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— *Labor & Employment Law* —
Defending Employer's Rights

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$100 Million Wage-and-Hour Class Action between Uber and Drivers in California and Massachusetts

Uber settled two wage and hour class actions with its drivers in California and Massachusetts for as much as $100 million, agreeing that the drivers will remain classified as independent contractors rather than employees. Uber will pay $84 million to the drivers now, and will pay an additional $16 million if the company goes public and meets certain performance metrics afterward. Uber also agreed to: (1) provide drivers with more information about their individual ratings and how they compare with their peers; (2) introduce a policy explaining circumstances under which drivers can be deactivated from the service; and (3) create a drivers association. The association would meet quarterly to discuss driver issues. Groups of drivers in California and Massachusetts have been in court with Uber fighting over whether the arbitration agreements signed by certain drivers are enforceable. Uber maintains that the drivers who signed the arbitration agreements are required to arbitrate all disputes with the company individually and not as a class, but a U.S. District Court judge recently held that the arbitration agreements were unenforceable as a matter of law.

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DISABILITY DISCRIMINATION

Under the ADA Plaintiff Must Show Employer's Non-Discriminatory Reason for Adverse Employment Action was Pretextual

The Ninth Circuit Court of Appeals held that under the Americans with Disability Act, the plaintiff must show a triable issue as to whether the employer's reason for adverse employment was pretextual in order to avoid summary judgment. Here, Alice Mendoza took a ten-month medical leave from her full time position as bookkeeper for a small parish church. The pastor handled her duties while she was on leave and during that time discovered that the position could be covered by a part-time employee. Thus, when Mendoza sought to return to her position, there was no longer a full-time position available, and the parish offered her the part-time position. She refused the position and brought a claim against the parish for violation of the Americans with Disabilities Act of 1990 (ADA). The district court granted the summary judgment motion of the parish dismissing the case, and the Ninth Circuit affirmed. Past precedent related to discrimination claims brought under the ADA has held, when (1) the employee establishes a prima facie case of discrimination and (2) the employer provides a non-discriminatory reason for the adverse action, then (3) the employee must raise a triable issue of fact showing that the non-discriminatory reason provided by the employer was merely pretextual. This requirement, however, is distinguishable from a Title VII discrimination claim where plaintiffs only need to show that the need for an accommodation may have been a motivating factor for an adverse employment action in order to avoid summary judgment dismissal.

Mendoza v. RCALA (2016) Ninth Circuit ___ F.3d ___.

SEXUAL HARASSMENT / CONSTRUCTIVE DISCHARGE

$1.7 Million Jury Verdict for Dental Assistant

Plaintiff, a dental assistant, contended that throughout her employment she was subjected to offensive sexual comments and inquiries and other unwelcome sexually based offensive conduct by her employer Sam Dason. Plaintiff contended Dason made sexual jokes, sexual comments, leered at her, inquired about private sexual topics, and on multiple occasions grabbed her breast and buttocks. Plaintiff alleges she complained to her manager, but that he failed to take sufficient action to stop the harassment. Then in May 2011 Defendant invited Plaintiff and another coworker to a dental convention in Las Vegas. Upon arrival, Plaintiff discovered there was not a dental convention. While in Las Vegas the Defendant took Plaintiff and her coworker zip-lining and then to a topless show. Once back at work, Defendant continued to harass Plaintiff by tickling her and staring at her breasts on multiple occasions. Plaintiff alleged that on one occasion while she was yawning he put his finger in her mouth and touched her tongue. Even though the unwanted touching continued, Plaintiff alleged she could not quit because needed to keep her job to support her daughter. Plaintiff continued to complain to her manager, but the harassment never stopped. Finally, Plaintiff was constructively discharged when Defendant made her employment benefits contingent upon her traveling to Las Vegas with him again when his wife went to India. The jury found for the plaintiff and awarded her $1.7 million.

Juddy Olivares v. Sam Dason, Sam Daniel Dason, DDS, A Professional Dental Corporation, San Bernardino Superior Court, Case Number: CIVDS1300810.

