THE ZAPPIA LAW FIRM, A PROFESSIONAL CORPORATION

— Labor & Employment Law —
Defending Employer's Rights

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In This Issue

- Two Recent ZLF Victories.
- Former Junior Partner Seeking $160 Million from Venture Capital Firm for Gender Discrimination.
- $10 Million Settlement of Whistleblower Retaliation Case Against The Regents of the University of California.
- An Article Discussing An Employer's Potential Exposure to Penalties and Damages for "Causing" an Employee to Work Seven Consecutive Days.
- A $3.6 Million Wage / Hour Settlement Against Pep Boys.
- A $2.8 Million Wage / Hour Settlement Against Soho House of West Hollywood.

Strippers Hustled by Hustler?

Exotic Dancers working at Larry Flynt's Hustler Club in New York are alleging they were misclassified as independent contractors and were denied minimum wages and overtime payment owed to them under the Fair Labor Standards Act and New York State wage-and-hour laws. The complaint stated "adult clubs such as Hustler are well-positioned to take advantage of entertainers and deny them basic workplace rights." The strippers also allege that they are unlawfully required to pay house fees or "rental fees" and are fined when they miss scheduled shifts. They also allege that the club gives out coupons called "Beaver Bucks" that patrons use to pay the strippers, and fail to give the full dollar amount to dancers when they attempt to exchange it for actual cash. Courts have recently been siding with exotic dancers in wage claims. This past November, a New York federal judge awarded a class of exotic dancers at Rick's Cabaret almost $11 million for misclassifying them as independent contractors, and the Nevada Supreme Court a month prior sided with former exotic dancers at the Sapphire Gentlemen's Club in Las Vegas and held that they qualified as employees under state labor law.

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DISCRIMINATION

Gender Discrimination – Interim Reddit CEO Ellen Pao Alleges Gender Discrimination Against Kleiner Perkins Caufield & Beyers LLP

Ellen Pao claims the venture capital giant Kleiner Perkins fired her for suing the firm for gender discrimination. In her 2012 complaint, Pao accuses Kleiner Perkins of fostering a discriminatory environment by, amongst other things, subjecting Pao to "discussions of porn stars and sexual partner preferences" during a business trip. Kleiner Perkins senior partner Ted Schlein testified that they had not discussed porn during the trip but they did talk about an upcoming Victoria Secret runway show and the Playboy Mansion. Schlein stated that Pao never let on that the discussions had made her uncomfortable. Pao also alleges she was pressured into a sexual relationship with a fellow junior partner. After she ended the relationship, Pao claims he retaliated against her by excluding her from important meetings and email threads. She also claims that a senior partner attempted to court her by asking her out to dinner and giving her a book of erotic poetry. According to her suit, her supervisors failed to take any corrective action when Pao reported it to them. The complaint said the senior partner who asked her to dinner was later given a seat on the board of a company she helped develop. Pao was terminated in October 2012. She was given severance pay at her current salary of $333,333 a month for six months. Pao seeks $16 million in lost income and up to $144 million in punitive damages if jurors believe the senior partners acted maliciously.

Kleiner Men Dished About Sex, Porn On Work Trip, Jury Told, Law360 (February 27, 2015), Beth Winegarner

Failure to Accommodate is Not Disability Discrimination When Employee Cannot Perform Even One Essential Function of the Position

