THE ZAPPIA LAW FIRM, A Professional Corporation

– Labor & Employment Law –
Defending Employers Rights

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CONFIDENTIAL
CLIENT LABOR & EMPLOYMENT LAW UPDATE

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Hope you all had a great Labor Day weekend.

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. **FEHA Claims – Prevailing Employers' Costs** – The California Court of Appeal held that an employer who prevails against an employee's discrimination claims under the Fair Employment and Housing Act ("FEHA") may recover ordinary litigation costs, even if the employee's lawsuit was not frivolous, unreasonable or without foundation. While a California employer may only recover attorney or expert witness fees if a lawsuit is frivolous, unreasonable, or without foundation, the court determined that this principle does not extend to the ordinary costs of litigation (such as an initial appearance fee, deposition fees, and motion fees).

   Williams v. Chino Valley Independent Fire District, (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/E055755.PDF

II. WAGE /HOUR

2. **PAGA – Federal Jurisdiction** – The Ninth Circuit Court of Appeals held that employers may not combine the value of employees' claims under California Private Attorney General Act ("PAGA") in order to obtain federal court jurisdiction, making it more difficult to remove such claims from the plaintiff-friendly state courts. Under PAGA, an employee may sue his employer in state court on behalf of himself and other employees for Labor Code violations if the state agency declines to investigate an alleged complaint. An employer may then remove the case to

federal court if the matter "exceeds the sum or value of $75,000." In this case, while the value of the individual plaintiff's claim was $11,602, the aggregation of other employees' claims would be more than $400,000. Nevertheless, the court concluded that since each employee's injury was unique and could be redressed without the involvement of other employees, aggregation of claims was improper and the federal court did not have jurisdiction over the claim.

Urbino v. Orkin Services of California, Inc., (August 13, 2013, Ninth Cir.) ___ F.3d ___. http://cdn.ca9.uscourts.gov/datastore/opinions/2013/08/13/11-56944.pdf

III. LABOR/UNION LAW

3. **NLRA Violation – Collective Bargaining** – An administrative law judge with the National Labor Relations Board held that an East Bay hospital violated the National Labor Relations Act ("NLRA") by unilaterally implementing terms and conditions of employment during collective bargaining negotiations with the nurses' union. During negotiations, the hospital claimed that it would need to reduce nurses' compensation and benefits due to the passage of the Affordable Care Act. When the union asked the hospital to provide information that would substantiate this claim, the hospital refused to provide the information, declared impasse, and unilaterally implemented the cuts. The judge ordered the hospital to rescind the unilateral changes, provide the information requested, and continue bargaining with the union.

   Sutter East Hospitals dba Sutter Delta Medical Center and California Nurses Association, LA Daily Journal, Verdicts & Settlements (August 9, 2013), NLRB Case No.: 20-CA-093609.

4. **NLRB Judge Holds Company Hat Policy is Unlawful** – An administrative law judge with the National Labor Relations Board ("NLRA") held that an employer's policy prohibiting baseball caps other than those with the logo of its parent company was a violation of the National Labor Relations Act. The judge also held that the employer could not tell an employee that he was being reassigned due to his social media activities.

   World Color (USA) Corp., A Wholly Owned Subsidiary Of Quad Graphics, And Graphics Communications Conference Of IBT Local 715-C, LA Daily Journal, Verdicts & Settlements (August 23, 2013), NLRB Case Nos.: 32-CA-062242, 32-CA-063140.

IV. POLICE

5. **No Qualified Immunity** – The Ninth Circuit Court of Appeals held that Santa Barbara Sheriff's Deputies were not entitled to qualified immunity for shooting and killing a terminally ill man who was carrying a pistol in one hand while holding a walker in the other. The deputies were dispatched to the decedent's residence for a domestic disturbance involving a firearm after his wife called 911. In order to invoke qualified immunity against an excessive force claim, the officers must have acted in response to an objective, immediate threat to the safety of themselves or others. The court determined that the facts indicated that the decedent did not pose an immediate threat: he was not pointing the gun at the officers and the fact that a suspect is armed

with a deadly weapon does not render the officers' response per se reasonable. The court also noted that although the deputies were responding to a domestic disturbance, the dispute seemed to be over when the officers arrived and therefore concerns about their safety were "less salient."

George v. Morris, (July 30, 2013, Ninth Cir.) ___ F.3d ___.
http://cdn.ca9.uscourts.gov/datastore/opinions/2013/07/30/11-55956.pdf

6. **Officer Liability – Tactical Conduct and Decisions** – The California Supreme Court held that peace officers' tactical conduct and decisions preceding the use of deadly force may be considered when determining whether the use of deadly force gives rise to negligence liability. After a suicidal man was shot to death in his home by San Diego County deputies the family sued, claiming that the deputies failed to properly assess the situation beforehand. The court noted that officers may be liable "if the tactical conduct and decisions show, as part of the totality of circumstances, that the use of deadly force was unreasonable."

