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

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In This Issue

"A" for Effort Award Winner

Founder and Only Member of "Sun Worshipping Atheism" not Subject to Religious Discrimination

The California Court of Appeal held that a corrections officer who was fired after refusing mandatory overtime because it interfered with his practice of "Sun Worshipping Atheism" (a religion that he founded and was the only member) was not subject to religious discrimination because Sun Worshipping Atheism was not a religion. The court noted that Sun Worshipping Atheism was a secular, not religious, belief system because it dealt with living a healthy lifestyle (requiring eight hours of sleep, socializing, and "getting fresh air") and not with "deep and imponderable matters."

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DISCRIMINATION

Gender Discrimination – Interim Reddit CEO Ellen Pao Loses Gender Discrimination Lawsuit Against Kleiner Perkins

A San Francisco jury found that venture capital firm Kleiner Perkins Caufield & Beyers LLP ("Kleiner Perkins") did not discriminate against former junior partner Ellen Pao because of her gender. The jury found that neither Pao's gender nor her internal complaints factored into the decision not to promote her. Pao alleged that a fellow junior partner pressured her into an affair then retaliated against her when she broke it off, that a senior partner made repeated sexual advances towards her, described the firm as a "boys club" where women were passed over for promotion and excluded from social events, and claimed she was fired after filing her lawsuit. Kleiner Perkins successfully contended that women weren't deliberately excluded from the social events and Pao was not promoted to senior partner because she did not have the necessary skills and clashed with colleagues. Pao sought $16 million in compensatory damages for lost wages and interest following her termination, and at least $100 million in punitive damages.

Kleiner Perkins Beats Pao's $100M Gender-Bias Case, Law360 (March 27, 2015), Beth Winegarner.

Racial and Religious Discrimination

The California Court of Appeal affirmed the trial court's decision to dismiss a lawsuit filed by a legal secretary for discrimination based on her religion and race. The secretary, a Christian African-American woman, claimed that her boss, who was Muslim, harassed her because of her religion and race. The secretary noted that her boss once commented that "Islam was the most hated religion in the world," bit her arm when she made a typographical error, and fired her after she scolded him for blurting out "Jesus Christ" during an argument in the office. The firm successfully contended that the secretary was terminated for repeated insubordination and tardiness, and mistakes in her work. The court concluded that her boss's comments and behavior did not support an inference that he held discriminatory animus against Christians.

Law Firm Escapes Ex-Secretary's Discrimination Suit Appeal, Law360 (March 11, 2015), Peter Yang

Disability Discrimination / Self-Serving Declarations Admissible to Establish Genuine Dispute of Material Fact

The Ninth Circuit Court of Appeals held that an employee had presented triable claims under FEHA: (1) that Sears discriminated against him because of his disability; (2) that Sears declined to accommodate his disability; and (3) that Sears did not engage in an interactive process to determine possible accommodation for him.

In reversing the summary judgment granted to Sears by the District Court, the panel noted that it was beside the point that some of the employee's evidence was self-serving because such testimony was admissible, though absent corroboration, it may have limited weight by the trier of fact at trial. The panel further noted that a court could disregard a self-serving declaration that stated only conclusions and not facts that would be admissible evidence. Here, however, Nigro's declaration and deposition testimony, albeit uncorroborated and self-serving, were sufficient to establish a genuine dispute of material fact on Sears's discriminatory animus.

He related statements made to him both in person and over the telephone, and his testimony was based on personal knowledge, legally relevant, and internally consistent.

Nigro v. Sears Roebuck & Co. (April 10, 2015 Ninth Cir.) ___ *F3d.* ___.

RETALIATION

Sexual Harassment – Employer Liability

The California Court of Appeal held that an employer may not be liable for failure to prevent sexual harassment if the sexual harassment that occurred was not severe or pervasive enough to result in liability. At the trial court level, the plaintiff sued her employer for sexual harassment and failure to prevent sexual harassment. The trial court jury found that although the plaintiff was subjected to unwanted harassing conduct, it was not "severe or pervasive." Nevertheless, the jury found that the employer was liable for failure to prevent sexual harassment. In overturning the jury's finding, the court concluded that the harassing conduct must be "sufficiently severe or pervasive so as to alter the condition of employment and create an abusive working environment" in order for an employer to be liable for failure to prevent harassment.