The California Court of Appeal affirmed a ruling that the City of Santa Monica did not fail to reasonably accommodate an employee's physical disability. The employee injured his knee while on the job in 2003, and underwent multiple surgeries. As a result, the City switched him to a lighter-duty post of groundskeeper, where he unfortunately injured his knee again in 2006. He underwent more surgeries, and in 2010, sought to be returned to his earlier position of solid waste equipment manager, but with several accommodations. His doctor stated he should be "precluded from kneeling, bending, stooping, squatting, walking over uneven terrain, running, and prolonged standing relative to the right knee, as well as climbing and heavy lifting." It was undisputed that heavy lifting, equipment maintenance, and recyclable disposal duties were essential functions for a solid waste equipment operator. The court found that it would have been impossible for the employee to perform these essential duties no matter what accommodations were made. Although FEHA requires employers to make reasonable accommodations for the disability of an employee unless doing so would produce undue hardship upon the employer's operation, the statute does not require the employer to cut essential job functions as a form of reasonable accommodation. The court held that the "inability to perform even one essential function is enough to move on to other alternatives, such as reassignment." Reassignment was not a viable accommodation in this situation because the employee did not meet the qualifications for any "comparable" or "lower graded" vacant positions.

Nealy v. City of Santa Monica (2015)___ Cal.App.4th ___. (2015 DJDAR 1785)

RETALIATION

Retaliation / Whistleblower — $10 Million Settlement Against The Regents of the University of California

Plaintiff Dr. Robert Pedowitz, M.D., a former Chair of UCLA's Department of Orthopedic Surgery settled a whistleblower claim brought against the Regents of the University of California and a number of other defendants for $10 million. Dr. Pedowitz claimed that his removal as chairman was retaliation for him disclosing improper governmental activities, which provided him protection under the California's Whistleblower Protection Act. At trial, he testified that one of the surgeons received $250,000 in consulting fees from Medtronic. He further alleged that "UCLA turned a blind eye to the conflict of interest because the university profited from the success of medical products or drugs developed by its doctors." Dr. Pedowitz brought causes of action against the Regents of the University as well as individual defendants. The individual defendants were dismissed from the case prior to the settlement.

Robert Pedowitz, M.D. v. The Regents of the University of California et al., LA Daily Journal, Verdicts and Settlements (February 27, 2015) Los Angeles Superior Court, Case Number: BC484611.

WAGE/HOUR

An Exempt Employee's Statutory Right to One Day Of Rest in Seven

"Every person employed in any occupation of labor is entitled to one day's rest therefrom in seven." (Labor Code Section 551). Employers may be exposing themselves to large penalties and damages if they "cause" any of their employees, including those that are exempt from overtime, to work seven consecutive days. Labor Code Section 552, which applies to exempt and nonexempt employees alike, states that "no employer of labor shall cause his employees to work more than six days in seven." Labor Code Section 554 provides an exception to the requirement and allows seven consecutive days of work in emergency situations or under a collective bargaining agreement. This exception is available only if the "nature of the employment reasonably requires that the employee work seven or more consecutive days." If so, the employer may comply by ensuring that "in each calendar month the employee receives days of rest equivalent to one day's rest in seven." The critical term "cause" under Section 552 which exposes employers to liability has yet to be clearly defined. The issue is before the 9th Circuit in *Mendoza v. Nordstrom Inc.*, 12-57130. The court will decide the issue as it pertains to a nonexempt employee with a fixed schedule, making the pending decision an unlikely source of guidance when navigating compliance issues with exempt employees under Sections 552 and 554. Additionally, confused federal appellate judges asked the state Supreme Court to help define the meaning of "workweek" to determine when a "day of rest" is required under the Labor Code and noted that no clear controlling state law precedent exists. The 9th Circuit has used this certified question procedure fewer than 50 times since 1998. The last time they asked the high court about a state labor code dealing with commission wages, it took a year and a half to find an answer. (*Peabody v. Time Warner Cable Inc.*, 59 Cal.4th 662)

An Employee's Right To A Day Of Rest, Los Angeles Daily Journal (February 9, 2015) Sebastian Miller.

