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— Labor & Employment Law —

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CONFIDENTIAL
CLIENT LABOR & EMPLOYMENT LAW UPDATE

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Hello everyone:

Following are brief reviews of recent labor and employment related cases and articles of interest. Click on the link of any case or article of particular interest for all the details, and feel free to contact us if you have any questions or comments.

I. DISCRIMINATION

1. **Disability Discrimination – HIV-Positive Patient** – The California Court of Appeal held that an anesthesiologist's refusal to perform medically necessary surgery on an HIV-positive patient is discrimination. The court reiterated that a person with HIV is disabled as a matter of California law; it is not for the jury to decide whether she is disabled or not.

   Maureen K. v. Tuschka (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/B236150.PDF

II. RETALIATION

2. **Retaliation – Reasonable Belief** – The Ninth Circuit Court of Appeals held that an employee's retaliation claims should not be dismissed if she reasonably believed she was subject to sexual harassment, even if the evidence did not support that she was sexually harassed. The employee claimed she was fired in retaliation for complaining about sexual harassment. To prove retaliation, an employee must show she engaged in protected activity which caused her to suffer a materially adverse action. An employee engages in protected activity when she either opposes an illegal employment practice or a practice that she reasonably believes is illegal. The court found that since the evidence could support the employee's reasonable belief that she was subject to sexual harassment, her complaints about that conduct would be a protected activity.

   Westendorf v. West Coast Contractors of Nevada Inc. (April 1, 2013, Ninth Cir.) ___ F.3d ___.
   http://cdn.ca9.uscourts.gov/datastore/opinions/2013/04/01/11-16004.pdf

III. WAGE/HOUR LAW

3. **FLSA – Standing to Sue** – The US Supreme Court held that an employee bringing a lawsuit under the Fair Labor Standards Act of 1938 ("FLSA") must have a personal stake in the outcome of the action. The employee, a former nurse, filed a collective action against her employer for not providing meal breaks (no other employees joined her action). Her employer offered her judgment on her claims in the form of unpaid wages and attorney fees, which she never responded to. The court found that the employer's offer of judgment would have satisfied the nurse's individual claim in the case. Since no other employees joined the lawsuit, the action became moot once her personal interest in the case was satisfied, and the entire collective action under the FLSA was thus properly dismissed as "non-justiciable" for lack of subject-matter jurisdiction.

   Genesis Healthcare Corp. v. Symczyk (2013) ___ U.S. ___.
   http://www.supremecourt.gov/opinions/12pdf/11-1059_5ifl.pdf

4. **Unpaid Time – Security Screenings** – The Ninth Circuit Court of Appeals held that warehouse employees may file a class action under the Fair Labor and Standard Act ("FLSA") to recover wages for unpaid time spent undergoing security screenings before leaving work each day. Employees' preliminary and postliminary activities are compensable under the FLSA if they are "integral and indispensable" to the employees' principal activities. "Integral and indispensable" activities must be necessary to the principal work performed and for the benefit of the employer. The court found that the screenings could be compensable: since the screenings were conducted in order to prevent employee theft, they were necessary to the employees' primary work as warehouse employees and performed for the employer's benefit.

   Busk v. Integrity Staffing Solutions Inc. (April 12, 2013, Ninth Cir.) ___ F.3d ___.
   http://cdn.ca9.uscourts.gov/datastore/opinions/2013/04/12/11-16892.pdf

IV. LABOR/UNION LAW

5. **LA Attorney Nominated for NLRB** – President Obama announced he will nominate two Republican management-side attorneys to join the National Labor Relations Board ("NLRB"), including Harry I. Johnson III, a partner with Arent Fox LLP in Los Angeles. The Board is currently composed of three Democrats: a chairman and two recess appointees added in early 2012 (who President Obama recently nominated as well). If the two Republicans are approved, they would serve as minority members on the Board. The NLRB currently faces a tremendous amount of uncertainty: more than a year's worth of Board decisions are in doubt after the D.C. Court of Appeals held in January 2013 that the recess appointments were unconstitutional. These decisions may have to be reconsidered by the newly appointed Board. Observers note that although the new Board would likely reaffirm many of the contested Board's unpopular decisions, the Republican minority would provide slightly more moderation to the proceedings.

Obama Nominates Los Angeles Management Partner to NLRB, LA Daily Journal (April 10, 2013), Laura Hautala.

V. PUBLIC EMPLOYERS LAW

6. **Scope of Employment – Personal Malice** – The California Court of Appeal held that the County of Fresno was not liable for a correctional officer's use of inmates' personal information in the County's computer system as part of a personal vendetta unrelated to his work. The officer used the inmates' information to intimidate a person suing him for an off-duty car accident. Although an employer may be liable for an employee's willful, malicious, or criminal actions if they fall within the scope of his employment (even if the employer did not authorize these actions), there must be a connection between his actions and his work. If the employee acts out of personal malice unrelated to his job, he is not acting within the scope of his employment and his employer is not liable for his actions.

