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- Labor and Employment Law -
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Labor and Employment Law Update

December 2013

Happy New Year Everyone!

We hope you all had a great holiday season, and we send best wishes as we head into 2014!

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

"In the Trenches"

Recent Verdicts and Settlements

$160,000,000 Settlement for Racial Bias

Merrill Lynch agreed to a $160 million settlement with a class of 700 black stockbrokers over racial bias claims, the largest settlement for plaintiffs in a racial discrimination suit against an American employer to date. The brokers claimed that black employees were steered into clerical positions and lucrative accounts were reserved for white brokers, resulting in lower pay and limited career advancement for the plaintiff brokers.

B of A's Merrill Wins

Even Where The Evidence of Disqualification is Discovered After the Fact, an Unqualified Applicant May Not Pursue a Discrimination Lawsuit After Being Denied a Position

The California Court of Appeal held that an unsuccessful applicant for a union organizer position previously convicted of a narcotics-related felony was unqualified for the job, and dismissed the applicant's racial discrimination lawsuit. After the applicant, an African-American union member, was denied the position, he sued the union for racial discrimination. During discovery for this lawsuit he admitted that he had a prior conviction for a narcotics-related felony. Although the union was unaware of this conviction when he had applied for the job, it argued that the applicant was barred from serving as a union organizer by federal law due to his conviction. A party alleging discrimination via failure-to-hire must first show he was qualified for the position. Because federal law dictated that the applicant could not serve as a union organizer the applicant was not qualified for the position. The union was entitled to present evidence that the applicant was unqualified for the position, even if it discovered this evidence after it made the decision not to hire the applicant. Because the applicant was unqualified for the position, the court dismissed his discrimination lawsuit.

Final Approval of Race-Bias Suit Accord, BusinessWeek (December 6, 2013), Andrew Harris.

$4,700,000 Settlement for Wage-and-Hour Violations

An employer operating a warehouse facility on behalf of Walmart settled for $4.7 million with a class of employees over alleged wage-and-hour violations. The employees alleged that their employer improperly implemented and made false representations about an alternative workweek schedule. The employees also contended that their employer did not maintain proper records, failed to provide rest and meal breaks, and unlawfully deducted time for lunch breaks.

Quezada v. Schneider Logistics Transloading and Distribution Inc., LA Daily Journal, Verdicts & Settlements (December 27, 2013) US District Court - C.D. California Case No.: 2:12-cv-02188-CAS-DTB.

Horne v. IUPAT District Council 16 (2013) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/A135470.PDF

Job Requiring Employee to Live Apart From Family During the Week is Not Substantially Similar to Old Position and May Not Be Used to Mitigate Damages

The California Court of Appeal held that a wrongfully terminated employee's new job, which required him to rent a room apart from his family during the week, was not substantially similar to his former job, and the wages from this new job could not mitigate the damages he was entitled to. A wrongfully discharged employee is entitled to recover the salary he would have earned, minus any amount earned in mitigation from employment "comparable, or substantially similar, to that which the employee has been deprived." If the new job is different or inferior, the wages from that job may not be used to mitigate damages. Although the employee's new job provided a similar position and salary, a jury could reasonably find that this job was inferior to his old position because of the burden placed on him by the location of the job (not seeing family on weekdays and having to pay for a second residence).

Villacorta v. Cemex Cement Inc. (2013) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/E054329.PDF

Employer Appealing Labor Commissioner's Wage Award Must First Post Bond Within 10 Days of Award

The California Court of Appeal held that an employer appealing a wage award by the Labor Commissioner in superior court must first post an undertaking (a bond in the amount of the Commissioner's award) before his notice of appeal is filed. The court concluded that the posting of an undertaking is a prerequisite for an employer to appeal the Commissioner's decision. If an employer wishes to appeal, he must do so (and post an undertaking beforehand) within ten days of the Commissioner's award; this is a jurisdictional deadline that cannot be extended by the trial court.

Palagin v. Paniagua Construction, Inc. (2013) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/A137754.PDF

Public Agency Does Not Have to Provide

$2,000,000 Verdict for Excessive Force Shooting Death

A Central District jury awarded $2 million in damages to the parents of a man who was killed by a Los Angeles County Sheriff's Deputy. The decedent, who had methamphetamine in his system, was walking down the street and ran into a nearby carport when he saw the deputy during a routine patrol. After the deputy followed him into the carport, the decedent was shot and killed (there were no third-party witnesses to the shooting). The plaintiffs successfully argued that evidence (including blood evidence and the back-to-front trajectory of the bullets that struck the decedent) indicated that the decedent was running away from the deputy when he was shot. The deputy claimed that the decedent was lunging at him with a knife when he fired in self-defense.