9th Circuit Asks State High Court For Help With Labor Law Puzzle, Los Angeles Daily Journal (February 20, 2015) John Roemer

Wage Order Allowing Health Care Workers to Voluntarily Waive One Required Meal Period Limited to Shifts Of 12 Hours Or Less

Section 11(D) of Industrial Wage Commission (IWC) wage order No. 5-2001 allows employees in the health care industry to voluntarily waive one of the required meal periods on shifts longer than eight hours. Labor Code Section 512(a) requires an employer to provide two meal periods for shifts longer 10 hours, but allows employees to waive the second meal period for shifts of no more than 12 hours. Orange Coast Memorial Medical Center used the wage order as an affirmative defense in a putative class action which alleged that the hospital policy allowing employees who worked on shifts longer than 12 hours to voluntarily waive one of their two meal periods violated the Labor Code. The Plaintiffs appealed the trial court's grant of summary judgment in favor of the hospital. The California Court of Appeal held that the wage order was invalid to the extent that it conflicted with Section 512(a)'s limitation on meal period waivers to shifts of 12 hours or less.

Gerard v. Orange Coast Memorial Medical Center (2015) ___ Cal.App.4th ___.

OTHER

DirecTV May Compel Arbitration as a Nonsignatory Successor Employer Since Continued Employment Constituted Implied Acceptance Of Arbitration Agreement

DirecTV successfully compelled arbitration of a putative class action alleging violations of state wage and unfair competition laws against plaintiff Francisco Marenco despite not being a signatory to the original agreement. DirecTV acquired 180 Connect and retained their employees, including Marenco. There was an employment agreement in place between 180 Connect and its employees which prohibited filing a class or collective action, or a representative or private attorney general action on behalf of a class of persons or the general public. Marenco continued to work for DirecTV after the acquisition until February 2010. The California Court of Appeal held that "a nonsignatory defendant may enforce an arbitration agreement between a signatory plaintiff and a corporation that was acquired by the nonsignatory defendant, which assumed all of the rights and obligations of the acquired corporation." They quoted *Boucher v. Alliance Title Company, Inc.* (2005) 127 Cal.App.4th 262, 271-272, which expanded a successor employer's ability to compel arbitration "under both federal and California decisional authority ... when the causes of action against the nonsignatory are 'intimately founded in and intertwined' with the underlying contract obligations. By relying on contract terms in a claim against a nonsignatory defendant, even if not exclusively, a plaintiff may be equitably stopped from repudiating the arbitration clause contained in that agreement." It was undisputed that DirecTV acquired all of 180 Connect's assets, employees, rights, and liabilities. Additionally, there was no evidence that the original terms of the employment agreement were changed or cancelled in any manner. The court concluded that the record supported a reasonable inference that the employees who continued working after the merger implicitly accepted DirecTV's decision to maintain their existing terms of employment, including the arbitration agreement, thus making it a valid enforceable contract.

Marenco v. DirecTV LLC, (2015) ___ Cal.App.4th ___. (2015 DJDAR 1513)

ZAPPIA IN THE TRENCHES

Peace Officer's Termination Sustained at Binding Arbitration

In a case handled by our firm, we successfully defended a police officer's appeal of his termination for his repeated, negligent storage and safeguarding of firearms. During a four-year time period, the officer had three weapons stolen or misappropriated: (1) a handgun was stolen from his car; (2) a fully loaded AR-15 was stolen from his bedroom; and (3) finally, his teenage son removed a handgun in the officer's bedroom and was arrested while in possession of the gun. Additionally, the officer had another AR -15 in his possession, which not been properly transferred to him and remained registered to another (former) police officer. After a two-day hearing, the arbitrator sustained the termination finding the City had proved by clear and convincing evidence that the charges were true and termination was the appropriate level of discipline.

Click this link to review the Decision.
Decision of Hearing Officer

County Board of Supervisors' Unilateral Changes to Take-Home Vehicle Policy Affirmed

In another case handled by our firm, the Court of Appeal affirmed a Superior Court's judgment in our client/the County of Riverside's favor, ruling that: (1) the Board's unilaterally imposed changes/restrictions on personal use of County vehicles was a management right per Board policy, and not a negotiable term of employment subject to bargaining; and (2) the waiver/zipper clause in the MOU precluded meeting and conferring over the matter because there was no mention of it in the MOU. In 2009, as one of many cost saving measures at the time, the County unilaterally revoked the previously authorized overnight use of county vehicles from over 150 District Attorney Investigators without meeting and conferring. The union alleged that use of county vehicles for commuting and overnight retention had occurred so regularly and for such a long period of time, that it had become a "past practice" which could not be unilaterally changed without meeting and conferring. The Court agreed with the County and rejected the union's argument that the County needed to meet and confer first.

