintiff are not suffice [sic] to establish procedural unconscionability."

The standard for procedural unconscionability presents a higher standard than just that the agreement is harsh or one-sided. One court required that to be procedurally unconscionable, the terms "must be so one-sided as to '**shock the conscience**.' [Emphasis in original.] "Where a party with superior bargaining power has imposed contractual terms on another, courts must carefully assess claims that one or more these provisions are one-sided and unreasonable."

With regard to this aspect of the inquiry, the court first addressed the mutual fee shifting provision. The court found that that was not a one-sided provision but instead one that was mutual: whichever side lost would have to pay the other's fees and costs, and that it did not shock the conscience.

The court then considered substantive unconscionability in connection with the forum selection. Galen had asserted that traveling to Washington to attend an arbitration would be a financial burden because of the travel expense and the loss of pay during the course of the hearing. It found this provision not to impose substantive unconscionability. The standard regarding forums is quite high: the party resisting the forum must show that the contractually selected forum would preclude him from getting a fair hearing, and expense and inconvenience were not factors that could be considered.

<u>What can employers take away from this case?</u>

To an increasing degree and particularly following the US Supreme Court case of *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), courts are operating on the basis that agreements calling for arbitration will be enforced unless the arbitration process would entail manifest unfairness to the employee. Accordingly, employers should ensure that arbitration clauses maintain some degree of fairness.

Averaging Out Commissions Paid Over Various Pay Periods to Meet Minimum Pay Requirements For Exempt Commissioned Salespeople Is a Violation of California Wage Laws

by Leila M. Rossetti

In the case of *Peabody v. Time Warner Cable, Inc.*, No. 10-56846, 2014 WL 3747222 (9th Cir. July 31, 2014), the California Supreme Court held that an employer may not average an employee's commission payments over various pay periods in order to meet California's minimum compensation requirements for exempt commissioned salespeople.

Plaintiff Susan J. Peabody was a commissioned salesperson employed by Time Warner Cable, Inc. She received biweekly paychecks which consisted of $769.23 in hourly wages paid with each paycheck and commissions paid approximately every other pay period. Assuming she worked a 40-hour workweek, Peabody was earning the equivalent of an hourly wage of $9.61 as a base salary.

"I, too, am making 7 figures. Unfortunately the first 3 of those figures are zeros."

Peabody filed a class action lawsuit against Time Warner, alleging that she regularly worked 45 or more hours per week but was never paid overtime for these hours, and further that she occasionally worked over 48 hours per week, rendering her base salary below minimum wage in those pay periods where she did not receive commission payments.

Time Warner admitted that Peabody regularly worked 45 hours per week and further admitted that she was not paid overtime for these hours. However, Time Warner argued that Peabody fell under California's "commissioned salesperson" exemption, rendering her ineligible for overtime pay. Under California law, commissioned salespeople can be considered exempt employees if they meet certain requirements, one of which is that the employee earns more than one and one-half (1½) times the minimum wage. Time Warner argued in this matter that, despite the fact that some of Peabody's paychecks caused her to be paid less than minimum wage, she still fell under the commissioned salesperson exemption because her commission payments, when averaged out over her other pay periods, caused her overall pay to rise above the minimum pay requirement for the commissioned salesperson exemption.

The Supreme Court rejected Time Warner's argument, finding that it violated Labor Code Section 204, which requires that all wages earned are due and payable twice during each calendar month (subject to certain exceptions which did not apply to this case). Accordingly, the court found that a minimum earnings requirement is only satisfied based upon the wages actually paid in a particular pay period. Time Warner's argument that averaging out the commission payments should be upheld in California because such a practice is permissible under federal law was also unsuccessful. The court specifically rejected this argument and cautioned employers not to rely upon federal authorities to interpret state regulations, which can often be more stringent than their federal counterparts.

What can employers take away from this case?

