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

# Labor and Employment Law Update

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***In This Issue***



## "WTF" Stands For "Where's the Fairness?" ... Sure It Does

The National Labor Relations Board (NLRB) ruled that AT&T could not lawfully prohibit workers from wearing buttons and stickers containing the phrase "Cut the Crap" or the abbreviation "WTF," despite AT&T's claims that they were too vulgar. The Board agreed with the judge who determined that wearing the buttons while on the job was okay because the buttons and stickers provided a non-profane, non-offensive interpretation on their face. While everyone knows that WTF is an acronym for "What the Fuck," the NLRB found these buttons to be non-offensive because the buttons provided "Where's the Fairness" as an alternate interpretation. Despite AT&T's further argument that it did not take issue with the word "crap" but with the way it was illustrated, the Board, in its ultimate wisdom, opined, "The color used on the word 'Crap' is orange and I am unable to tell

(continued on next page)

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if the word 'Crap' represents feces, cheese or Cheetos." The NLRB ordered AT&T to cease and desist the enforcement of the rule banning employees from wearing the questionable buttons and refusing to let them work until they removed them.

*Ban On 'Vulgar' Union Stickers, Buttons Unlawful, NLRB Says*, Law360 (June 3, 2015), Ben James.

## DISCRIMINATION

### CVS Pharmacy Accused of Racial Profiling

A group of former CVS Pharmacy loss prevention detectives have filed a class action claiming they were told to target black and Hispanic customers. The two representative plaintiffs alleged that CVS targets and racially profiles its black and Hispanic patrons based on a highly offensive, discriminatory and ill-founded belief that these minority customers are criminals and thieves. Rather than attempting to prevent shoplifting by individuals of all races equally, CVS allegedly directed the investigators to profile black and Hispanic customers. The plaintiffs allege that their supervisor said, "These black people are always the ones that are thieves, and Lots of Hispanic people steal here." When Plaintiffs complained to Human Resources and the head of loss prevention, no remedial action was taken. Then within weeks of complaining, the plaintiffs allege they were subjected to increased scrutiny by management and were later constructively discharged. Plaintiffs seek injunctive relief requiring CVS to end the profiling, and for monetary damages for constructive discharge/wrongful termination.

*CVS Hit With Racial Profiling Claims By Ex-Store Detectives, Suit Says,* Law360 (June 3, 2015), Y. Peter Kang.

### Marriott Hotel Accused of Pregnancy Discrimination

A California woman has accused Marriott International, Inc. of discriminating against her for being a surrogate mom, because the company prohibited her from taking lactation breaks even though other new mothers were allowed such breaks. The plaintiff, Mary Gonzales, has accused the Marriott of violating the federal Pregnancy Discrimination Act and the California Fair Employment and Housing Act (FEHA). Initially, the hotel did allow Gonzales, a surrogate mom, to take lactation breaks, while she was providing the milk to child she had most recently carried. However, the hotel forced her to use her lunch break to lactate after she stopped giving the expressed milk to the family and began donating the milk to other mothers who could not produce enough of their own. The Marriott claims that Gonzales was no longer entitled to the lactation break accommodation, because she was no longer pumping for the purpose of "feeding a child at home." Gonzales's complaint alleges this is an impermissible distinction between "legitimate motherhood" and "surrogate motherhood."

*Marriott Has A Bias Against Surrogate Moms, Suit Says*, Law360 (May 6, 2015), Aaron Vehling.

### Caution: English-Only Policy May Lead To a Discrimination/Bias Lawsuit

Fourteen drivers, dispatchers and cleaners filed a discrimination lawsuit against their employer Gate Gourmet, Inc. for instituting an "English-only" policy, forbidding them to speak Spanish while they worked servicing airplane cabins at LAX. The employees claim that their evening shift manager threatened and harassed them for speaking Spanish on the job. The employees claim they were never given clear notice of the consequences of violating the policy, and that the other

shifts did not have such a policy. The complaint alleges employees who only speak Spanish are afraid to speak to coworkers for fear of discrimination, harassment, humiliation and discipline. The employees allege the policy violates FEHA because it serves no legitimate business need and because less discriminatory measures, such as employing bilingual dispatchers, are available. Gate Gourmet denies the allegations and claims: (1) they do not have an English-only policy; (2) they are proud of their ability to integrate non-English speakers into the workforce; and (3) that all policies and procedures are delivered in both English and Spanish.

*Airline Janitors File Bias Suit Over 'No Spanish' Rule,* Law360 (May 8, 2015), Jody Godoy.

