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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. **Unlawful Termination – Mixed Motives** – The California Supreme Court held that when an employee alleging wrongful termination has demonstrated that discrimination was a substantial factor motivating her firing, her employer is then entitled to demonstrate that legitimate, nondiscriminatory reasons would lead to the same decision to terminate at the time. If the employer is able to prove that it would have made the same decision to terminate for lawful reasons, the employee cannot be awarded damages, back pay, or reinstatement (although an employee may be entitled to declaratory/injunctive relief and attorney fees). The court also noted that before the burden shifts to her employer to prove it would have made the same decision for nondiscriminatory reasons, the employee must first prove that discrimination was a *substantial* motivator in her employer's action, not just a factor in the decision.

   Harris v. City of Santa Monica, (2013) ___ Cal.4th ___.
   http://www.courts.ca.gov/opinions/documents/S181004A.PDF

2. **Whistleblowing – Against Fellow Employees** – The California Court of Appeal held that California's whistleblower-protection laws protect employees from discrimination for reporting claims of illegal conduct by fellow employees as well as by their employer. In this case, the whistleblowing employee was terminated after reporting fraud by fellow employees to his supervisors and police. The employer unsuccessfully argued that state law protects only whistleblowing on employers, not on fellow employees. The court also noted that an employee's report of illegal activity to law enforcement may constitute protected conduct, even if making such reports was part of the employee's regular job responsibilities.

   McVeigh v. Recology San Francisco, (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/A131833.PDF

3. **Discrimination – Pregnancy Leave** – The California Court of Appeal held that an employee who has exhausted all permissible leave available under the Pregnancy Disability Leave Law ("PDLL") may nevertheless file a pregnancy discrimination claim against her employer under the California Fair Employment and Housing Act ("FEHA"). In this case, the employee was fired after a high-risk pregnancy prevented her from returning to work, even after she had used the four months of leave that PDLL provides pregnant employees. The court determined that even if an employer complies with PDLL it must still comply with FEHA and provide reasonable accommodations (such as granting additional leave) to a pregnant employee.

   Sanchez v. Swissport, Inc., (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/B237761.PDF

II. PUBLIC EMPLOYERS LAW

4. **Public Employees Fighting Pension Reform** – Following the passage of Governor Brown's pension reforms (Public Employee Pension Reform Act and AB 197), county employees across the state are suing county retirement systems to restore the pensions they claim were promised when they began work. Both the employees and county retirement systems are unsure of whether the reforms (which will reduce future pension payouts for employees continuing to work) supersede previous agreements the county workers originally made with their employers. However, legal observers note that the employees must prove that an actual or implied contract existed in the first place in order to prevail on their claims.

   State Pension Reform Prompting Suits, LA Daily Journal (February 13, 2013), Laura Hautala.

5. **Health Benefits – Implied Contract** – The California Court of Appeal held that retirees from the Lawrence Livermore National Laboratory could sue the University of California for breach of implied contract after they were removed from the university-sponsored health insurance plan. After a private contractor took control of the formerly university-operated Laboratory, the retirees' university-sponsored group health insurance was terminated. A recent California Supreme Court case holds that in certain circumstances, public employees may have the vested right to health benefits arising from an implied contract (based on the parties' intent). The court noted that the retirees could argue that the university's obligation to provide them medical benefits is implied by its provision of retiree medical benefits for over fifty years, and from university publications assuring employees they would receive health benefits in retirement.

   Requa v. The Regents of the University of California, (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/A132778.PDF

6. **San Diego Pension Reform Unlawful** – An administrative law judge for the Public Employment Relations Board ("PERB") ruled that pension reform passed by San Diego voters violated state labor law, since the mayor failed to negotiate the measure with unions before presenting it to voters. According to the judge, "The Mayor's choice of a citizen's initiative as a vehicle to implement his policy determination is not privileged because it amounts to bypassing the unions." It is important to note however that the judge's ruling does not immediately invalidate the law, as the city may appeal to PERB itself and later, the state Court of Appeal.

   San Diego Pension Reform Initiative Unlawful, PERB Judge Says, LA Daily Journal (February 14, 2013), Laura Hautala.