Click this link to review the Opinion.

RSA v. County of Riverside

OTHERS IN THE TRENCHES

$3.6 Million Wage and Hour Settlement Against Pep Boys

Pep Boys settled a wage and hour class action for $3.6 million. Plaintiffs alleged Pep Boys failed to pay minimum wage for all hours worked, overtime pay, and other labor law violations. Eligible class members will receive between $1,122 and $2,245 for every full year they worked for Pep Boys during the relevant period in dispute.

Steve Tokoshima et al. v. The Pep Boys et al., LA Daily Journal, Verdicts and Settlements (February 27, 2015) U.S. District Court for the Northern District of California, Case Number 3:12-cv-04810-CRB

$2,467,523 Jury Verdict For Sex And Gender Discrimination And Retaliation In Violation Of FEHA Against City Of Los Angeles

A jury awarded three former male employees who held various positions at the Los Angeles Police Department a total of $2,467,523 in damages for their sex and gender cause of action and their retaliation cause of action under FEHA. Plaintiffs alleged that a female Lieutenant exhibited favoritism and favored females in the workplace.

They also alleged that when they pointed this out, the female supervisor retaliated against them and they suffered adverse employment actions. One former cop claimed he was removed from his command and was denied reinstatement to his former night watch supervisory position because the supervisor preferred women in that position.

Peter J. Bakotich, et al. v. City of Los Angeles., LA Daily Journal, Verdicts and Settlements (February 13, 2015) Los Angeles Superior Court, Case Number: BC442344.

$2.8 Million Settlement Of Wage And Hour Class Action Against Soho House West Hollywood

A class of non-exempt hourly workers employed by Soho House West Hollywood LLC settled their class action for $2.8 million. The employees alleged wage and hour violations including overtime violations, meal and rest period violations, itemized wage statement violations, waiting time penalties, failure to provide expense reimbursements, failure to pay personal days, unlawful business practices, and violations of the Private Attorneys General Act.

Andrea Ware et al. v. Soho House West Hollywood LLC, et al., LA Daily Journal, Verdicts and Settlements (February 27, 2015) Los Angeles Superior Court, Case Number BC496246.

$1,319,263 Jury Verdict For Railroad Worker

A railroad worker received a $1,319,263 jury verdict in his action against the Union Pacific Railroad for violations of numerous Occupational Safety and Health Administration regulations that mandate training, and that negligent maintenance of a cone vehicle contributed to the accident that led to Plaintiff suffering a spinal injury.

Plaintiff went on leave for three months, then returned to restricted duty, which he performed for nine months until his physician restricted him from prolonged periods of sitting.

Perry Mack Jr. v. Union Pacific Railroad, LA Daily Journal, Verdicts and Settlements (February 27, 2015) Los Angeles Superior Court, Case Number NC058492.

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

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The Zappia Law Firm provides its public and private sector employer-clients experienced, responsive and aggressive representation and defense with their labor and employment law matters. The firm focuses on representing management in employment and labor related litigation, appeals, arbitrations and administrative hearings; police and public employee discipline, due process and civil rights matters; personnel investigations; and general advice and counsel on California and federal labor and employment. The firm's attorneys have extensive experience representing and advising their clients in labor and employment matters involving discrimination, harassment, retaliation, wrongful termination, union negotiations and issues; California Labor Code, Fair Labor Standards Act, wage/hour claims, Family Medical Leave Act, Americans with Disabilities Act, employee leave laws and employee discipline.

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