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

March 2014

Good afternoon 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 $26.1 million judgment for age discrimination;
- Another termination based on spousal jealousy - is it discrimination?
- Our firm's recent triumph of having an emergency stay granted on the eve of trial in a labor code whistle blower action;
- A $10 million settlement for a class of employees incorrectly classified as independent contractors; and
- An article regarding the court of appeal reviewing and ruling on whether the private emails of government officials must be disclosed as public records.

Court to Determine Whether Anti-Discrimination Law Protects Employees Terminated Due to Spousal Jealousy.

Charles Nicolai and his wife Stephanie Adams are being sued by Dilek Edwards, a yoga instructor and former employee, for gender discrimination in New York state court. Edwards claims she was terminated by Adams because she was jealous that her husband found Edwards to be "too cute." Adams, a former Playboy Playmate, allegedly sent Edwards a text message that read: "you are NOT welcome at Wall Street Chiropractic, DO NOT ever step foot in there again, and stay the F*** away from my husband and family!!!!!!!" In a motion to dismiss the suit the defendants' asserted, "The simple fact is that the anti-discrimination law does not protect employees terminated due to spousal jealousy, and every case on this issue has held exactly that." Edward's attorney stated that the "Defendants' argument is absurd, sexist and offensive... My client was fired because of her gender. Plain and simple."

'Too Cute' Yoga Teacher Can't Show Bias, Ex-Bosses Say, Law360 (February 10, 2014),

Abigail Rubenstein.
http://www.law360.com/articles/508474/-too-cute-yoga-teacher-can-t-show-bias-ex-bosses-say

Please recall the case of the "irresistible" Iowa dental assistant terminated for being too attractive which we brought to you in our July 2013 newsletter.

"Hey, Hot Stuff - You're fired: Iowa Court Upholds Termination of Attractive Employee."

The Iowa Supreme Court stood by its ruling that a dentist acted legally when he fired an assistant because he found her too attractive and worried he would try to start an affair. Coming to the same conclusion as it did in December 2012, the all-male court found that bosses can fire employees they see as threats to their marriages, even if the subordinates have not engaged in flirtatious or other inappropriate behavior. The court said such firings do not count as illegal sex discrimination because they are motivated by feelings, not gender. The ruling upholds a judge's decision to dismiss the discrimination lawsuit filed against the dentist, who fired the assistant, even while acknowledging she had been a stellar employee for 10 years.

Melissa Nelson Update: Iowa Supreme Court Upholds Ruling of Dental Assistant Fired For Being 'Irresistible' (July 12, 2013)
http://www.ibtimes.com/melissa-nelson-update-iowa-supreme-court-upholds-ruling-dental-assistant-fired-being-irresistible

California Supreme Court Will Review Ruling that After-Acquired Evidence Of Plaintiff's Criminal Conduct Can Be Used to Shield Defendants' Discriminatory Conduct

The California Supreme Court granted petition for review to determine whether the after-acquired evidence and unclean hands doctrine preclude a plaintiff who uses false documentation to obtain employment benefits, from pursuing claims under the Fair Employment and Housing Act? Plaintiff alleged that the Defendant's ("Council") decision not to hire him as a union organizer was racially motivated. During discovery, Plaintiff revealed he had been convicted of drug possession, served prison time for it, and was paroled after his release. The Council did not know of this information at the time they failed to hire him. The Court of Appeal held that the after-acquired evidence of his criminal history was inadmissible if used as evidence bearing on the Council's motives for not hiring him. But, the Court allowed the after-acquired evidence during the first stage of the suit and held that "evidence that the applicant was disqualified as a matter of law at the time of the employment decision is relevant, whenever the employer acquired that information." The Court held that Horne's criminal activity disqualified him from the union-organizer position as a matter of law. The California Supreme Court will review the decision of the Court of Appeal. We will keep you apprised.

Horne v. International Union of Painters and Allied Trades, (review granted, Feb. 26, 2014, S215870) 2014 WL 777599

Performance Deficiency Deemed Pretext for Discrimination Where Employer's Policies Anticipate and Expect Mistakes

A terminated employee was permitted to proceed to trial on an allegation that termination for alleged performance deficiencies was a pretext for age discriminatory termination, since the employer's own written policies anticipated and expected such mistakes would inevitably occur based on the nature of the work.

Cheal v. El Camino Hospital, (2014) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/H036548M.PDF

Doctors May Swiftly Sue Hospitals for Retaliation and Need Not First Challenge the Peer Review Process

The California Supreme Court unanimously held that doctors may sue hospitals for retaliating against them for reporting concerns about the treatment of patients without having to first seek and obtain a mandamus review judgment to challenge peer review. They affirmed the appellate court's finding, holding that "mandamus review does not directly address claims of retaliation, but merely examines whether the findings of the peer review were accurate."