III. POLICE

7. **Retaliatory Arrest – Freedom of Speech** – The Ninth Circuit Court of Appeals held that police officers were not entitled to qualified immunity for arresting a driver in retaliation for exercising his free speech rights. After he was pulled over for a noise violation, the driver briefly left his car and yelled at the officers, claiming that the traffic stop was racially motivated. The officers arrested and booked the driver for the noise violation. Officers are entitled to qualified immunity unless they violate a clearly established constitutional right. The court determined that: (1) the driver's criticism of what he perceived to be an unlawful and racially motivated traffic stop was clearly protected by the First Amendment; (2) the officer's actions chilled his right to free speech; and (3) this right was clearly established at the time of arrest. The court concluded that the driver had the right to be free from police action motivated by retaliatory animus, even if probable cause existed for the officers to initially arrest the driver for violating a noise ordinance.

   Ford v. City of Yakima, (February 8, 2013, Ninth Cir.) ___ F.3d ___.
   http://cdn.ca9.uscourts.gov/datastore/opinions/2013/02/08/11-35319.pdf

8. **Some Seek Whistleblower Reform post-Dorner** – Following LAPD Chief Charlie Beck's decision to reopen Christopher Dorner's termination case, certain legal commentators have advocated a whistleblowing standard of review that reserves termination only for officers who make maliciously false allegations, not for officers whose allegations ultimately cannot be substantiated. For example, the National Labor Relations Board holds that a private sector employer cannot fire an employee for complaining about working conditions unless the employee's complaints were willfully and knowingly false, with the intent to deceive. These commentators claim that such a policy would encourage well-meaning individuals to complain and would help diminish the public's perception of a "code of silence" that limits the department's ability to regulate itself.

   How Should Whistle-Blowing Officers Be Judged? LA Daily Journal (February 13, 2013), Glenn Rothner.

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

9. **$21.7 Million Verdict – Employment Discrimination** – A Los Angeles jury awarded a $21.7 million verdict to a terminated waste company employee after concluding that her employer unlawfully discriminated against her by firing her because of a mental disability (panic attacks). The employer unsuccessfully argued that the employee had been fired for not calling her supervisor to explain a three day absence.

   Industry Waste Company Must Pay $21.7 Million in Panic Attack Discrimination Case, Diamond Bar-Walnut Patch (February 15, 2013), Bill Hetherman.

   http://diamondbar-walnut.patch.com/articles/industry-waste-company-must-pay-21-7-million-in-panic-attack-discrimination-case

10. **$2 Million Settlement – Overtime Compensation** – The Ritz-Carlton settled with a class of 1,500 current and former employees for $2 million over overtime compensation claims. The employees contended that the Ritz-Carlton violated state wage/hour laws by underpaying overtime wages to employees who did not receive prior authorization to work overtime.

    Vernon M. Lambsdon v. The Ritz Carlton Hotel Company, LLC, LA Daily Journal, Verdicts & Settlements (February 22, 2013), N.D. California Case No.: 3:11-cv-06669-CRB.

11. **$473,750 Verdict – Reasonable Accommodation** – A Los Angeles jury awarded $473,750 to a retired Los Angeles Unified School District ("LAUSD") teacher for disability discrimination and failure to engage in the interactive process and accommodate. After the teacher was assaulted by students in his classroom, he was placed on medical leave. When he attempted to return from leave to work, he petitioned LAUSD for reasonable accommodation. LAUSD denied his request on the grounds that the positions he sought involved either a promotion or competitive exam. After his appeal of this decision was denied, the teacher emailed a LAUSD official stating that he could also teach adults depending on the location. Nonetheless, the official refused to consider this new information or reconsider the reasonable accommodation request because he thought the teacher had already retired. However, the teacher did not apply for retirement until after this exchange, since he feared losing his lifetime medical benefits.

    Ghassan Bisharat v. Los Angeles Unified School District, LA Daily Journal, Verdicts & Settlements (February 22, 2013), Los Angeles Superior Court Case No.: BC458496.

12. **$450,000 Verdict – Whistle Blower** – A Los Angeles jury awarded $450,000 to an employee who claimed he was wrongfully terminated for expressing concern about his supervisor's alleged drug abuse during working hours. At a meeting with management where the employee expressed his concerns, the employee joked that he would have to videotape his supervisor in the

office bathroom. Shortly thereafter, the employee was terminated based on allegations of actually taping his supervisor in the bathroom.

Andrew MacDonald v. Ascent Media Group LLC, LA Daily Journal, Verdicts & Settlements (February 22, 2013), Los Angeles Superior Court Case No.: BC444911.

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

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