WAGE AND HOUR

Dispute about Whether Mandatory 10-Minute Rest Breaks Can Be Combined or Not Must Go to Jury and Cannot Be Dismissed By Summary Judgment

The California Court of Appeal held that a wage and hour class action cannot be dismissed on summary judgment when the parties dispute whether or not it is impractical or burdensome for the employees to take two separate ten-minute breaks. A class of hourly workers brought a wage and hour class action lawsuit against their employer alleging they were forced "to take a single combined rest period" per eight-hour work shift. Wage Order 1-2001 provides for 10-minute rest periods in each of the four hour work periods on either side of a mandatory minimum 30-minute lunch period. The *Brinker* case held that as a general matter, one rest break should fall on either side of the meal break. *Brinker* also held that employers are obliged to make a good faith effort to implement the preferred schedule, but may deviate from it where practical considerations make it infeasible. Here, the defendant argued that *Brinker* allowed a combined 20-minute rest break because it was more practical considering the amount of time it takes to shut down and restart the company's machinery. The trial court granted summary judgment in defendant's favor. The court of appeal, however, reversed because the employee's claim that they lost little or no work time in taking breaks, created triable issues of fact which must be heard by a jury.

Rodriguez v. E.M.E. Inc. (2016) ___ Cal.App.4th ___.

BILLS SIGNED INTO LAW

Governor Brown Signs Law Increasing Minimum Wage to $15 per Hour by 2022

Governor Jerry Brown signed a bill which will raise California's minimum wage to $15 per hour statewide by 2022. The state's minimum wage will rise to $10.50 per hour in January for businesses with 26 or more employees and then to $11 per hour the following year. It will increase an additional dollar each year until reaching $15 per hour in 2022. Small businesses — with 25 or fewer employees — will have an additional year to ramp up for the pay boost, with the $15 goal targeted for 2023.

Governor Brown Signs Law Increasing Pay During Family Leave

Governor Brown signed legislation that will raise compensation for residents who take paid family leave. The bill will allow people who take time off to care for a new child or sick family member to earn 60 percent or 70 percent of their paycheck, depending on their income. Currently, Californians receive 55 percent of prior wages under the state's Paid Family Leave program. This change will take effect in January 2018. Governor Brown stated, "Families should be able to afford time off to take care of a new child or a member of their family who becomes ill. This expansion makes sense for employers and employees." Under the bill, AB 908, workers who earn the lowest wages in the state will receive 70 percent of their normal pay when out on family leave. Those with higher wages will get 60 percent.

LAW ENFORCEMENT / PUBLIC EMPLOYERS LAW

U.S. Supreme Court Allows Employee to Bring Lawsuit over Free Speech, Even Though He Was Not Actually Engaged In a Constitutionally Protected Activity

The U.S. Supreme Court held that when an employer demotes an employee out of a desire to prevent the employee from engaging in protected political activity, the employee is entitled to challenge that unlawful action under the First Amendment, even if the employer's actions are based upon a factual mistake about the employee's behavior.

Here, Jeffrey Heffernan, a police officer, as a favor to his bedridden mother, agreed to pick up and deliver a campaign yard sign for a candidate running for mayor named Spagnola. The Chief of Police and Heffernan's supervisor had both been appointed by the incumbent mayor, Torres, who was running for re-election against Spagnola. Torres's security detail and other officers saw Heffernan, who was not involved with Spagnola's campaign in any capacity, speaking to staff at a Spagnola distribution point when he went to pick up the sign. The next day Heffernan's supervisor demoted him from detective to patrol officer as punishment for his "overt involvement" in Spagnola's campaign. Heffernan filed a lawsuit claiming that he had been demoted because he had engaged in conduct that (on their mistaken view of the facts) constituted protected speech. Heffernan contended his employer had thereby deprived him of a right secured by the Constitution.

The Court was tasked with determining whether the Constitutional right that Heffernan may have been deprived of is a "right that primarily focuses upon (the employee's) actual activity or a right that primarily focuses upon (the supervisor's) motive, insofar as that motive turns on what the supervisor believes that activity to be." Neither the statute itself nor precedential case law could answer the question. In arriving at its decision, the Court concluded that the government's reason for demoting Heffernan is what counts here. "When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment – even if, as here, the employer makes a factual mistake about the employer's behavior." The Court reasoned, "a discharge or demotion based upon an employer's belief that the employee has engaged in protected activity can cause the same kind, and degree, of constitutional harm whether that belief does or does not rest upon a factual mistake."

Heffernan v. City of Paterson, New Jersey (2016) 578 U. S. _____.

OTHER

California Supreme Court Interprets Wage Order and Clarifies When Employers Must Provide Employees a Seat

A California Federal Court asked the California Supreme Court to interpret a California Wage Order requiring employers to "provide seats to employees when the nature of the work reasonably permits the use of a seat." To interpret and clarify the vague language of the Order, the Court was required to answer three questions: (1) Whether the phrase "nature of the work" refers to individual tasks or a holistic consideration of an employee's duties; (2) what factors to consider in determining whether the nature of the work "reasonably permits" use of a seat; and (3) what type of proof is needed to show a violation of the seating provision.