This case presents two lessons to employers. First, when looking to get creative with compensation schemes, employers are cautioned to ensure that the manner of compensation complies with all relevant wage and hour laws. The designation of an employee as exempt is complex and reliant upon a number of factors, and misclassification of an employee as exempt can expose an employer to major liability, particularly when (as in this case) an employee can bring the claim as a class action. Moreover, employers are further cautioned to pay careful attention to the differences between federal laws and state laws, especially in California, where the employment laws are extremely employee-friendly. Any doubt as to whether a particular practice is in compliance with the applicable laws should be brought to the attention of an employment attorney before the practice is implemented.

AM I AN INDEPENDENT CONTRACTOR OR EMPLOYEE?

by Michelle T. Harrington

The Ninth Circuit Court of Appeal, which covers California, recently ruled that drivers employed by FedEx Ground Packaging System, Inc. are employees and not independent contractors. (*Alexander et al. v. FedEx Ground Package Sys., Inc.* 765 F.3d 981 (9th Cir. 2014))

More than 2;000 delivery drivers for FedEx filed a class action lawsuit in state court alleging claims for employment expenses and unpaid wages under California law on the ground that FedEx had improperly classified them as independent contractors. FedEx removed the case to federal court, and thereafter numerous related cases from other states were consolidated for multidistrict litigation proceedings in Indiana (MDL).

"Now go forth as an independent contractor, keeping a careful diary of your travel expenses."

FedEx moved for summary judgment based on an operating agreement that each driver entered into with the company. The agreement provided that each driver could be assigned his or her own routes as well as additional routes that he or she could service with his or her own employees. FedEx argued that these entrepreneurial opportunities were inconsistent with the drivers being employees. The drivers also provided their own trucks thereby supplying the "instrumentalities" for performing their work. Most importantly, the drivers were responsible for setting their own route and delivering the packages in the order they saw fit, thereby, controlling the means and methods of performing their jobs. The MDL court granted FedEx summary judgment ruling that the drivers were independent contractors. The drivers appealed.

The Ninth Circuit rejected all of FedEx's arguments because of the broad control that FedEx maintained over the drivers. FedEx assigned a driver's service area, which it could reconfigure at its sole discretion, and even though packages could be delivered in the order decided by the driver, all packages must be delivered that day. The driver provided truck had to be painted in approved colors and carry all the logos and marks of a FedEx truck. As well, drivers had to wear FedEx uniforms, meet its grooming standards, and their performances were evaluated by FedEx managers. Additionally, the work performed by the drivers did not require a high degree of skill and was essential to FedEx's core business, and the drivers' lengthy tenures were inconsistent with independent contractor status.

What can employers take away from this?

The lesson to be learned here is that it is the totality of the working relationship between a company and purported independent contractor, rather than a single component that is left in the control of the contractor, that will define the parties' relationship.

NLRB Protects Concerted Activity Even if Phrasing Includes %$&@

by Eric A. Schneider

The supplemental decision and order in *Plaza Auto Center, Inc. and Nick Aguirre*, 360 NLRB No. 117 (May 28, 2014) following appellate remand illustrates two disparate concepts:

1. Bad facts make bad law; and
2. The National Labor Relations Act protects employees who engage in concerted activity even where the employee communicates his complaints concerning compensation and working conditions by way of otherwise unacceptable profanity.

In the abstract and out of context, one would expect that an employee who called his employer a "f------ mother-f------," a "f------" crook," and an "a------" would not be able to hold onto his job. Under ordinary circumstances that would be true, but car salesperson Aguirre did not unleash his spate of profanity under ordinary circumstances:

- When he inquired about breaks and restroom facilities at a tent sale, he was told that "salespeople are always on break," and was directed to a Sears store across the street for a restroom;
- When he voiced his opinion that the commission only compensation structure did not comply with minimum wage law, he was told he could go work elsewhere; and
- When he wanted information concerning vehicle costs because he did not trust the employer's computation of his commissions, he was likewise told that he was asking too many questions.