Dickson v. Burke Williams Inc. (2015) ___ Cal.App.4th ___.

WAGE/HOUR

Car Washes Fined $1.3 Million for Failure to Pay Wages

The California Labor Commissioner's Office fined 35 Los Angeles car washes for violations of state wage laws by cheating employees out of earned wages. An enforcement sweep revealed that 400 workers were not paid full wages owed, overtime, or the minimum wage.

The Labor Commissioner noted that many of the violations occurred at car washes that failed to register with the Commissioner's Office, and "when car wash businesses fail to register, it is often an indicator of wage theft." The Commissioner's Office further noted that many of the employees did not understand their rights since they did not speak English.

35 Calif. Car Washes Fined $1M Over Shorted Wages, Law360 (March 5, 2015), Michael Mello

LABOR/UNION

NLRB Rules that Calling a Supervisor "a NASTY MOTHER F-----" on Facebook is Protected Activity

The National Labor Relations Board held that a waiter for a catering service who called a supervisor "a NASTY MOTHER F-----" in a Facebook post engaged in protected activity. At an event two days before a representation election for the caterer's employees, the supervisor approached the wait staff and told them in a "loud, "raised, harsh tone" to "turn your head that way and stop chitchatting," and to "spread out, move, move." Incensed, the waiter posted a Facebook status during his break. In addition to calling the supervisor "a NASTY MOTHER F-----" in his status, the waiter also stated "F--- his mother and his entire f------ family" and "Vote YES for the UNION!!!!!!" In determining that the waiter's status constituted protected, concerted union activity, the Board noted that the caterer's employees were motivated to seek union representation due to the perceived disrespectful and hostile conduct by supervisors. The Board also noted that the employer tolerated the widespread use of profanity in the workplace and that the waiter's comments were not vulgar enough to lose protection under the National Labor Relations Act.

Pier Sixty, LLC (2015) 362 NLRB No. 59.

NLRB Rules that Threatened Suspension for Union Steward is Unlawful

The National Labor Relations Board held that it was unlawful for an employer to threaten a union steward with a suspension for using notes while representing a worker in an investigatory interview with Human Resources. The steward met with the employee before the interview (regarding his failure to properly perform a certain task) and took notes which evidenced the employee was not properly trained for the task. During the interview, the steward drew attention to the employee's claimed lack of training and read aloud from the notebook. The Human Resources interviewer threatened to suspend the steward if he kept reading from the notebook. In concluding that the steward engaged in protected conduct, the Board noted that an employee is entitled to a union representative in an investigative interview who may provide "assistance and counsel to employees who may lack the ability to express themselves" and the representative may provide "active assistance to the employee." Here, the Board found that the steward provided clarification and counsel to the employee by reminding him of his lack-of-training defense, and there was no evidence that his actions interfered with the integrity of the investigation.

Howard Industries (2015) 362 NLRB 35.

NLRB Requires Strict Interpretation of Collective Bargaining Agreement

The National Labor Relations Board (NLRB) reversed an arbitration panel's decision that found Verizon was right in telling workers to remove picket signs in windows of their cars parked on company property. An arbitration panel had found that the display of signs in employees' vehicles at three of Verizon's facilities amounted to picketing in violation of a provision of the union's collective bargaining agreement, but the NLRB disagreed, saying the employees were protected under the National Labor Relations Act (NLRA) and that the workers had not waived that right. The company and the union were parties to a collective bargaining agreement, which contained a "no strike" provision that prohibits union members from picketing on the company's premises. Union members, however, displayed picket signs in the windows of their personal vehicles in Verizon's parking lot while they were at work. Verizon instructed the union members to remove the signs and they complied. None of the union members were disciplined for displaying a sign and there was no evidence that the displays disrupted Verizon's operations at all.

The union filed unfair labor practice charges alleging that Verizon violated the NLRA by prohibiting employees from displaying signs in their vehicles. After the regional director deferred the cases to the parties' contractual grievance and arbitration process, the union members alleged that Verizon violated the contract by requiring removal of the signs. The arbitration panel denied the grievance, saying that the union members' actions amounted to picketing and that they waived their right to do so under the "no strike" provision in the contract.

