THE ZAPPIA LAW FIRM
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- Labor and Employment Law -
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Labor and Employment Law Update

June 2014

Wishing a Happy and Safe 4th of July weekend to 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 for all the details, and feel free to contact us if you have any questions or comments.

In this month's update:

- A $22.7 million wage/hour class action settlement for warehouse workers in the inland empire;
- Two recent victories for the The Zappia Law Firm;
- A $1 million settlement for quid pro quo sexual harassment; and
- A $3.5 million verdict for 3 police officers in Westminster for discrimination and retaliation.

DISCRIMINATION

Federal Immigration Law Does Not Preempt Immigrant Worker's Claims under California's FEHA, Even If the Worker Used False Documents To Secure Employment.

The California Supreme Court held that unauthorized alien workers can sue for unlawful termination. A seasonal worker, who had used another person's Social Security number to obtain employment, sued his employer for alleged violations of California's Fair Employment and Housing Act. The trial court dismissed the action because the federal Immigration Reform and Control Act requires employers to verify the identity and work eligibility of new employees, and compels employers to immediately terminate a worker with unauthorized status. California Senate Bill No. 1818, however, adopted a provision into California law which states all protections, rights, and remedies available under state law are available to all individuals regardless of immigration status, who have applied for employment or who have been employed in the state. The Court reasoned that not allowing unauthorized aliens this protection would effectively immunize employers from discriminating against their workers.

Salas v. Sierra Chemical Co. (2014) ___ Cal.4th ___.
http://www.courts.ca.gov/opinions/documents/S196568.PDF

WAGE / HOUR

Proposed $2M Wage/Hour Settlement for MetLife Officers Rejected By Judge

A California federal judge rejected a proposed $1.97 million class actions settlement claiming MetLife failed to properly pay its financial service representatives (FSR) for overtime, forced them to pay business costs, and confiscated commissions if they quit or were fired too early, finding that the distribution of funds isn't equitable. The judge found that because FSRs who worked beyond ten quarters suffered an additional injury, they should receive an additional amount from the second part of the settlement fund that those who did not work beyond ten quarters do not receive. The judge is requiring a distribution that separately compensates FSRs who worked more than ten quarters, and gave the plaintiffs 28 days to file an amended motion addressing the issues she identified.

$2M Settlement Shot Down In MetLife Loan Officer OT Suit, Law360 (June 6, 2014), Jeff Sistrunk
http://www.law360.com/employment/articles/545637

$7.65 Million Wage/Hour Class Action Settlement

A U.S. District Court Judge approved a $7.65 million settlement brought on behalf of commissioned sales workers who accused Nordstrom's Inc. of violating state minimum wage law. Allegations made under the California Labor Code and Fair Labor Standards Act included failure to pay commissioned sales workers minimum wage for time spent before and after the stores' official opening and closing times. The $7.65 million total includes a $2.7 million monetary fund for the class, $2.6 million in vouchers that can be used at Nordstrom stores in California, and up to $2.3 million that will go to attorneys' fees.

Nordstrom Strikes $7.65M Deal In Sales Workers Wage Suit, Law360 (June 2, 2014), Ben James
http://www.law360.com/employment/articles/543617

AGREEMENTS TO ARBITRATE

Arbitration Agreement That Compels Waiver Of Representative Actions Under Private Attorneys General Act Is Unenforceable as a Matter Of Public Policy

The California Supreme Court held that an arbitration agreement providing that "any and all claims" arising out of employment are to be submitted to binding arbitration before a neutral arbitrator is unenforceable. The agreement the employee signed also contained a class action and representative action waiver. The employee alleged the employer failed to pay overtime and brought both a class action as well as a representative action under the Private Attorneys General Act (PAGA). Under PAGA, an employee may bring a civil action personally and on behalf of current or former employees to recover civil penalties for

Labor Code violations. In holding that an employee's right to bring an action under PAGA is unwaivable, the Court reasoned that allowing an employee to waive this right would serve to disable one of the primary procedures for enforcing the Labor Code.

Iskanian v. CLS Transportation Los Angeles LLC (2014) ___ Cal.4th ___.
http://www.courts.ca.gov/opinions/documents/S204032A.PDF

Employee Who Continues To Work After Being Given Notice Of New Conditions Of Employment Is Deemed To Have Accepted The New Terms Or Conditions

The Ninth Circuit Court of Appeals held that an arbitration provision prohibiting employees from filing most class action could be enforced. In California an employer may unilaterally alter the terms of an employment agreement, unless the new terms violate the Labor Code. Also, if an employee continues their employment after having been given notice of the new conditions, the employee has accepted the new terms. The employer does not even have to inform employees that their continued employment will result in the employee's acceptance of the new terms. Here, the employee will be compelled to arbitrate her claims that her employer violated employment laws because: (1) she was given a 30-day notice period of the change to the employee handbook; (2) she did not object to the revision, nor did she quit; and (3) the employer did not have a duty to inform her that she was accepting the new terms by remaining employed.

