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

Labor and Employment Law Update

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In This Issue

$12 Million Jury Verdict in Sexual Harassment Lawsuit Against Toy Company Employer

After an eight-day jury trial, a federal jury awarded plaintiff $11.88 million for sexual harassment against her former employer. Plaintiff alleged harassment for being called sexually demeaning terms, including whore, on an almost daily basis. Plaintiff even alleged her supervisor pulled her head down to his crotch on one occasion. When Plaintiff did attempt to complain, she was unsuccessful and her supervisor told her that the head office in China "doesn't care about women." The plaintiff and other similarly harassed women were terminated after they complained. This case was filed concurrently with three other cases of alleged sexual harassment, where the women had nowhere to turn because the harasser was the same supervisor. The other cases are still awaiting trial.

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DISCRIMINATION

Age Discrimination Can Be Established Even When Speaker of Discriminatory Statements Is Not The Final Decision Maker.

The Ninth Circuit Court of Appeals held, that in a failure to promote claim, age discrimination can be established even where the superior, who expressed preference for younger employees, was not the decision maker regarding the promotion. Here, John France, a 54-year old border patrol agent was passed over for four promotions of employees aged 44, 45, 47 and 48. France sued the Department of Homeland Security alleging age discrimination. France provided evidence, which was corroborated by other agents, that his supervisor, who made the hiring recommendations, had expressed his preference that "young, dynamic agents" fill the four positions. The district court granted summary judgment to defendants, reasoning that France could not meet his burden because even if Gilbert, the supervisor, was inclined to promote younger agents, he was not the ultimate decision maker with regard to the promotions. The Ninth Circuit, however, reversed and denied the summary judgment, finding that a genuine dispute of material fact was created. The court reasoned that the speaker of the discriminatory statements need not be the final decision maker, provided that it can be shown that he or she may have some demonstrable impact on the process, which Gilbert did have in this case.

France v. Johnson, (August 3, 2015, Ninth Cir.) ___ F3d. ___.

National Origin Discrimination / Hostile Work Environment

A former Benihana employee sued the company alleging he was shortchanged on wages and that he was harassed and discriminated against by co-workers for years until he was finally forced to resign. Plaintiff's complaint alleged the restaurant failed to provide meal breaks and required employees to perform work off-the-clock for no pay. Plaintiff also alleged that he was not paid wages for trips that he made to off-site markets for food products, and that he was also not reimbursed for the mileage that he incurred when using his personal vehicle to make those trips. In addition to the wage-and-hour violations he also alleged he was subjected to a hostile work environment. Plaintiff alleged that his co-workers harassed and bullied him based on his national origin, and that he complained to his supervisors that his co-workers relentlessly threatened to call immigration on him because of their belief that he was living in the U.S. without permission. His supervisors ignored his complaints, told him not to worry about it, and to ignore the harassment because his immigration status was secure. Despite his multiple complaints, defendants did nothing to address the increasingly hostile work environment.

Ex-Chef Sues Benihana Over Unfair Wages, Hostile Workplace, Law360 (August 6, 2015) by Benjamin Horney.

SEXUAL HARASSMENT

$1 Million Jury Verdict For Sexual Harassment / Hostile Work Environment

A federal jury awarded a cocktail waitress more than $1 million after finding that the

casino she worked for violated its anti-sexual harassment policy by allowing a customer accused of sexual assault to return to the casino. Here, plaintiff was serving drinks as part of her duties as a cocktail waitress when a high-roller customer put his hand down her shirt and put a $1 chip in her bra. Then, even after the casino had promised to ban him for life, the casino allowed the customer to return after only one month. Plaintiff filed a lawsuit claiming the casino's actions created a hostile work environment, which included prohibited sexual harassment under Title VII of the Civil Rights Act. When the incident first took place, she reported it to casino management and declined to press charges because the casino promised her he would be banned for life. When asked how she felt about the high-roller returning to the casino, she told her supervisor she was uncomfortable with him returning, and claimed that customers and other employees were asking here if the assault even happened. Plaintiff was also never told that he was officially allowed back into the casino, but eventually encountered him and had repeated contact with him while on the job.

Pa. Casino Waitress Wins $1M In Sexual Harassment Row, Law360 (August 13, 2015), by Daniel Langhorne.