**Barnes & Noble Sued For Transgender Bias**

A transgender former employee has sued Barnes & Noble for alleging that she was prevented from identifying as a woman as work, was harassed for being transgender, and was fired when she complained. Victoria Ramirez claims that her boss wouldn't allow her to present as a woman at work and that when the company finally recognized her as a woman, it placed humiliating restrictions on her, such as forbidding her from using the woman's bathroom in the store, prohibiting her from talking about her transition, and restricting her from wearing skirts. Ramirez alleges that when she complained to a higher ranking manager, he did nothing about the supervisor's behavior, and she did not complain again for fear of retaliation. Ramirez seeks damages on 14 counts including discrimination, failure to prevent retaliation, wrongful termination and other violations.

*Barnes & Noble Hit With Transgender Bias Suit*, Law360 (May 11, 2015), Aaron Vehling.

## HARASSMENT

**Sexual Harassment—FEHA Protections Extend to a Person Who Worked For An Employer That Provided Services To A City Pursuant To A Contract**

The California Court of Appeal held that the protections of the Fair Employment Housing Act (FEHA) extend to a person who is providing services as an independent contractor at the employer's business. Here, Plaintiff Hirst was providing phlebotomist services to the City pursuant to a contract the City had with Hirst's employer, American Forensic Nurses, Inc. The Court opined, "There is no basis ... to preclude recovery for an individual who provided services under a contract merely because he or she is also employed by a separate entity with respect to the work performed." A jury awarded Hirst $1.25 million in damages.

*Hirst v. City of Oceanside* (2015) ___ Cal.App.4th ___.

## WRONGFUL TERMINATION

**Target Corporation Accused of Wrongfully Terminating Employees For Requesting or Taking Military Leave**

A pair of former employees has sued Target Corporation alleging that they were wrongfully terminated in response to having given notice that their Air Force Reserve and National Guard duties required extended leave from the company. Both plaintiffs claim the company justified their terminations with allegations of misconduct that never happened. Rhodes, the Air Force reservist, claims she was fired after being questioned about allegedly berating an employee and threatening that employee with termination.

She denied the allegation during the inadequate investigation which was conducted on the same day she was terminated. Drawdy, the National Guard reservist, claims that he was fired after being questioned about allegedly wrestling with another employee and the use of profanity. He denied the allegation and also alleges that no significant investigation was conducted prior to his termination.

*Target Accused Of Firing 2 Workers Over Military Deployments*, Law360 (May 14, 2015), Bryan Koenig.

## WAGE AND HOUR

**Unpaid Interns: The Latest Group Cashing In On Wage-and-Hour Class Action Litigation**

NBC Universal Inc. has settled a putative and collective class action filed by former unpaid interns for $6.4 million. The interns worked at MSNBC and Saturday Night Live. Many of the interns initially objected to the settlement because their payment of approximately $500 under the terms of the settlement works out to less than $1.89 per hour, which is far below the minimum wage. In arguing against the class action, however, one former intern points out that "NBC has opened many doors for me after my internship. I think this case is unfair." The settlement covers nearly 8,000 former unpaid interns.

*NBCUniversal Gets Nod For $6.4M Unpaid Intern Deal,* Law360 (June 3, 2015), Aaron Vehling.

## LABOR/UNION

**Employer May Not Refuse To Bargain With A Union Despite 24-Years Of Inactivity.**

The California Court of Appeal held that an employer had no right to refuse to bargain and must resume bargaining with a union despite 24 years of inactivity. The Court reasoned that once a union becomes the employees' bargaining representative, a mutual duty to bargain in good faith is created. Therefore, unless the union disclaims interest or becomes defunct, the duty to bargain in good faith continues until the union is replaced or decertified. Moreover, the Agricultural Labor Relations Act indicates that the employees, not the employer, decide whether or not it shall bargain with the union. Thus, inactivity and abandonment are not valid defenses to a current request to bargain by the same union.

*Tri-Fanucchi Farms v. Agricultural Labor Relations Board (United Farm Workers of America),* (2015) ___ Cal.App.4th ___.

## OTHER

**Los Angeles City Council Gives Initial Approval of Proposal to Increase Minimum Wage to $15 Per Hour by 2020.**

In a 14-1 vote, the City Council passed the proposal, which will require businesses to increase minimum wage between now and 2020. The Ordinance will go into effect in 2106, and will require businesses to begin gradually increasing minimum wage in steps: $10.50 on July 1, 2016, then increasing to $12, $13.25, $14.25 and $15 each July 1st until 2020.

For businesses with fewer than 25 employees, the increases will follow the same pattern, but will start a year later in 2017. The proposal has been sent to the city attorney's office, where the ordinance will be drafted, voted on one more time and signed into law later in the year.