Davis v. Nordstrom Inc. (June 23, 2014, Ninth Cir.) ___ F3d. ___.
http://cdn.ca9.uscourts.gov/datastore/opinions/2014/06/23/12-17403.pdf

Former Employee Must Arbitrate Claims Because She Did Not Choose To Opt Out Of Arbitration Agreement That Waived Class Action Right

The Ninth Circuit Court of Appeals held that an arbitration agreement, which waived an employee's right to bring employment related claims as a class action, was enforceable where the employee was given the right to opt out of the waiver and failed to do so. The Norris-LaGuardia Act provides that employees have the right to be free from interference, restraint, or coercion of employers in the designation of representatives or in self-organization for collective bargaining purposes. Further, the National Labor Relations Act provides employees the right to engage in "other concerted activities" for the purpose of collective bargaining. Here, however, the Court found there was no coercion involved, because the employee willingly waived her right to bring the class action by not opting out of the arbitration agreement.

Johnmohammadi v. Bloomingdale's Inc. (June 23, 2014, Ninth Cir.) ___ F3d. ___.
http://cdn.ca9.uscourts.gov/datastore/opinions/2014/06/23/12-55578.pdf

OTHER

First Amendment Protects Employee Who Is Terminated For Testifying At The Criminal Trial Of Another Employee

The United States Supreme Court held that a public employee's speech will be protected by

the First Amendment, if the speech can pass a two-step inquiry. First, the employee must have spoken on a matter of public concern. If the answer is "yes," then the court must determine whether the government entity had an adequate justification for treating the employee differently from any other member of the general public. Here, the speech was clearly speech as a citizen on a matter of public concern, because it was outside the scope of the employee's ordinary job duties, as he was addressing corruption and misuse of state funds.

Lane v. Franks (2014) ___ Cal.4th ___.
http://www.supremecourt.gov/opinions/13pdf/13-483_906b.pdf

"In the Trenches"

Recent Verdicts, Settlements, and Current Cases

"Zappia in the News"

Motion for Summary Judgment Granted, Dismissing Sheriff Deputy's Claims of Disability Discrimination, Failure to Engage in the Interactive Process, and Failure to Reasonably Accommodate (Alleged Wrongful Involuntary Disability Retirement)

Our firm successfully defended our client's actions and rights to involuntary disability retire a sheriff's deputy with a history of epileptic seizures, after he was still unable to obtain a medical clearance to return to duty without restriction after 14 months on medical leave. Plaintiff/former Deputy Sheriff Josh Hiraoka had an on-duty epileptic seizure in July 2007, resulting in a minor car accident, and leaving him incapacitated/unconscious behind the wheel of a police vehicle while in full uniform and armed. Fortunately, nearby deputies were immediately available to secure Hiraoka, his weapons and vehicle.

Fourteen months later by September 2008, Hiraoka still had not provided a medical clearance to return to duty without restriction, and had refused alternative training and employment in other positions such as polygrapher. It was then discovered that his medical condition and treatment were far more severe than he had been representing throughout the interactive process over the previous 14 months, including an undisclosed brain surgery in July 2008. Hiraoka was thus involuntarily disability retired in October 2008 since he was not medically cleared to return to duty, and there was no reasonably certain future date that he would be medically cleared to return to duty, if ever.

Plaintiff Hiraoka filed a disability retirement appeal and a civil discrimination case. Plaintiff Hiraoka alleged that his July 2008 brain surgery had "cured" him, and had our client waited another 6-12 months he would have been medically cleared to return to work by July 2009. Our firm first successfully defended our client against Plaintiff's disability retirement claim through an administrative arbitration, a superior court writ petition and the Court of Appeal. (*Hiraoka v. County of Riverside*, California Court of Appeal, Fourth Appellate District, Second Division, Appeal Number E058886)

Then last week our firm successfully prevailed against Plaintiff's civil discrimination claims in

defending our clients' actions and decisions regarding Plaintiff's interactive/reasonable accommodation efforts, and legitimate decision to involuntarily disability retire him. The Riverside County Superior Court granted our motion for summary judgment, finding substantial evidence that our client sufficiently engaged in the interactive process and offered reasonable accommodations, and that the medical evidence demonstrated that the County had legitimate nondiscriminatory reasons to involuntarily disability retire Hiraoka. (*Hiraoka v. County of Riverside*, RSC Case No. RIC 513890)

More "Zappia in the News"

Sheriff's Department May Require Full Pre-Employment Type Background Check and Medical Examples for Sworn Personnel Show That Were Terminated But Later Reinstated