WAGE AND HOUR

Owners Of Health Centers Ordered To Pay $2.2 Million For Wage Theft

The owners of three southern California residential health centers were ordered to pay nearly $2.2 million after a Labor Commissioner investigation discovered that nine (9) employees had been forced to work six to seven 24-hour shifts each week for less than $2 an hour. The owners were cited for wage theft claims related to minimum wage, overtime, meal and rest periods, and workers compensation violations. The investigation revealed that two people worked at each of the facilities and that they provided 24-hour care to elderly residents suffering from late-stage dementia or Alzheimer's. The workers lived at the facility and provided around-the-clock care for patients, many who were bedridden and receiving hospice care. The employees were paid between $900 and $1,300 a month in cash, which amounted to ranges from $1.25 to $1.80 per hour. The owners did not report the wages to governmental agencies, and did not pay taxes or workers compensation premiums. The owners, who filed for bankruptcy protection immediately, have been found liable for $1.3 million in wages, nearly $720,000 in liquidated damages, and $170,000 in civil penalties.

Calif. Health Facilities Must Pay $2M For Wage Theft, Law360 (August 7, 2015), by Shayna Posses.

Strippers Given A Second Crack At Class Certification

A class of 300 to 500 exotic dancers has been given a second chance to pursue their class action alleging that they had been misclassified as independent contractors. The allegation of illegal misclassification includes failure to pay minimum wage, overtime wages, meal and rest breaks, as well as a claim for illegally withheld wages in the form of "stage fees." In 2013, the Los Angeles Superior Court denied class certification because common questions did not predominate the class. The California Supreme Court's 2014 ruling in *Ayala v. Antelope Valley Newspapers*, which found that workers could be treated as a class if they are subject to a common job policy, however, gives the class of dancers a second chance for certification.

Stripper OT Class Wins Cert. After Calif. Appellate Victory, Law360 (August 5, 2015), by Bonnie Eslinger.

WAGE AND HOUR (CONT.)

Sirius XM Radio Paying $1.3 Million To Settle Wage-and-Hour Class Action With Interns

A class of interns will receive a $1.3 million settlement from their employer Sirius XM Radio. The interns filed this class action lawsuit alleging Sirius XM had failed to pay them even though they performed work necessary to the company's operations and received no academic or vocational training pay. Sirius XM denied the allegations and asserted that its unpaid internship program was completely lawful and fully complied with all wage-and-hour laws. Without admitting liability, Sirius XM reached a settlement agreement with the interns. The 1,852 class members will receive a settlement payment based upon a formula that calculates the number of "internship sessions" in which that person was unpaid any time between 2008 and 2015.

Sirius XM, Interns Settle Labor Wage Suit For $1.3M, Law360 (August 3, 2015), by Aaron Vehling.

$2 Million Wage-and-Hour Class Action Settlement Paid By HomeTown Buffet

HomeTown Buffet will pay over $2 million to settle a wage-and-hour class action brought on behalf of 11,000 nonexempt employees who alleged the restaurant failed to provide breaks or reimburse employees for gas mileage. Specifically, the class alleged that the restaurants failed to provide 10-minute rest breaks for every four hours worked, and half-hour meal breaks within five hours of starting work. The complaint also alleged that the restaurants required employees to use their own cars on work-related deliveries and pickups, and that the restaurant failed to reimburse for gas mileage. The class also alleged failure to pay wages in a timely manner after termination or resignation, and also was alleged to have failed to provide accurate wage statements.

HomeTown Buffet Serves Up $2M Deal In Wage Dispute, Law360 (August 4, 2015), by Shayna Posses.

NLRB

Throat Slashing Gesture May Be Grounds For Termination

The Eighth Circuit Court of Appeal overturned an NLRB ruling that had found that a company's termination of an employee, for making a "cut throat" gesture at another worker, was an unfair labor practice. Initially, an administrative law judge had found that the employer, Nichols Aluminum, did not violate the National Labor Relations Act (NLRA) when it terminated an employee for seriously threatening a fellow employee by gesturing in a cutting motion across his throat. The NLRB, however, overruled the judge's decision, finding that the employee's participation in strike activity was a motivating factor in his being terminated, because the gesture was directed at a fellow employee who had crossed a picket line. The 8th Circuit reversed the NLRB's decision because: (1) the employer successfully argued it had discharged the employee because it has a "zero tolerance policy" against workplace violence, and that his cut throat gesture violated the policy; and (2) the union failed to prove that discriminatory animus toward the employee was a substantial motivating factor in the employer's decision to terminate him.