*LA Latest, Largest City To Move To $15 Minimum Wage*, Law360 (May 19, 2015), Daniel Siegal.

## IN THE TRENCHES

### $11 Million Wage and Hour Class Action Settlement For Drivers

Shippers Transport Express and SSA Marine Inc. will pay $11 million to settle a wage and hour class action with approximately 540 drivers in the Port of Los Angeles. The class accused Shippers Transport of misclassifying them as independent contractors which deprived them of overtime pay. The class also accused the company of deducting business expenses from the driver's pay.

*LA Port Truckers Reach $11M Wage Deal*, Law360 (May 11, 2015), Kat Greene.

### $9 Million Wage and Hour Class Action Settlement Paid by Bank of America

A class of part time employees settled a wage-and-hour class action with Bank of America for $9 million. The class accused B of A of knowingly scheduling part-time employees for more hours than they were supposed to work. This resulted in plaintiffs and others not being paid appropriate wages, including but not limited to vacation time and other paid time off. The class asserted claims for failure to pay accrued wages upon termination, failure to pay overtime, missed meal breaks, waiting time penalties, and failure to provide accurate wage statements. B of A asserted that all plaintiffs received proper vacation pay and other paid time off, and agreed to settle for $9 million.

*Sheri Garibaldi, on behalf of herself and others similarly situated v. Bank of America,* LA Daily Journal, Verdicts and Settlements (May 15, 2015) U.S. District Court for the Northern District of California, Case Number, 3:13-cv-02223-SI.

### $7.8 Million Wage and Hour Class Action Settlement Paid by Chinese Daily News Inc.

A Chinese-Language newspaper has settled a nearly 10-year old wage-and-hour class action for $7.8 million. The class alleged failure to pay overtime wages, failure to provide meal and rest breaks, and failure to provide itemized pay stubs.

*Newspaper Pays $7.8M To End Decade long OT Class Dispute,* Law360 (May 13, 2015), Y. Peter Kang.

### $3.3 Million Jury Verdict for Whistleblower Retaliation and Defamation

Plaintiff Archie Roundtree won a $3,335,840 verdict against LA Unified School District, the school principal and assistant principal, for whistleblower retaliation and defamation. Roundtree, a veteran ROTC instructor at an LA high school, informed the principal that the ROTC program was operating in violation of federal law. Three days later, the principal received an anonymous complaint against Roundtree and reported his conduct to the Air-Force. Roundtree's 15-year ROTC certification was revoked following the accusation and submission of an unsatisfactory performance evaluation submitted by the school district.

Roundtree sued LA Unified School District, the principal, and two assistant principals for defamation, tortious interference with contractual relations, and retaliation. The jury found in favor of Roundtree on the whistleblower retaliation action and defamation actions against the principal and other administrators.

*Archie Roundtree v. Los Angeles Unified School District, et al.,* LA Daily Journal, Verdicts and Settlements (May 8, 2015) Los Angeles Superior Court Case No.: BC 499893.

**$1.3 million Verdict for National Origin Discrimination**

After nearly 2 decades of working for the employer, Plaintiff Ortiz was terminated without notice for poor performance. Plaintiff brought claims that he was fired because of his age, race, and national origin, and for failure to accommodate his disability. He alleged a history of discrimination by the employer, and that he was from Ecuador, while the employer favored Danish employees. Plaintiff, who also suffered from back injuries, alleged that the employer discriminated against him for his disability. The jury found in plaintiff's favor on the national origin discrimination claim and awarded him 1.3 million.

*Carlos Ortiz v. Reson A/S, et al.,* LA Daily Journal, Verdicts and Settlements (May 16, 2015) Santa Barbara Superior Court Case No.: 1385278

**$1.2 Million Verdict for Retaliation / Wrongful Termination**

Plaintiff Elaine Allyn won a $1.2 million verdict against the Fallbrook Union Elementary School District for retaliation and wrongful termination. Allyn, the former director of educational technology for the school district, contended that her supervisors directed her to wipe out the Districts entire electronic imaging from its email archives after they became aware of pending investigations. Allyn refused, citing record retention laws and the District's own 3 -year retention policy. After being threatened with insubordination, she took the archive server off line. When she was unable to produce emails requested by investigator, she reported what she had been directed to do. The District placed her on administrative leave and later terminated her. The District contended that she was terminated for hacking into the computer system and prying into employee files.

*Elaine Allyn v. Fallbrook Union Elementary Union School District,* LA Daily Journal, Verdicts and Settlements (May 29, 2015) San Diego Superior Court Case No.: 37-2012-00054069-CU-WT-NC.

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

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## Presentations

We are also available to present on various topics, including:

- The Limitations of AB 646 Post Impasse Procedures
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