ZLF

THE ZAPPIA LAW FIRM, A PROFESSIONAL CORPORATION

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

Labor and Employment Law Update

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In This Issue

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RETALIATION

Male Go-Go Dancers Allege Retaliation For Joining a Wage/Hour Class Action.

A Federal Judge granted certification to a class of male go-go dancers who have accused their employer of violating the Fair Labor Standards Act and for later retaliating against the dancers who joined the lawsuit. The class alleges that the club misclassified them as independent contractors and did not pay them for their work. Allegations of retaliation against the dancers if they joined the suit included: threatening to blacklist them from the nightclub industry; threatening them with disparaging tax reports to the IRS; and firing a dancer when he announced he was joining the suit.

Dancers Win Class Cert. in FLSA Suit Against Ga. Nightclub, Law360 (July 7, 2014), Aaron Vehling
http://www.law360.com/employment/articles/555012

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HARASSMENT

Female Against Female — Female Executive Sued for Sexual Harassment by Female Subordinate.

Maria Zhang, a female company executive at Yahoo, has been sued for sexual harassment and retaliation by another woman, Nan Shi, who worked as a software engineer at the company. Nan Shi alleges that Maria Zhang, her direct supervisor at the time, pressured her into having "oral and digital sex" multiple times and later fired her for objecting. Shi further alleged that Zhang told her "she would have a bright future at Yahoo if she had sex with her, and that Zhang said she could take everything away from her, including her job, stocks, and future if she did not do what she wanted." Shi alleges that after she rejected Zhang's advances, her performance reviews were unfairly downgraded, she was placed on unpaid leave and terminated.

Female Yahoo Exec Hit With Sexual Harassment Suit, Law360 (July 14, 2014), Scott Flaherty
http://www.law360.com/employment/articles/557091

WAGE/HOUR

Vacation Time — Employers Can Require Exempt Employees To Use Vacation Hours When Absent From Work For Part Of A Day.

The Court of Appeal held that an employer's practice of requiring exempt employees to use their vacation hours when they were absent from work for portions of the day did not violate California law. General Atomics had a policy for its exempt workers to accrue annual leave hours which could be used for any reason, including vacation, sickness, medical appointments, family obligations, and leisure pursuits. The Plaintiff argued that the policy should only apply when the employee was absent for at least four hours. The Court ruled that regardless of whether an absence is at least four hours or for a shorter period, an employer may deduct hours from an exempt employees vacation leave.

Rhea v. General Atomics, (2014) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/D064517.PDF

Employers May Not Average Out And Strategically Pay Commissioned Wages In A Period Other Than The Period In Which They Were Earned To Satisfy California Compensation Requirements.

The California Supreme Court held that an employer's practice of paying commissions on a monthly basis, rather than twice during each calendar month, in order to satisfy minimum earnings requirements, violated California law. Time Warner was averaging out its employee's commissions and paying them monthly in order to satisfy the minimum earnings prong of the commissioned employee exemption. This exemption requires that a commissioned employee's earnings per pay period are at least 1-1/2 times minimum wage, that is, $12/hour. The Court, however, found that an employer will only satisfy the minimum earnings prong in those pay periods in which it *actually pays* the required minimum earnings.

Peabody v. Time Warner Cable, Inc. (2014) ___ Cal.4th ___.
http://www.courts.ca.gov/opinions/documents/S204804.PDF

Independent Contractor — Newspaper Carriers May Sue for Misclassification As Independent Contractors, Despite Having The Right To Control Their Work

The California Supreme Court held that a group of newspaper carriers could proceed with their litigation as a class. The carriers filed a class action arguing that they were misclassified as independent contractors, rather than employees, and that as a result, the carriers were denied wage and hour protections to which they were entitled. The carriers alleged unpaid overtime, unlawful deductions, failure to provide breaks, and other statutory and wage violations. The Court indicated that the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. The Court stated further, that what matters is whether the hirer retains all *necessary* control over its operations. Finally, the court pointed out that a certain amount of freedom of action will not change the character of the employment, if the employer has general supervision and control over it.

Ayala v. Antelope Valley Newspapers, Inc. (2014) ____ Cal.4th ____.
http://www.courts.ca.gov/opinions/documents/S206874.PDF

LABOR / UNION

Contracting Out Bargaining Unit Work — County's Community Development Commission May Contract With Private Company To Conduct Housing Inspections That Union Employees Used To Perform

The Court of Appeal held that the Community Development Commission has free reign to contract for services, including housing inspection services, regardless of whether the employees who perform these services are from the private or public sector. In 2009 the Commission entered into a contract with a private entity to provide housing inspection services during high workload periods. Then in 2012, the Commission indicated its intention to contract out some work normally performed by SEIU employees and layoff three SEIU employees. SEIU sent a cease and desist and later, but the Board of Supervisors approved the Commission's contracting out and the Commission laid off the three employees. In arriving at the decision, the Court reasoned that the Legislature could have prohibited the Commission from contracting out if it had wanted to, but it did not.