Employer Tony Plaza testified that he had no intention of firing Aguirre when the two met to discuss Aguirre's issues. Aguirre however not only cut loose with the profane language, but told Plaza that no one liked him, that he was stupid, and that everyone talked about him behind his back. At what proved to be the conclusion of the meeting, Aguirre got up from his seat in Plaza's small office, pushed his chair aside, and told Plaza that if Plaza fired him, Plaza would regret it. It was then that Plaza indeed fired him.

Aguirre brought a complaint with the National Labor Relations Board. Following an evidentiary hearing, the administrative law judge issued her decision. She noted that the employer violated provisions of the National Labor Relations Act several times by inviting Aguirre to quit in response to his protected protests of working conditions. Nevertheless, she concluded that Aguirre had lost the protection of the Act by way of his belligerent behavior and use of obscene language.

The Acting General Counsel filed exceptions, and the NLRB found Aguirre's conduct not so severe as to cause him to lose his protection. In so doing it applied the four part test enunciated in *Atlantic Steel Co.*, 245 NLRB 814 (1979) which calls for consideration of:

1. The place of the discussion;
2. The subject matter of the discussion;
3. The nature of the outburst; and
4. The provocation by the unfair labor practice.

Aguirre then filed a petition for review with the Ninth Circuit Court of Appeals. (*Plaza Auto Center, Inc. v. NLRB,* 664 F.3d 286 (9th Cir. 2011)). The appellate court too examined the circumstances within the *Atlantic Steel* framework. It agreed that three of those factors weighed in favor of Aguirre (the place, subject matter, and employer conduct), but remanded back to the Board to reconsider the "nature-of-the-outburst" factor, viewing Aguirre's conduct as "obscene and personally denigrating" towards Plaza and amounted to insubordination. The court directed the Board "to properly consider whether the nature of Aguirre's outburst caused him to forfeit [the Act's] protection."

Ultimately, the Board found in Aguirre's favor because notwithstanding his lack of decorum, he did not engage in physically threatening behavior.

<u>What can employers take away from this rather unusual case?</u>
While Plaza stated that he did not intend to terminate Aguirre until he went off on him, his handling of very legitimate complaints over working conditions was abhorrent. Rather than addressing Aguirre's complaints in a civil rational manner, he threatened termination at every turn. To state the obvious, Plaza or any other employer should listen to such complaints and properly address them. Ultimately, the employer's overreaction to the legitimate labor issues overrode the employee's use of profane language.

Employee Can Maintain Wrongful Termination Claim Despite Admission of Participation in Fraudulent Activity

by Leila M. Rossetti

In the case of *Yau v. Santa Margarita Ford, Inc.*, 229 Cal. App. 4th 144 (2014), the Court of Appeal upheld a claim of wrongful termination in violation of public policy brought by the service manager of a Ford dealership who claimed he was fired after complaining about fraudulent warranty repairs being submitted to Ford Motor Company. The court permitted the employee to pursue the claim despite the fact that he admitted to having participated in some fraudulent activity.

Plaintiff Eddie Yau was an employee of Santa Margarita Ford from 1992 until his termination in 2009. Mr. Yau claimed that, beginning in December 2007, he began reporting to the general manager that Santa Margarita Ford was engaging in fraudulent behavior by, among other allegations, ordering parts from Ford Motor Company for fictitious warranty repairs, subsequently collecting the payment from Ford Motor Company for the parts ordered, but failing to send any parts anywhere (and thus receiving a windfall). Mr. Yau further alleged that he complained about this practice numerous times from December of 2007 on, and that each time he was told it would be looked into. Mr. Yau admitted that he had, under orders from his superiors, participated in some fraudulent activity.

Mr. Yau claimed that his employment was wrongfully terminated in violation of public policy because he was fired for reporting illegal activity to his supervisor and the owner and for refusing to engage in illegal activity. Santa Margarita Ford sought to dismiss the lawsuit by way of a demurrer (a motion brought at the beginning of a lawsuit seeking to dismiss the case based on the fact that, even if everything the plaintiff was alleging was true, there would still be no case against the defendant) arguing that Mr. Yau was terminated for his involvement in the fraudulent activity.