The California Supreme Court held:

1) The "nature of the work" refers to an employee's tasks performed at a given location for which a right to a suitable seat is claimed, and does not call for consideration of the employee's entire range of duties. Thus, a seat may be called for where the employee's tasks at a particular location reasonably permitted seating, and providing one would not otherwise interfere with the employee's other duties.

2) The totality of circumstances must be considered in determining whether the nature of the work reasonably permits sitting, with an emphasis on the nature of the work. The court opined that while relevant, workplace layout and the employer's business judgment will not be dispositive factors.

3) Finally, the court held that when an employer argues that no suitable seat is available, the employer bears the burden of proving unavailability.

Kilby v. CVS Pharmacy Inc., (April 4, 2016) California Supreme Court, Case number: S215614

IN THE TRENCHES

$9 Million Wage-and-Hour Class Action Settlement against GNC

A class of 8,000-plus employees settled labor and wage law violation claims against GNC, the vitamin retailer, for $9 million. The class claimed they worked without pay and received incomplete wage statements. They argued that GNC violated labor laws, including failing to provide meal breaks, providing inaccurate wage statements and not paying final wages within the required time limits. Named plaintiff and former Northern California GNC assistant store manager, Charles Brewer, lodged the suit on behalf of a putative class. In the complaint he alleged that employees who worked the closing shifts at GNC retail stores were not properly paid for certain tasks they completed after clocking out for the day and often didn't receive overtime pay. The class further argued there were hundreds of thousands of meal break violations, including allowing employees to punch out and continue working if they chose to skip a meal period.

Brewer v. General Nutrition Corp., U.S. District Court for the Northern District of California, Case Number: 4:11-cv-03587.

$7.4 Million Jury Verdict for Wrongful Termination in Violation of Public Policy

Plaintiff Yang brought an action against his former employer ActioNet for wrongful termination in violation of public policy because he was fired due to an incident where he was the victim of workplace violence. Yang was terminated for his participation in an altercation with his co-worker, but it was the coworker who choked Yang, punched down the walls of his cubicle and threatened to kill him. Yang contended that the coworker was acting in the course and scope of employment when he threatened and assaulted him, and that his employer ActioNet was liable based on vicarious liability. This liability included the right of protection from bodily restraint or harm and interference with rights through threats, intimidation and coercion. Yang contended that ActioNet was negligent because other employees had previously complained of the coworker's aggressive behavior. Yang claimed he was terminated in violation of public policy because the investigators of the incident had exonerated him of any wrongdoing. Yang was unable to obtain comparable employment; was forced to accept a lesser position; and was later diagnosed with a major depressive disorder.

The jury found in Yang's favor and awarded him $2.4 million in compensatory damages as well as $5 million in punitive damages.

Yowan Yang v. ActioNet Inc., LA Daily Journal, Verdicts and Settlements (April 22, 2016) U.S. District Court for the Central District of California, Case Number: 2:14-cv-00792-ABC (SH).

$4 Million Settlement of Gender Discrimination Class Action Brought Against Farmers Insurance Group

Farmers will pay $4 million to about 300 in-house lawyers, will make attorney compensation figures more readily available, and will substantially increase the number of women promoted to top salary grades over the next three years. Named plaintiff, Lynne Coates, began at Farmer's in 2010 when she had 22 years of experience. In 2014 she was put on the company's Elite High Exposure team of litigators where she learned that a male colleague with equal experience earned between $150,000 and $200,000, while she was only making $90,000. She also found out that Farmers was hiring men with less than five year's experience at $85,000 and that the men were quickly promoted up the ladder, while women with similar experience were hired at $68,000. When she began asking questions, Coates was removed from the high exposure team and was asked to perform tasks given to attorneys two levels under her. Farmers pledged to remedy the trend by increasing the number of women by 5% in each of the top five attorney grades.

Coates v. Farmers Group, Inc. et al., U.S. District Court for the Northern District of California, Case Number: 5:15-cv-01913.

$1.25 Million Wage-and-Hour Class Action Settlement

Plaintiffs, as individuals and on behalf of all others similarly situated, brought the action against their employer for failure to pay non-exempt employees all wages and/or premiums owed. Plaintiffs also alleged their employer failed to provide accurate wage statements. Defendants denied any wrongdoing and the parties settled the action for $1.25 million.

Mary Barber et al. v. Grundfos Pump Corporation, LA Daily Journal, Verdicts and Settlements (April 8, 2016) Fresno Superior Court, Case Number: 14-CECG-00166.

As always, please do not hesitate to contact any of our attorneys if you have any questions or comments.

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