Service Employees International Union, Local 1021, AFL-CIO v. County of Sonoma (2014) ____ Cal.App.4th ____.
http://www.courts.ca.gov/opinions/documents/A138637.PDF

Unfair Labor Practice Charge — Security Guards File Unfair Practice Charge Against SEIU For Deception, Intimidation, And Misuse Of Their Mandatory Dues.

A group of nonunion security guards filed an unfair labor charge against SEIU, Local 24/7, in San Francisco alleging that they were forced to pay for union activities. The security guards filed a claim with the NLRB alleging that after a contract was reached with the employer, SEIU began forcing nonmember guards to pay full union dues, including funds that did not go toward bargaining activities. The guards allege that the contract with the prior security contractor allowed the nonunion workers to

opt out of paying for union political activities or members-only events. The charge also alleges that the SEIU bosses are resorting to deception and intimidation to force workers into full dues paying positions.

Guards Accuse SEIU Of Forcing Nonmembers To Pay Full Dues, Law360 (July 22, 2014), Scott Flaherty
http://www.law360.com/employment/articles/559789

Picketing Rights — According to the NLRB, It Is Permissible/Non-Disciplinable Conduct For A Picketing Employee To Grab His Crotch And Direct Obscene Gestures At Strikebreakers

The National Labor Relations Board held that a male employee's obscene sexual gesture did not justify his suspension. The picketer allegedly grabbed his crotch in a gesture directed at a customer service representative not represented by the IBEW chapter when she arrived at work one morning during the strike. The judge said that while the gesture was obscene and likely did occur as reported, it was an isolated incident and didn't constitute sexual harassment that would justify suspension.

Obscene Gesture Amid Strike Didn't Warrant Discipline: NLRB, Law360 (July 7, 2014), Scott Flaherty
http://www.law360.com/employment/articles/554841

OTHER

Unemployment Benefits — Employee's Refusal To Sign Disciplinary Notice Without Union Representation Does Not Constitute Misconduct To Render Him Ineligible for Unemployment Benefits.

The California Supreme Court held that an employee was entitled to unemployment benefits because his good faith error in judgment of not signing a disciplinary notice did not amount to the type of misconduct required for ineligibility. Section 1256 of the Unemployment Insurance Code allows an employer to deny/contest eligibility for unemployment benefits where an employee has been discharged for misconduct connected with their work. To establish misconduct, there must be evidence of deliberate, willful and intentional disobedience. The Court found that in this case, Medeiros's good faith refusal to sign did not rise of the level of misconduct contemplated by the statute, as he believed he had the right to union representation.

Paratransit Inc. v. Unemployment Insurance Appeals Board (Medeiros) (2014) ___ Cal.4th ___.
http://www.courts.ca.gov/opinions/documents/S204221.PDF

IN THE TRENCHES

ZAPPIA LAW FIRM

Attorney's Fees — Award For $100,000 Completely Reversed

We are very pleased to report that in a case that has been heavily litigated for over 6 years, in which ZLF handled two arbitrations and two appeals, *we just received a final appellate court ruling* ***completely reversing*** *the $100,000 award of attorney's fees to plaintiff Shirley Rivera*. This is a very difficult result to achieve, as attorney fees are practically automatic to prevailing employment plaintiffs under the California Civil Code and federal law. Nonetheless, the Court of Appeal reversed the trial court's award of attorney fees to Plaintiff, agreeing with ZLF that she failed to confer "a significant benefit on the general public," and that the County bore no municipal liability for Rivera's alleged wrongs.

Ms. Rivera worked in Animal Control, and was fired for drinking on the job, along with other similar accomplishments. The issue was not the underlying facts of her termination, but whether the County had complied with due process in sending her a Final Notice of Proposed Termination to her only address of record on file with the County, exactly as the MOU requires. Although Rivera admitted receiving three such prior notices at this exact address, and admitted that she never informed the County of a new address, the appellate court in *Rivera I* concluded that the County had violated Rivera's due process rights by failing to give her notice in a way "reasonably calculated to reach the recipient."

Rivera then brought a motion for attorney's fees under 42 USC 1988, for violation of her constitutional due process rights under 42 USC section 1983, which the trial court granted in full, and even applied a multiplier of 1.5 to Rivera's base fees, yielding an attorney fee award against the County of over $100,000.

