THE ZAPPIA LAW FIRM, A Professional Corporation

— Labor & Employment Law —
Defending Employers Rights

Los Angeles Office
333 South Hope Street
Suite 3600
Los Angeles, California 90071
Telephone: (213) 814-5550
Facsimile: (213) 814-5560
www.zappialegal.com

Orange County Office
5942 Edinger Avenue
Suite 113-284
Huntington Beach, CA 92649
Telephone: (657) 888-9353
Facsimile: (657) 888-9354
www.zappialegal.com

Author's Direct Dial:
Edward P. Zappia
Direct Dial: (213) 814-5555
ezappia@zappialegal.com

CLIENT LABOR & EMPLOYMENT LAW UPDATE

October 2013

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/HARASSMENT/RETALIATION

1. **Punitive Damages – Employer Liability** – The California Court of Appeal held that an employer may be liable for punitive damages to an employee discriminated against by her supervisors, if her supervisors were "managing agents." Punitive damages may only be awarded if the defendant is guilty of oppression, fraud, or malice. Corporations may be liable for punitive damages through the malicious acts of their employees, but only if the employees are managing agents. Managing agents must have the power to exercise substantial discretionary authority over significant aspects of the corporation's business. The court noted that evidence showing an employee's hierarchy, job duties, responsibilities, and authority may be sufficient to support a reasonable inference that the employee is a managing agent of the corporation.

   Davis v. Kiewit Pacific Co. (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/nonpub/D062388.PDF

2. **Punitive Damages – Excessive Award** – The Ninth Circuit Court of Appeals held that an award of $300,000 in punitive damages in an employee's sexual harassment lawsuit was improper since the jury awarded only $1 in compensatory damages. The employee sued under Title VII of the Civil Rights Act of 1964, which limits punitive damages to $300,000. However, a punitive damages award which is grossly excessive violates fundamental fairness notions. The court found that the ratio of punitive to compensatory damages (300,000:1) was constitutionally excessive and that an award of $125,000 in punitive damages was the highest reasonable amount the plaintiff could be entitled to.

   State of Arizona v. ASARCO, LLC (October 24, 2013, Ninth Cir.) ___ F.3d ___.
   http://www.metnews.com/sos.cgi?1013//11-17484

3. **Disability Discrimination – Failure to Accommodate – Organ Donation** – The California Court of Appeal held that a fired employee could pursue his lawsuit against his employer that he was fired for planning to take paid leave to donate a kidney to his sister. Under the Fair Employment and Housing Act, an employer cannot discriminate against an employee because of a physical disability. This includes an employee's association with a person who is disabled, especially if that person has a disability that could prove costly to the employer. Although disability by association usually refers to a disabled spouse on an employer's medical insurance plan, the court concluded that the employee could pursue his claim that his employer preemptively terminated him to avoid expenses: he would have had to take paid leave after he donated the kidney, and he would have required reasonable accommodations when he returned.

   Rope v. Auto-Chlor System of Washington, Inc. (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/B242003.PDF

4. **Required Disclosure – Internal Gender-Bias Complaints** – A New York judge ordered Goldman Sachs to turn over internal gender-bias complaints by female workers to lawyers representing former employees in a gender discrimination lawsuit. The judge ruled that Goldman Sachs must provide all complaints "conceivably related" to discrimination against women, including the names of the complainants. Goldman Sachs unsuccessfully argued that the disclosure of the internal complaints was an overbroad "fishing expedition."

   Goldman Must Turn Over Female Employee Complaints in Suit, Bloomberg (October 15, 2012), Karen Gullo.

   http://www.bloomberg.com/news/2013-10-15/goldman-must-turn-over-female-employee-complaints-in-suit.html

II. WAGE /HOUR

5. **Employer's Arbitration Agreement Unenforceable When Unreasonably One-Sided** – The California Supreme Court overturned a state law categorically prohibiting waivers of a "Berman hearing" in a pre-dispute arbitration agreement imposed on an employee as a condition of employment. A Berman hearing is a dispute resolution forum designed to assist employees in recovering wages owed. Despite this holding, the court still affirmed the relevance of the unconscionability doctrine in determining the enforceability of arbitration agreements: an arbitration agreement may not be enforced if it is unreasonably unfair to either party. Although a court may not refuse to enforce an arbitration agreement as unconscionable simply because it waives an employee's right to a Berman hearing, an employee may still argue that the agreement is unconscionable if it is otherwise unreasonably one-sided in favor of the employer.