The court ruled against Santa Margarita Ford and held that Mr. Yau could proceed with his lawsuit. Specifically, the court found that Mr. Yau's allegations were sufficient to allow him to proceed with his claim for wrongful termination against Santa Margarita Ford, because the allegations, if proven, were sufficient to establish that Mr. Yau may have been terminated for complaining about, and refusing to participate in, illegal activity, namely theft and fraud. The court also rejected Santa Margarita Ford's argument that, because Mr. Yau admitted to his involvement in the wrongful activity, his termination couldn't have been in violation of public policy. The court found that his allegations could reasonably be interpreted to indicate that Mr. Yau only complied with the directions from his immediate supervisor for fear of losing his job and that Mr. Yau had "repeatedly raised concerns with the general manager about the propriety of the warranty claims."

What can employers take away from this case?

Claims for wrongful termination in violation of public policy can be tricky to defend against because employees often tend to complain about perceived injustices or improprieties at the workplace and can later claim that their termination (which very well could have had nothing to do with any such complaints) was in retaliation for such claims. Indeed, sometimes an employee who can tell he/she is "in the hot seat" may even submit a formal complaint in anticipation of termination or other discipline.

Employers are advised to ensure that any complaints made by an employee are noted in his/her personnel file and to review an employee's personnel file prior to terminating the employee. More importantly, if an employee is performing poorly or has other issues which may result in termination, employers should make sure all such issues are documented clearly and contemporaneously in the employee's file and, if possible, that the issues are discussed with the employee and a signed acknowledgment is obtained from the employee regarding the issues. While, of course, there exists no "sure-fire" way to avoid a wrongful termination lawsuit, following these guidelines may serve to prevent some lawsuits from occurring and assist with the speedy and cost-efficient resolution of others. When possible, any doubts about whether a particular employee should be terminated or otherwise disciplined should be discussed with an employment attorney prior to taking the adverse employment action.

Employer May Revise Employee Handbook Without Any Duty to Inform Employees Specifically That Their Continued Employment Constitutes Acceptance of New Terms of Employment

by Leila M. Rossetti

In *Davis v. Nordstrom, Inc.*, 755 F.3d 1089 (9th Cir. 2014), an employee filed a class action lawsuit against her employer alleging failure to pay proper wages and provide requisite breaks. The employer, which had recently revised the employee handbook to compel arbitration and prohibit most class action suits, moved to compel the employee to participate in individual arbitration. The court rejected the employee's arguments that the revised provisions in the employee handbook were unenforceable and found in favor of the employer, holding that the employer's motion to compel arbitration should be granted.

In 2011, plaintiff Faine Davis was employed by Nordstrom. Prior to July, 2011, Nordstrom's employee handbook contained a provision which required employees to arbitrate their individual disputes, but also allowed employees to bring class action lawsuits in civil court. The handbook also required Nordstrom to give employees 30 days' written notice of any substantive changes to the arbitration provision (the "notice provision") and stated that the notice provision was meant to "allow employees time to consider the changes and decide whether or not to continue employment subject to the changes." Davis acknowledged that she received a copy of the employee handbook at the time of her hire and that throughout her employment with Nordstrom, the handbook was revised several times and each time she was notified of the changes.

In July of 2011 and again in August of 2011, Nordstrom revised the arbitration provision in the handbook. The new revisions required employees to arbitrate nearly all claims individually, and precluded employees from bringing most class action lawsuits. Nordstrom sent letters to employees, including Davis, informing them of the changes to the arbitration policy. The letter also stated that "the Nordstrom Dispute Resolution Program has been in place for several years. We've recently made updates to the program and want to ensure you have the current version." The letter also included a copy of the updated dispute resolution program, including the arbitration provision.