Our firm also successfully defended our client's right to require two former sworn employees to undergo full pre-employment type background investigations and medical exams before returning them to active duty. The deputies had been ordered reinstated to their positions two years after having been terminated. The deputies argued that California law and the Peace Officer Standards & Training guidelines only permit full pre-employment background checks for new officer candidates and not to officers allegedly wrongfully terminated and ordered reinstated. They argued that because their termination was overturned they should not be forced to undergo a background check despite their separation of two years. They also argued that an order of "reinstatement" means to full active duty, and not just a return to paid administrative leave pending successful completion of a background investigation. The Court agreed with our client, ruling that Government Code 1031.1 permits a full pre-employment type background investigation and medical examinations for officers who have a break in service, even if the break in service is caused by a termination that is later reversed. (Mills and Clardie (Riverside Sheriffs' Association) v. Riverside County Sheriff's Department, RCSC Related Case Nos. RIC1402250 and RIC1401786.) (Citing, Cal. Govt. Code 1031.1, Sager v. County of Yuba (2007) 156 Cal.App.4th 1049, POST Regulation 1950(d).)

$22.7 Million Wage/Hour FLSA Class Action

A US District Court judge finalized a settlement with workers in three Wal-Mart warehouses in the Inland Empire for violations of the Fair Labor Standards Act and the California Labor Code and Wage Orders. The workers alleged long hours, under oppressive conditions for legally inadequate pay. Defendant Schneider Logistics, which managed the warehouses on Wal-Mart's behalf, is solely liable for a payment of $21 million.

Carillo v. Schneider Logistics Transloading and Distribution, Inc., et al., LA Daily Journal, Verdicts and Settlements (June 20, 2014) U.S. District Court for the Central District of California, Case Number 2:11-cv-08557-CAS-DTB.

$3.45 Million Jury Verdict for Race/National Origin Discrimination

A US District Court jury awarded 3 Latino police officers nearly $3.5 million for race/national origin discrimination and retaliation. The officers alleged they were denied special assignments and promotions because of their race and national origin. They contended that their applications for special assignments were routinely denied despite

having been routinely recognized for their work as officers including a Centurion Award.

Flores v. City of Westminster, et al., LA Daily Journal, Verdicts and Settlements (June 13, 2014) U.S. District Court for the Central District of California, Case Number 8:11-cv-00278-DOC-RNB.

$1 Million Settlement for Sexual Harassment and Retaliation

Plaintiff claimed that after she was hired, her crew foreman and immediate supervisor, subjected her to unwanted and offensive sexual harassment, including: making verbal comments about her attractiveness; demanding she ride with him in a golf cart to work sites; alluding that she should have sex with him as "payback" for helping her get her job; asked her to go out with him despite both of them already being married; touched her leg and hands without her consent; contacted her after work for non-work related reasons; and made inappropriate comments to her. After she complained to his superiors and an investigation was performed, Plaintiff was transferred to a different facility, and was terminated two weeks later, in a so-called "reduction in force."

Mendoza v. Transfield Services Americas, et al., LA Daily Journal, Verdicts and Settlements (June 6, 2014), Los Angeles Superior Court, Central District, Case Number: BC507645

Defense Verdict for Retailer against Allegations of Discrimination, Harassment and Retaliation

A Los Angeles Superior Court judge granted retailer Abercrombie & Fitch's motion for summary judgment against a plaintiff who asserted multiple causes of action including: racial discrimination, racial harassment, retaliation, failure to prevent discrimination, wrongful termination, and intentional infliction of emotional distress. Defendant Abercrombie & Fitch argued that her termination was not racially motivated at all, but that she was fired for not returning after the end of a medical leave period. She had been warned that she would be terminated if she did not return by a required date. When she did not, she was terminated.

Hallman v. Abercrombie & Fitch Stores Inc, et al., LA Daily Journal, Verdicts and Settlements (June 6, 2014), U.S. District Court, Central District of California, Case Number 2:13-cv-02139-ODW-SS.

Sun Cab Inc. Ordered to Cease and Desist and Reinstate Driver to Former Position

An administrative Law Judge for the National Labor Relations Board found Sun Cab's conduct of retaliating against a driver by threatening to blacklist him constituted unfair labor practice under the National Labor Relations Act. The NLRB ordered Sun Cab to: (1) cease and desist from any further violations of the Act; (2) reinstate the former driver; and (3) compensate him for any losses. The employee claimed he was terminated for being a union sympathizer, and for participating in an "extended break" with 16 other Ethiopian drivers who were protesting the Taxi Authority's consideration to issue more taxi medallions.

Sun Cab Inc. dba Nellis Cab Co and Fikreselassie Woldeyes, LA Daily Journal, Verdicts and Settlements (June 27, 2014) National Labor Relations Board, Case Number 28-CA-106245.

Workplace Training

We offer group and private training to meet your needs:

- California's Mandatory Harassment Training
- FMLA / CFRA / Pregnancy Leave
- Disability Discrimination Amendments
- Pregnancy Disability Law Amendments
- Employee Discipline
- Workplace Investigations
- Union Avoidance and Relations

Presentations

We also present on various topics, including:

- Labor Negotiations
- Pension Reform; and
- The Limitations of AB 646 Post Impasse Procedures

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

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