In arriving at its decision, the Board stated, "The contractual provisions considered by the arbitration panel neither address nor reasonably encompass employees' display of signs in their personal vehicles, and there is no evidence that the parties intended the contract to cover that conduct. Accordingly, we find that it is 'clearly repugnant' to the Act, and that deferral to the award is inappropriate."

NLRB Reverses Arbitration Win In Verizon Sign Fight, Law360 (March 11, 2015), Kelly Knaub

NLRB —"English Only" Rule Unlawful

The NLRB ruled that a handful of Las Vegas area hospitals implemented several unlawful workplace rules, including one that forced employees to speak only English in most situations, saying the rule could impinge on their ability to communicate about workplace conditions. The NLRB held that the English-only rule was overly broad because it requires employees to speak only that language while on duty, when conducting business at the hospitals or with each other, and when patients or customers are present or nearby, rather than limiting the rule to immediate patient care areas only.

NLRB Judge Says Hospitals' 'English Only' Rule Unlawful, Law360 (March 20, 2015), Vin Gurrieri

OTHER

Judge find SpaceX not liable for defamation after executive called terminated employees "low performers"

A Los Angeles judge dismissed a defamation claim added to a lawsuit by former Space Exploration Technologies Corporation ("SpaceX") employees alleging they were not given sufficient notice under the California WARN Act before they were terminated. In response to the alleged WARN Act violation, SpaceX contended that the Act applies to layoffs, not performance-based terminations and the president of SpaceX called some of the employees "low performers" in a press conference. The employees contended that the president's comments could hurt them if future employers saw the press conference and discovered they were fired for their performance. In dismissing the claim, the judge noted that the president only called "some" of the employees "low performers" and questioned how the employees would divide themselves into adequate and inadequate performers.

Judge ponders defamation claim in employment class action, The Daily Journal (March 27, 2015), Matthew Blake.

IN THE TRENCHES

$15 Million Stripper Settlement for Alleged Labor Violations

A New York City strip club reached a settlement of up to $15 million with 2,200 dancers over wage-and-hour claims. The dancers claimed that some of their tips were given to club management, the "house mom," and DJ, and that the club set requirements for bathroom use, appearance, and attitude. The CEO of the club's parent company issued a statement hailing the settlement as in the best interest of its shareholders.

NYC Strip Club Pays Up To $15M To Settle Dancers' Wage Suit, Law360 (April 1, 2015), Matthew Bultman.

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$4 Million Jury Verdict for LAPD Officers' Discrimination and Retaliation Claims

A Los Angeles jury awarded $4 million dollars to two Latino LAPD officers who claimed that they face discrimination and retaliation after the fatal shooting of an unarmed, autistic black man in 2010. Although Chief Charlie Beck found that their use of deadly force was justified, the civilian Police Commission concluded that the shooting was unreasonable. Despite his finding, Chief Beck testified that the officers were "benched" because they were unfit to work in the field, as they made serious tactical errors prior to the shooting. The officers successfully claimed that they were "benched" at desk jobs after the shooting because of the controversy surrounding shootings of black citizens by non-black LAPD officers.

Two LAPD Officers awarded $4 million in discrimination lawsuit, Los Angeles Times (March 20, 2015), Veronica Rocha.

$1,290,391 Arbitration Award for Failure to Prevent Sexual Harassment

An arbitrator awarded $1,290,391 to an agricultural worker who claimed another employees sexually harassed her for ten years. The worker alleged that the company's sexual harassment policies and training were all inadequate, and that her harasser was promoted to her direct supervisor *after* she complained to management about his behavior.

Georgina Jimenez v. Reiter Berry Farms, LA Daily Journal, Verdicts and Settlements (March 20, 2015) JAMS.

$950,000 Settlement for JPMorgan Chase Underwriters' Overtime Claims

JPMorgan Chase Bank settled a proposed class action suit filed by San Diego loan modification officers who accused the bank of overwhelming them with work that they could not complete without overtime. The underwriters claimed that the bank had strict policies on overtime and punished employees who worked overtime without authorization, forcing them to work off-the-clock and through meal breaks to meet unrealistic quotas for processing loan applications.

JPMorgan Settles Calif. Underwriters' OT Suit For $950K, Law360 (April 2, 2015), Aaron Vehling.

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

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