Although we strenuously disagreed with *Rivera I*'s conclusion that the County had violated Rivera's due process rights at all, we could not re-argue the underlying "violation" on the second appeal. Thus, we had a difficult uphill battle in *Rivera II*, as attorney fee awards under section 1988 to the prevailing party for section 1983 violations are practically automatic, and reviewed on an extremely deferential standard. Nonetheless, in *Rivera II* (2012) we argued that although the court ruled that Rivera prevailed on her constitutional due process arguments (and we could not revisit that decision), she failed to "confer a significant benefit on the public or a large group of persons," and so the taxpayers of Riverside County should not be forced to shoulder the costs of her obtaining an award that didn't benefit anyone but herself. We also argued that even if the County violated her due process rights in this particular instance, unless this due process violation was part of the County's official policy or long-standing custom, the County should have municipal immunity under *Monell*. It was this argument that proved dispositive, and two weeks after receiving the parties' Supplemental Briefs on this issue, the Court of Appeal reversed the trial court and reversed the award of attorney fees to Rivera *entirely*. This is a significant victory on important and recurrent issues for the County, and sets an excellent precedent for all such future claims. (Rivera v. County of Riverside, Riverside Superior Court Case No. RIC 494960, Court of Appeal Case No. E055956)

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Police — Due Process — Investigation/Interview Notice

We are also pleased to report that we successfully defended a terminated police officer's petition for writ of mandate and injunctive relief seeking orders to rescind his termination based upon alleged violations of the Public Safety Officers Procedural Bill of Rights Act (POBRA) and of the City's Civil Service Rules. Specifically, former City of Hermosa Beach police officer Lance McColgan alleged that the City violated his POBRA rights by providing insufficient notice of the nature of the investigation prior to his administrative interview during the personnel investigation. He also alleged that the City violated its own rules by not timely referring his appeal of his termination to a civil service commission. In denying the petition for writ of mandate, the Court found that: (1) the City did not violate POBRA as McColgan was sufficiently notified of the nature of the investigation before his investigative interview; (2) the investigation and service of notice were completed timely under the POBRA; and (3) the City timely complied with its own rules to "promptly" process his post-termination appeal. The Court did find that McColgan was not properly noticed of several expanded and collateral allegations discovered during the investigation, but that this was inconsequential harmless error to the more serious reasons for which he was terminated. The matter now proceeds to McColgan's post-termination appeal before a civil service commission. (McColgan v. City of Hermosa Beach, Los Angeles Superior Court Case No. YC 068203)

$23 Million Settlement of Wage/Hour Class Action

A group of non-exempt retail store employees agreed to a $23 million settlement with Walgreen's for violations of the California Labor Code and Wage Orders. The workers alleged failure to pay wages, failure to provide accurate itemized wage statements, and unfair business practices.

Wilson, et al. v. Walgreen Co., LA Daily Journal, Verdicts and Settlements (July 18, 2014) U.S. District Court for the Central District of California, Case Number 2:11-cv-07664-PSG-FFM.

$6.5 Million Settlement of Wage/Hour Class Action

A group of garage door installers agreed to a $6.5 million settlement with Lowe's for violations of the California Labor Code and Wage Orders. The installers alleged they were misclassified as "independent contractors" and were not provided benefits or overtime wages.

Shephard, et al. v. Lowe's HIW, Inc., LA Daily Journal, Verdicts and Settlements (July 18, 2014) U.S. District Court for the Northern District of California, Case Number 4:12-cv-03893-JSW.

$4.75 Million Settlement of Wage/Hour FLSA Class Action

A group of non-exempt workers agreed to a $4.75 million settlement with Universal Alloy Corp. for violations of the FLSA and California Labor Code. The workers alleged unlawful meal and rest periods, and sought overtime, back pay, and other relief.

Gonzalez, et al. v. Universal Alloy Corp., LA Daily Journal, Verdicts and Settlements (July 3, 2014) U.S. District Court for the Central District of California, Case Number 8:13-cv-00807-JVS-MRW.

$1.9 Million Settlement of Wage/Hour FLSA Class Action

A group of workers agreed to a $1.9 million settlement with U.S. Bank for alleged violation of California Labor Code and Wage Orders. The class alleged the bank failed to provide workers with suitable seating. They also alleged that the bank failed to provide rest breaks that complied with California law.

Brooks v. U.S. Bank N.A., LA Daily Journal, Verdicts and Settlements (July 3, 2014) U.S. District Court for the Northern District of California, Case Number 3:12-cv-04935-EMC.

$1.3 Million Jury Verdict for Constructive Discharge / Gender Discrimination

A Los Angeles Superior Court jury awarded a single female plaintiff over $1.3 million for gender discrimination and constructive discharge. The jury agreed with Plaintiff's contention that her supervisor treated her as a personal servant and not a working professional. Plaintiff alleged that her supervisor: (1) degraded her publicly; (2) forced her to scrub and clean desks even though there was a maintenance crew; (3) prevented her from taking the lead because she was female; (4) used other male employees to be the "face" of the school; (5) required her to work longer hours without overtime pay; (6) demoted her; and (7) transferred her to another campus with twice the commute.

Kuwahara v. Asahi Gakuen, et al., LA Daily Journal, Verdicts and Settlements (July 25, 2014) Los Angeles Superior Court, Central, Case Number BC 454896.

As always, don't hesitate to contact any of our attorneys if you have any questions or comments.

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Presentations

We also present on various topics, including:

- Labor Negotiations
- Pension Reform; and
- The Limitations of AB 646 Post Impasse Procedures