Gutierrez v. County of Los Angeles, LA Daily Journal, Verdicts & Settlements (December 20,

Investment Records It Did Not Prepare, Own, or Retain

The California Court of Appeal held that the Regents of the University of California did not have to provide records to Reuters America regarding returns on individual private equity funds under the California Public Records Act ("CPRA") that the University did not prepare, own, use, or retain. Public records are "documents prepared, owned, used, or retained" by a public agency. Since the private equity firm in question did not provide the Regents with information on specific funds' performance, this information was not a public record and the Regents were under no obligation to obtain it from the private equity firm. Reuters unsuccessfully argued that the information was a public record since it related to "the conduct of the public's business."

The Regents of the University of California v. Reuters America LLC (2013) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/A138136.PDF

ERISA Plan May Set Statute of Limitations for a Participant to File for Judicial Review

The United States Supreme Court held that an employee benefit plan covered by the Employee Retirement Income Security Act of 1974 ("ERISA") may set a statute of limitation for a participant to pursue judicial review of the plan's denial of coverage as long as it is reasonable and lawful. ERISA plan participants may not file suit until the plan's administrative review is completed; this process requires the participant to submit proof of loss before a final decision is made. The court held that a group long-term disability plan could require participants to bring suit within three years after "proof of loss" is due, even if less than three years had elapsed after the administrative review was complete. The plan participant unsuccessfully argued that the three-year limitation period ran afoul of the general rule that statutes of limitation commence upon accrual of the cause of action (the final decision of the administrative review).

Heimeshoff v. Hartford Life & Accident Insurance Co. (December 16, 2013) ___ U.S. ___.
http://www.supremecourt.gov/opinions/13pdf/12-729_q8l1.pdf

An Officer Who Cannot Perform the 14 "Critical Activities" Required of All Officers is Entitled to Disability Retirement from His Prior Position, Even

2013), US District Court - C.D. California Case No.: 2:10-cv-07608-PSG-AJW.

$1,904,635 Verdict for Failure to Accommodate

A Los Angeles jury awarded $1,904,635 in damages to a former Los Angeles bus driver for his disability discrimination claims. The bus driver, who was terminated for incurring eight chargeable absences over his four years of employment, was 66 years old and suffered from gout, diabetes, cataracts, and a hip condition.

He successfully contended that he fully informed his employer of the reasons for his absences before he was fired. The driver also claimed that although some of his absences were protected under the California Family Rights Act, his employer failed to designate these absences as protected. The employer unsuccessfully contended that it was unaware of the drivers' disabilities and he failed to request an accommodation or engage in the interactive process.

Though the Officer Can Perform the "Usual Duties" of His Current Position

The California Court of Appeal held that a California Highway Patrol ("CHP") officer who could not complete the "14 critical activities" required of all officers was entitled to disability retirement, even if his disability did not preclude him from carrying out the duties of his most recent position. After the officer injured himself while on duty, he began work as a Public Affairs Officer ("PAO") for CHP. Although work as a PAO did not include a beat to patrol and mostly involved interaction with the community, it was not a light duty position. When a medical examination revealed that the officer could not perform several of the 14 critical activities required of CHP officers, the officer was discharged and applied for disability retirement. The court found that the officer was entitled to disability retirement if he could not perform the standard duties of a CHP officer, not the "usual duties" of the position he most recently held. Since the officer's position as a PAO was not a light duty assignment, "the ability to perform all tasks required of a CHP officer" were part of the "usual" duties of his job.

Beckley v. Board of Administration of California Public Employees' Retirement System (2013) ____ Cal.App.4th ____.
http://www.courts.ca.gov/opinions/nonpub/A135418.PDF

A Police Department May Demote an Officer Who Repeatedly Complains About Safety Concerns.

The Ninth Circuit Court of Appeals held that a police department did not unlawfully retaliate by demoting an officer who repeatedly complained about safety procedures. After the officer, a member of the K-9 unit, complained to his supervisor about safety concerns following a series of incidents involving negligent firearm discharges, he was removed from the unit. The First Amendment does not protect a public employee's speech if it is spoken pursuant to the employee's official duties. In a law enforcement setting, officers have an official duty to report safety concerns and an officer raising concerns internally through the chain of command is usually performing in accordance with his official duties. Since the officer raised his safety concerns internally through the chain of command, his comments were not protected by the First Amendment. The court also noted that an employee's "routine report, pursuant to normal departmental procedure about a particular incident" is typically within his official duties.

Hagen v. City of Eugene (December 3, 2013, Ninth Cir.) ____ F.3d ____.
http://cdn.ca9.uscourts.gov/datastore/opinions/2013/12/03/12-35492.pdf

Vasquez v. Los Angeles County Metropolitan Transportation Authority, LA Daily Journal, Verdicts & Settlements (December 6, 2013), Los Angeles Superior Court Case No.: BC484335.

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