Just weeks after the handbook was revised, Davis filed a class action suit against Nordstrom, alleging nonpayment of wages, failure to provide meal and rest breaks, and unfair competition. Nordstrom moved to compel Davis to submit to individual arbitration (i.e. drop the class action aspect of her suit altogether and participate in binding arbitration) based upon provisions in the revised employee handbook. Davis argued that she should not be compelled to participate in individual arbitration because Nordstrom failed to provide employees with the requisite 30 days' written notice of revisions to the handbook, because Nordstrom failed to inform employees specifically that their continued employment constituted acceptance of the new arbitration provision, and because the arbitration agreement was unconscionable because it forced employees to waive certain unwaivable rights, such as the right to be paid overtime wages.

The court cited to authority for the proposition that "an employer may terminate or modify a contract with no fixed duration period after a reasonable time period, if it provides employees with reasonable notice, and the modification does not interfere with vested employee benefits." The court also noted, however, that when an employer has a particular policy regarding modification of policies and notice to employees regarding any such modifications, the employer is required to abide by its own policies. In addressing this matter, the court rejected the argument that Nordstrom failed to give employees the 30 days' notice required under Nordstrom's own notice provision, finding that the notice "satisfied the minimal requirements under California law," regardless of whether the revised policy went into effect immediately upon the issuance of the notice. It held that Nordstrom did not violate the notice provision because it did not attempt to enforce the revised arbitration policy until more than 30 days after the notice was sent to employees.

The court was similarly unpersuaded by Davis's second argument, finding that "California law imposes no duty upon Nordstrom specifically to inform employees that their continued employment constituted acceptance of new terms of employment." Instead, the court found that California employees accept the policies of an employer when they accept an offer of employment, California employers are permitted to change unilaterally the terms of the policies which apply to such employment, and continued employment upon notice of a change in policy constitutes acceptance by the employee of the new terms or conditions of employment.

The court declined to address the issue of unconscionability on the basis that the California Supreme Court was then reviewing a case on that issue in the matter of *Iskanian v. CLS Transp. Of Los Angeles, LLC,* 59 Cal. 4th 348 (2014). The Supreme Court issued its ruling on the *Iskanian* case the same day as this case, and ruled that arbitration agreements in which employees waive their rights to file class action lawsuits are not unconscionable.

What can employers take away from this case?

This case presents a victory for employers in that it upholds an employer's right to change the terms of an employment handbook with reasonable notice to employees and also does not require employers to notify employees specifically that their continued employment constitutes acceptance of any revised terms and conditions of employment. Nevertheless, employers are wise to always make such policies and practices as clear as possible to employees. Such a practice helps to avoid lawsuits altogether, as opposed to providing a valid (often costly) defense after suit has already been filed. In addition, when company policy sets forth certain parameters, whether or not such parameters are required by law (i.e. the 30-day notice provision in this case), employers must be aware that the company will be expected to abide by its own policies and procedures.

PAID SICK LEAVE MANDATORY COME JULY 1, 2015

by Colleen A Déziel

On September 10, 2014, California mandated that employers provide paid sick leave when Governor Edmund G. Brown signed the Healthy Workplaces, Healthy Families Act of 2014 (AB 1522). With very few exceptions, this mandate applies to all private and public employers, regardless of size. All California employers must provide their California employees with at least 3 days (24 hours) of paid sick leave per year.

The new law applies to employees (exempt and non-exempt) who work in California 30 days or more in a year. This includes temporary, part-time, and seasonal employees, and out-of-state employees who work in California 30 or more days in a calendar year. The only employees not included are: (1) union-represented employees covered by a valid collective bargaining agreement if the agreement expressly provides for paid sick leave, provides for final and binding arbitration of disputes concerning the application of paid sick day provisions, and meets other requirements; (2) employees in the construction industry covered by a valid collective bargaining agreement that meets certain requirements; (3) providers of in-home supportive services under California law; and (4) employees of an air carrier flight deck or cabin crew members who receive compensated time off equal to the amounts in the new statute.

The specific requirements of the new law are as follows:

Sick leave may be used for the diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member. The definition of "family member" is broad and includes, but is not limited to, parents-in-law, grandparents, grandchildren, and siblings. Sick leave may also be used for victims of domestic violence, sexual assault, or stalking.