Hayes v. County of San Diego, (2013) ___ Cal.4th ___.
http://www.courts.ca.gov/opinions/documents/S193997.PDF

7. **Whistleblowing – First Amendment Protection** – The Ninth Circuit Court of Appeals held that a police officer who goes outside the chain of command to report alleged misconduct may be protected by the First Amendment. While speech made pursuant to a public employee's duty is not protected by the First Amendment, speech made by an employee as a private citizen enjoys protection. Although a previous Ninth Circuit decision held that officers' whistleblowing is not protected by the First Amendment since California police have a legal duty to report misconduct, the court overruled this broad proposition. Since the whistleblowing officer disclosed his information outside the police department to internal affairs, his union, and ultimately the Los Angeles Sheriff's Department, the court found that his disclosure was not within his job duties and could be protected under the First Amendment. The court also noted that being placed on administrative leave may qualify as an adverse employment action depending on the circumstances.

Dahlia v. Rodriguez, (August 21, 2013, Ninth Cir.) ___ F.3d ___.
http://cdn.ca9.uscourts.gov/datastore/opinions/2013/08/21/10-55978.pdf

V. OTHER

8. **Scope of Employment – Holiday Party** – The California Court of Appeal held that an employer, the Marriott Del Mar, may be liable for torts committed by an employee who got drunk at the annual holiday party. The company holiday party was an optional event where attendees were given two drink tickets for beer or wine. The employee, a bartender at the hotel, drank before the party and brought a flask of whiskey to the event. He was driven home from the party by a coworker and consumed no more alcohol. After deciding to leave his house to drive another colleague home, the employee rear-ended another car, killing its driver. The court found that the employee's actions could be within the scope of his employment since the purpose

of the party was to improve employee morale and employees had Marriott's express permission to drink alcohol at the event. Even though the accident did not occur while the employee was going or coming from the party, the court noted that the proximate cause of the accident, the employee's intoxication, occurred at the party. The court concluded that the employer could have lessened the risk by prohibiting smuggled alcohol, serving drinks for a limited period of time, or by forbidding alcohol completely.

Purton v. Marriott Intl. Inc., (2013) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/D060475.PDF

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

9. **$3.5 Million Class Settlement – Overtime Compensation** – A class of current and former steel plant workers settled with their employer over claims of wage and hour violations. The employees alleged that their employer denied overtime compensation, refused to authorize meal and rest periods, failed to supply itemized wage statements, and neglected to pay terminated employees in a timely fashion.

   Cordy v. USS-Posco Industries, LA Daily Journal, Verdicts & Settlements (August 9, 2013), US District Court- N.D. Cal. Case No.: 2:10-cv-8458.

10. **$3.25 Million Verdict – Discrimination** – A Los Angeles jury awarded $3,250,000 to a City of Los Angeles gardener for disability and racial discrimination. The gardener, who was 63 years old and white, claimed he had been forced to retire after a pattern of discrimination and harassment by his supervisors due to his racial background, age, and disability (which stemmed from an injury he suffered on the job).

    Duffy v. City of Los Angeles, LA Daily Journal, Verdicts & Settlements (August 23, 2013), Los Angeles Superior Court Case No.: BC454369.

11. **$1.96 Million Verdict – Failure to Prevent Harassment** – A Sacramento jury awarded $1,967,806 in damages to an employee who claimed she was discriminated against and wrongfully terminated following the investigation of a sexual harassment complaint filed against her by a male supervisor. The plaintiff successfully contended that the sexual harassment complaint was fabricated and part of an ongoing campaign of harassment and discrimination orchestrated by several of her superiors. Her employer unsuccessfully argued that the plaintiff was fired as part of its policy to prevent sexual harassment in the workplace.

    Angel v. Sutter Health, LA Daily Journal, Verdicts & Settlements (August 23, 2013), Sacramento Superior Court Case No.: 34-2009-00055279.

12. **Defense Verdict – Sexual Harassment** – A Los Angeles jury held for the defendant employer against a former employee's lawsuit that his termination was pre-textual and that he was fired for rebuffing the sexual advances of a superior. The employer successfully contended that the employee was fired for coming in late while on company probation and that he never reported any alleged harassment to management, even though the telephone numbers of the appropriate contacts were in the employee handbook.

    Hall v. Skateland Enterprise Inc., LA Daily Journal, Verdicts & Settlements (August 16, 2013), Los Angeles Superior Court Case No.: BC458871.

13. **Defense Verdict – Search and Seizure** – A Los Angeles jury held that County of Los Angeles deputies did not commit an illegal search and seizure by searching an arrestee's home and car for drugs. After the deputies observed the plaintiff holding a large bag of marijuana outside his house, they arrested him and recovered another bag of marijuana from his car. The deputies then searched the plaintiff's home, where they confiscated marijuana plants and other drug-related items. The deputies successfully argued that they had probable cause to search the plaintiff's home since one of its occupants was on formal probation for narcotics violations.

    Simpson v. County of Los Angeles, LA Daily Journal, Verdicts & Settlements (August 16, 2013), Los Angeles Superior Court Case No.: TC025257.

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

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