Fahlen v. Sutter Central Valley Hospitals, (Cal., Feb. 20, 2014) 14 Cal. Daily Op. Serv. 1722
http://www.courts.ca.gov/opinions/documents/S205568.PDF

Courts Further Whittle Down Constructive Voluntary Quit Doctrine

Confirming that it is almost impossible for employers to successfully challenge a former employee's application for unemployment benefits, the California Court of Appeal recently rejected an employer's claim that his employee "constructively quit" by making unreasonable demands when she came back from stress leave and concluded there was a reasonable alternative to discharging the employee. The employee was deemed "fired" and was entitled to unemployment benefits.

Kelley v. California Unemployment Insurance Appeals Board (2014) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/B244098.PDF

New Standard Makes Remanding Wage and Hour Class Action Suits to State Court More Difficult

The Ninth Circuit's ruling last August in Rodriguez v. AT&T Mobility Services, LLC created a new standard of eligibility for class action wage and hour cases to be heard by federal courts, which only requires defendants' to prove by a "preponderance of evidence" that there is at least $5 million at stake in the case. The old standard required defendants to prove it with "legal certainty." Defense attorneys believe more of these cases will land in federal courts as judges are ordered to examine facts with greater scrutiny, making it more difficult for judges to remand wage and hour class action lawsuits to plaintiff-friendly state courts.

Ruling Keeps More Wage Cases Federal, LA Daily Journal (February 18, 2014), Henry Meier.

Bifurcation of Public Employee Retirement Benefits Under PERS

The California Court of Appeal held that the Board of Administration of the Public Employees' Retirement Systems (PERS) was correct in determining that the statutory scheme governing a member's retirement benefits required them to calculate it on a bifurcated basis. The member's time as a City employee would be calculated using his highest employee salary, and his time on the City Council would be calculated using his highest compensation as an elected official.

Chaidez v. Board of Administration of California Public Employees' Retirement System (2014) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/C065913M.PDF

House and Senate Bills May Eliminate Automatic Deductions of Union Dues

H.B. 1507 and S.B. 1034 would amend Pennsylvania's 1970 Public Employee Relations Act by preventing most unions and public employers from negotiating provisions in their collective bargaining agreement requiring automatic deductions of union dues or political contributions from state public workers' paychecks. Neither measure would affect police and firefighter unions' rights to include automatic dues deduction provisions in their CBAs. U.S. Sen. Bob Casey, D-Pa., asked leaders of the Pennsylvania General Assembly to vote against two nearly identical bills awaiting consideration by legislative committees. He believes "this legislation is an attempt to unfairly target the rights of hardworking Pennsylvanians and silence their voices as they fight for better wages and benefits to help their families." Rep. Bryan Cutler, R-Lancaster, who introduced H.B. 1507, said "My legislation makes no attempt to limit the power of unions; it only asks that they collect dues and political money directly from their own members and not by paycheck deduction... No other organization, business or club has the power to use public assets for political purposes to collect money directly out of paychecks."

Senator Casey Wades Into Fight Over Pennsylvania Union Dues Bills, Law360 (February 28, 2014), Matt Fair.
http://www.law360.com/articles/513784/sen-casey-wades-into-fight-over-pa-union-dues-bills

Judiciary May Unilaterally Change Probation Officer's Work Schedule

A New Jersey probation officer's union filed a grievance against the state judiciary's Ocean Vicinage for unilaterally imposing a new work schedule requiring probation officers to work at least four Saturdays annually, claiming it violated their Collective Bargaining Agreement. The New Jersey Public Employment Relations Commission (PERC) ruled that the union could not arbitrate the issue over the work schedule change because the nature of a probation officers' job requires them to work on Saturdays in order to keep track of probationers. By

visiting their work and home on Saturdays, officers establish the necessary community presence needed to provide effective supervision of probationers. PERC thus rejected contractual restrictions on the Judiciary's right to modify probation officers work schedules.

Judiciary Need Not Arbitrate Work Schedules: NJ Labor Panel, Law360 (February 27, 2014), Joshua Alston.
http://www.law360.com/articles/513876/judiciary-need-not-arbitrate-work-schedules-nj-labor-panel

United Airlines Cannot Circumvent California Sick Leave Law

The California Court of Appeal held that United Airlines cannot circumvent California law that allows employees to use their sick leave to take care of sick family members since United's plan fell outside the scope of ERISA. The courts reasoned that the assets in the plan were subject to United's creditors upon insolvency, making the sick leave benefits at risk until they were paid out. Such a plan does not fall within the scope of ERISA since the "degree of risk that employees will not be paid benefits depends on the financial health of the employer, not the fund."

Airline Pilots Association International v. United Airlines, Inc. (2014) ____ Cal.App.4th ____.
http://www.courts.ca.gov/opinions/documents/A129914.PDF

Court of Appeal to Decide Whether Government Officials Will Be Required to Disclose Personal Emails that Discuss Official City Business

The Sixth District Court of Appeals will soon decide whether the use of a government official's personal email account instead of one's official ".gov" account can transform otherwise public records into the personal property of government officials. In Smith v. City of San Jose, the superior court ruled in favor of disclosing personal emails that discuss official city business, reasoning that a record's status as a public record depends only on its content. Another issue on appeal is whether the mechanism used to obtain these personal emails would lead to an illegal search and seizure under the Fourth Amendment. The court will likely not find a constitutional violation as long as the search for government business within personal emails is conducted by the government official who wrote them.