Employees are entitled to use accrued paid sick days beginning on the 90th day of employment. However, an employer may lend paid sick days to an employee in advance of accrual. Employers may limit the amount of sick leave used to 24 hours or 3 days per year. Employers may also set a minimum increment not to exceed two hours for use of paid sick leave. The employee must provide reasonable advance oral or written notification of the need to use sick leave, if foreseeable. If the need to use sick leave is not foreseeable, the employee must provide notice as soon as practicable. The employer cannot condition the use of sick leave on the employee finding someone to cover his/her work.

Sick days must be accrued at the rate of not less than one hour per every 30 hours worked, beginning at the commencement of employment or July 1, 2015, whichever is later. This equates to approximately 1.3 hours per week, or 5.3 hours per month, for employees who work 40 hours a week. Exempt employees are deemed to work 40 hours per workweek, unless the employee's normal workweek is less than 40 hours.

Unused, accrued sick days must carry over to the next year, up to a permissible accrual cap of 48 hours, or 6 days. However, if the total amount of sick leave that may be used per year—24 hours or 3 days—is made available to the employees at the beginning of each year, without their having to accrue them during the course of the year, no accrual or carry-over is required.

Sick leave must be paid out at the employee's hourly wage. If the employee is paid by commission, or otherwise has a variable hourly wage, or is a non-exempt, salaried employee, then the rate of pay is calculated by dividing the employee's total wages (not including overtime pay) by the employee's total hours worked in the full pay periods in the prior 90 days of employment. Payment for sick leave must be made no later than the payday for the next regular payroll period after the sick leave was taken.

Unlike vacation time, employers are not required to provide compensation to an employee for accrued, unused paid sick days upon separation of employment. However, if an employee separates from an employer and is rehired within one year, previously unused paid sick days must be reinstated.

An employer that already has a paid leave or paid time off ("PTO") policy is not required to provide additional paid sick leave, provided that the employer makes available an amount of leave that may be used for the same purposes and under the same conditions as the new law, and the policy either: (1) satisfies the accrual, carry-over, and use requirements of the new law; or (2) provides at least 24 hours or 3 days of paid sick leave, or equivalent paid leave or PTO, for employee use at the beginning of each year of employment or calendar year. Employers who already have a PTO policy still must comply with the posting, record-keeping, and other requirements of the new law. Also, employers who combine vacation and sick leave into undifferentiated PTO must continue to pay out all of the PTO upon termination.

As noted above, employers must provide employees with a written notice that sets forth the amount of paid sick leave available, or PTO provided in lieu of sick leave, on either the employee's itemized wage statement, or in a separate writing provided on payday. Employers must also display in a conspicuous place a poster telling employees about their rights under the new law, and provide new employees with written notice of the substantive provisions of the new law at the time of hiring. Both the poster, and a template with the new hire information, will be drafted and made available by the Labor Commissioner.

Employers must keep for at least three years records documenting the hours worked and paid sick days accrued and used by each employee, and make such records available for employee inspection, if requested.

Employers may not deny an employee the right to use accrued sick days, discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using or attempting to use accrued sick days. The law creates a rebuttable presumption of unlawful retaliation if an employer takes an adverse employment action within 30 days of an employee: (1) filing a complaint with the Labor Commissioner or in court alleging violations of the new law; (2) cooperating with an investigation or prosecution of an alleged violation of the new law; or (3) opposing a policy, practice, or act that is prohibited by the new law.

If you have any questions regarding implementation of this new law, or if you want to ensure that your existing policy complies with this new law, please contact your employment counsel. Be aware that failure to follow the new law will subject employers to significant penalties.

Employment Practices Group at Anderson, McPharlin & Conners LLP

Our Employment Practices Group places a special emphasis on keeping pace with rapidly changing employment laws and providing employers with effective representation in this constantly evolving area. For twenty years, our clients have known that we understand the challenges they face and that we will work with them in assessing risks and developing cost-effective strategies to bring employment matters to prompt and satisfactory resolution.

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