   Perry v. County of Fresno (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/F063887.PDF

7. **Arbitration Advice – Independent Legal Counsel** – The California Court of Appeal held that when a partner in a law firm represents a city department at an advisory arbitration regarding an employee's termination, the city council cannot be advised by a different partner of the same firm on the correctness of the arbitrator's decision. Although the employee was terminated by the city, the arbitrator changed the employee's discipline from termination to suspension. However, after consulting with the advisory partner, the city council rejected the arbitrator's decision and made the employee's termination final. The court found that since the partners owed each other the fiduciary duties of loyalty and care, the risk of the advisory attorney providing biased advice and tainting the decision-making process was too high to be acceptable.

   Sabey v. City of Pomona (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/B239916.PDF

8. **Stockton Bankruptcy Places CalPERS Payments at Risk** – The City of Stockton's decision to enter Chapter 9 bankruptcy could threaten its payments to the California Public Employees' Retirement System ("CalPERS") and set a harmful precedent for public pension funds. Although California law prohibits changes to public pension agreements, the City's huge pension obligations (approximately $900 million) may necessitate a deal to reduce its payments. Observers note that if CalPERS were to challenge a reduction in payments, the court may side with Stockton, since "the point of bankruptcy proceedings are to allow contracts to be modified, and . . . California . . . has developed a theory that pension rights are essentially contracts."

   Stockton Bankruptcy Could Settle Pension, Chapter 9 Questions, LA Daily Journal (April 9, 2013), Paul Jones.

VI. POLICE

9. Civil Rights – False Statements – The Ninth Circuit Court of Appeals held that a former suspect could sue the City of Los Angeles for false arrest, false imprisonment, and malicious prosecution in federal court, even if a state court previously held that the City had probable cause to detain him. The plaintiff alleged that his arresting police officer lied during his preliminary hearing for attempted murder, and the state court found probable cause based on this false testimony (the plaintiff was later acquitted by a jury). The lower court dismissed the plaintiff's claims, ruling that he would have to relitigate probable cause, which had already been decided. The Ninth Circuit disagreed; although California law bars retrial if the issue sought to be relitigated was decided in a prior action, this rule does not apply if the plaintiff alleges the arresting officer lied at the preliminary hearing

Wige v. City of Los Angeles (April 16, 2013, Ninth Cir.) ___ F.3d ___.
http://cdn.ca9.uscourts.gov/datastore/opinions/2013/04/16/10-56515.pdf

VII. OTHER

10. Conviction – Stealing Client Lists – A federal jury found an executive recruiter guilty of conspiring to steal trade secrets and hacking, after he used unauthorized access into his ex-employer's database to obtain information about prospective clients for a rival executive search firm he started. The recruiter directed employees at his former firm to log in to its database and download client lists for him; he unsuccessfully argued that these employees were allowed to access the database, making the hacking claims invalid.

Federal Jury Convicts Former Recruiter of Violating Anti-Hacking Law, LA Daily Journal (April 25, 2013), Hadley Robinson.

VIII. "In the Trenches" (The Blow by Blow of Active Court Cases)

11. $6,500,000 Verdict – Wrongful Death – A Central District jury awarded $6.5 million in damages to the family of a man shot by Long Beach police officers. The decedent had a blood alcohol level of .42 and was sitting on his porch holding a water nozzle. The police, who never announced their presence or gave a warning, observed him for eight minutes before shooting him (the plaintiffs contended that the decedent was too drunk to realize the police were there). The City unsuccessfully argued that the Los Angeles County District Attorney determined it was a justified shooting and that the officers believed they were under threat of immediate harm.

Zerby v. City of Long Beach, LA Daily Journal, Verdicts & Settlements (April 19, 2013), C.D. California Case No.: 2:11-cv-06379-AG-RNB.

12. **$2.5 Million Verdict – Age Discrimination** – A Los Angeles jury awarded $2,563,630 to two Union Bank employees for their age discrimination and wrongful termination claims. The employees, aged 66 and 53, claimed their manager made frequent comments about wanting "younger sales people." After they were terminated, one of the employees was replaced by a 25 year old.

    Behar v. Union Bank, LA Daily Journal, Verdicts & Settlements (May 3, 2013), Los Angeles Superior Court Case No.: BC427993.

13. **Dismissal – Union Representative Compensation** – A North District court dismissed a lawsuit brought by the National Union of Healthcare Workers ("NUHW") against Kaiser Permanente, claiming Kaiser improperly favored the incumbent union, Service Employees International Union ("SEIU") by paying salaries and benefits to SEIU representatives for time spent campaigning before an election. Although NUHW was hoping to displace SEIU through the election and represent Kaiser employees, SEIU won the election. Although NUHW argued that Kaiser and SEIU's conduct interfered with employees' free choice, the court acknowledged that Kaiser paid SEIU employees for their time campaigning only because it was included in the collective bargaining agreement with the union.

    National Union of Healthcare Workers v. Kaiser Foundation Health Plan Inc., LA Daily Journal, Verdicts & Settlements (May 3, 2013), N.D. California Case No.: 3:10-cv-03686-WHA.

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

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