Public Officials, Private Emails, Public Records, LA Daily Journal (February 10, 2014), Peter Scheer.

Extent of Firefighter's Right to Inspect Personnel File to be Determined by California Supreme Court

The California Supreme Court granted a petition for review of "whether the files containing the daily logs pertaining to firefighters are within the ambit of Government Code section 3255. The petition comes from the ruling of the California Court of Appeal that held a firefighter must have the chance to review a captain's daily logs for adverse comments about him. The Captain kept daily logs (stored at the fire station) documenting the firefighters' personnel files. Based on these logs, the captain determined that the firefighter's performance was substandard and placed him on a performance plan. The Firefighter Procedural Bill of

Rights (which mirrors the Public Safety Officers Procedural Bill of Rights Act) provides that a firefighter shall not have an adverse comment entered in his personnel file "or any other file used for any personnel purposes... without the firefighter having first read and signed... the adverse comment."The court held that since the daily logs were used for personnel purposes, they were subject to the provisions of the Bill of Rights and the firefighter was entitled to review his captain's negative comments.

Poole v. Orange County Fire Authority, (2013) review granted, S215300, 2014 WL 777385 (Feb. 26, 2014)

"Zappia in the News"

Recent Victories and Accomplishments of The Zappia Law Firm

Emergency Writ Granted in Labor Code Whistle-blower Case

In the Zappia Law Firm's own case, our appellate partner recently got the California Supreme Court to grant our Petition for Writ and Emergency Stay in a whistle-blower/retaliation claim on the eve of trial. Such Emergency Petitions are granted one in 1,000 times. The specific legal issue in that case was whether a whistle-blower plaintiff must exhaust administrative remedies in front of the Labor Commissioner specifically, in addition to obtaining a Right to Sue letter with the DFEH. Our Writ Petition was based on AB 666, a recent amendment to California Labor code section 1021.5, which expressly amended the Labor Code to specify that no additional exhaustion of administrative remedies is required. As soon as this Emergency Petition was granted, the value of the case increased exponentially, and ultimately we settled this lawsuit for ten times the initial offer.

"In the Trenches"

Recent Verdicts, Settlements, and Current Cases

$26,100,000 Verdict for Age Discrimination

A Los Angeles jury awarded $26,100,000 to a former Staples employee for wrongful termination and age discrimination. The plaintiffs attorney stated that the award is the largest of its type in Los Angeles legal history. The Plaintiff was 64 when he was fired from Staples in 2011. Allegedly, his managers told him that he was being terminated because they needed to remove older, higher-paid employees. Plaintiff also alleged that other staff members frequently picked on him about his age and that he was harassed after declining to resign from his position voluntarily.

Ex-Staples Worker Gets $26.1M in Age Discrimination Suit, Law 360 (February 27, 2014), Zachary Zagger.

$10,000,000 Bench Decision for Employees Misclassified as Independent Contractors

A San Diego County Superior Court judge awarded $10,000,000 to a class of employees who worked as carriers for The Copley Press, Inc. because the carriers were misclassified as independent contractors instead of employees.

Espejo v. The Copley Press, Inc., LA Daily Journal, Verdicts and Settlements (February 7, 2014), San Diego Superior Court Case No.: 37-2009-00082322.

$2,500,000 Class Action Settlement for Wage Hour Violations

Sports Authority settled with a class of employees over alleged wage and hour violations. The employees claimed their former employer failed to provide meal and rest periods, pay wages, provide accurate itemized wage statements, pay wages upon termination, unfair business practices, and violation of the California Private Attorney General Act. They also claimed they were subjected to Sports Authority's policy of conducting security checks on non-exempt employees.

Nielson v. TSA Stores Inc. dba Sports Authority, LA Daily Journal, Verdicts & Settlements (February 14, 2014), N.D. California Case No.: 4:11-cv-04724-SBA.

$950,0000 Verdict Awarded to a Group of Los Angeles Inmates Because of Cruel and Unusual Punishment

A jury awarded a group of inmates $950,000 after sheriff deputies used excessive force in response to the inmates protesting the "climate of excessive force" being carried out against them by the Sheriffs Department. Plaintiffs allege they executed a systematic effort to punish them for their protest. Twenty-one (21) inmates were extracted from their cells and nineteen (19) of them were hospitalized. The plaintiffs suffered multiple broken bones, head trauma, and other injuries. Defendants' use of force violated the cruel and unusual punishment clause of the Eighth Amendment and was found to be malicious and sadistic.

Rodriguez et al. v. County of Los Angeles, LA Daily Journal, Verdicts and Settlements (January 31, 2014), C.D. California Case No.: 2:10-cv-06342-CBM-AJW.

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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