NLRB Wrong In 'Cut Throat' Worker Firing Case, 8th Cir. Says, Law360 (August 13, 2015), by Daniel Langhorne.

OTHER

Employee Who Prevailed In Administrative Hearing May Recover Attorney's Fees Incurred to Defend The Employer's Appeal

The California Court of Appeal held that an employee will be deemed the successful party, and therefore be entitled to attorney's fees and costs, even when the employer withdraws its appeal prior to the court ruling on the appeal. Here, employee filed a wage claim with the Labor Commissioner against her employer and obtained an award of approximately $30,000. Her employer appealed the ruling, which forced her to obtain legal counsel. When her counsel threatened to present new claims of Labor Code violations, the employer withdrew its appeal and paid her the award plus interest. Her counsel then requested fees and costs, which are specifically provided to a prevailing employee under the Labor Code. The trial court denied the motion for fees and costs, explaining that there must be a court award before the party can collect fees and costs, and that the employer's withdrawal of the appeal took away the possibility of an award. The court of appeal, however, found that she was entitled to attorney's fees and costs because she had already prevailed in the underlying administrative action and had already secured an enforceable judgment.

Royal Pacific Funding Corp. v. Arneson, (2015) ___ Cal.App.4th ___.

Determiner Of Arbitrability Should Be Delineated In A Delegation Provision In An Agreement To Arbitrate

The Ninth Circuit Court of Appeals held that the arbitrator, not the court, should decide issues of arbitrability where the parties have clearly and unmistakably agreed to arbitration rules that delegated issues of arbitrability to the arbitrator. Here, plaintiff had signed an employment agreement with his employer, which included an agreement to arbitrate all disputes. This arbitration agreement also contained a delegation clause, which dictated that any disputes would be settled in accordance with rules of the American Arbitration Association (AAA). Following an employment dispute, plaintiff sued his employer, and the employer sought to compel arbitration. The lower court agreed and dismissed the action in favor of arbitration. Plaintiff appealed, arguing that the arbitration agreement was unconscionable, and therefore unenforceable. The issue on appeal was who should decide whether the arbitration clause was enforceable or not, an arbitrator or a judge. Plaintiff/appellant argued that California law should apply, which would have placed the question of arbitrability with the court and not the arbitrator. The Ninth Circuit, however, found that the delegation provision in the agreement "clearly and unmistakably" delegated to the arbitrator the question of whether the arbitration clause was enforceable because it incorporated the AAA Rules, one of which provided that the "arbitrator shall have the power to rule on his or her own jurisdiction, including objections."

Brennan v. Opus Bank, (August 11, 2015, Ninth Cir.) ___ F3d. ___.

IN THE TRENCHES

$11 Million Wage-and-Hour Class Action Settlement for California Port Truck Drivers

A class of 540 current and former California port truck drivers settled a Wage-and-hour class action with Shippers Transport Express for over $11 million. The class sued for unpaid wages and penalties arising from the misclassification of drivers as independent contractors instead of employees. The action also sought to stop the practice of deducting business expenses, like fuel and insurance, from the drivers' pay. The class asserted failure to pay minimum wage, failure to reimburse business expenses, unlawful coercion, wage statement penalties, and waiting time penalties.

Taylor v. Shippers Transport Express, Inc., LADJ V&S 9/4/15 USDC Central 2:13-cv-02092-BRO-PLA.

$5 Million Wage-and-Hour Class Action Settlement Paid by Black and Decker.

Nearly 1,500 truck drivers settled their class action litigation for nearly $5 million. The class brought the action against Black & Decker and its affiliates for multiple wage-and-hour violations. In subclass I, consisting of approximately 300 members, the class alleged that defendants required them to deduct 1/2 hour from their timesheets to account for travel to and from work when leaving their homes in company-owned trucks, and prohibited them from doing any personal business during that drive to and from. In subclass II, consisting of approximately 1,100 members, the class accused defendants of failing to provide accurate pay stubs, because the legal entity on the check was inaccurate, and the wages reported were inaccurate. The parties settled at mediation and Black & Decker agreed to pay $4.97 million to the class.

Long v. Stanley Black & Decker Inc. et al., LA Daily Journal, Verdicts and Settlements (August 14, 2015) U.S. District Court for the Southern District of California, Case Number: 14-cv-01246-JLS-BGS.

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

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