   Sonic-Calabasas A, Inc. v. Moreno (2013) ___ Cal.4th ___.
   http://www.courts.ca.gov/opinions/documents/S174475.PDF

6. **Employer's Arbitration Agreement Unenforceable When Acceptance of Agreement is Condition of Employment** – The Ninth Circuit Court of Appeals held that Ralph's Grocery Company's arbitration policy was unconscionable and unenforceable against an employee's claims. The employee signed her employment application, which stipulated she agreed to Ralph's policies (including an arbitration agreement) by signing. However, the court found that the policy was unconscionable since it was a condition of employment (and was enforceable regardless of whether she signed the application or not), the terms of the arbitration provision were not provided to the employee until after she already agreed to it, and the provision was unfairly favorable to Ralph's by allowing the company to always select the arbitrator.

   Chavarria v. Ralph's Grocery Company, (October 28, 2013, Ninth Cir.) ___ F.3d ___.
   http://cdn.ca9.uscourts.gov/datastore/opinions/2013/10/28/11-56673.pdf

III. LABOR/UNION LAW

7. **Employer's Arbitration Clause Must Clearly and Unmistakably Delineate Which Claims Must Be Arbitrated** – The California Court of Appeal held that a unionized employee is not required to arbitrate statutory claims with her employer if the arbitration provision in the collective bargaining agreement does not contain a clear and unmistakable agreement to arbitrate statutory discrimination cases. The court noted that "the presumption that disputes arising out of collective bargaining agreements are arbitrable does not apply to statutory violations and that a requirement to arbitrate statutory claims in a collective bargaining agreement must be 'particularly clear.'" Since the arbitration provision of the agreement did not state that claims over statutory discrimination were arbitrable, the employee could not be forced to arbitrate her claims.

   Mendez v. Mid-Wilshire Health Care Center (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/nonpub/B243144.PDF

IV. PUBLIC EMPLOYERS

8. **Criminal Liability for Network Administrator Who Refused to Provide Password to Employer for Two Weeks** – The California Court of Appeal held that the City of San Francisco's principal network engineer was criminally liable for refusing to reveal network passwords after being reassigned. The engineer developed and administered the City's new fiber optic wide area network. He was the only person with administrative access to the network and refused to divulge the password when he was reassigned, which resulted in locking the City out of the network for almost two weeks and causing hundreds of thousands of dollars in damages. The court reasoned that it is a crime for anyone to disrupt or cause denial of computer services to authorized users of the network, and this law should apply not only to external hackers, but also to employees who use their authorized access to disrupt computer services to lawful users.

   People v. Childs (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/A129583.PDF

9. **City of Bell Does Not Have a Duty to Defend Corrupt Former Employees** – The California Court of Appeal held that the City of Bell did not have to provide the defense for its former Chief Administrative Officer in civil and criminal lawsuits against him, including a lawsuit by the City itself. The lawsuits stemmed from well-publicized allegations that former City employees received excessive salaries and stole millions of dollars from the City. The court noted that a public entity may refuse to indemnify an employee in a civil lawsuit if he was acting outside the scope of his employment, his actions were the result of actual fraud, corruption or malice, or if it would create a conflict of interest. The court concluded that given the City's belief that the former employee stole millions of dollars from the City, it would be "unacceptable" for it to be required to defend him.

   City of Bell v. Superior Court (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/B247362.PDF

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

10. **$17,448,500 Settlement – Overtime Compensation** – 24 Hour Fitness settled with a group of personal trainers for almost $17.5 million over allegations of overtime pay violations. The trainers contended they were required to work "off-the-clock" performing work related to their job with no overtime pay.

    Beauperthuy v. 24 Hour Fitness USA Inc., La Daily Journal, Verdicts & Settlements (October 4, 2013), US District Court – N.D. California Case No.: 3:06-cv-00715-SC.

11. **$2,600,000 Settlement – Excessive Force** – Monterey County settled with the children of a deceased suspect for $2.6 million over the use of a flash bang device that started a fire. While serving a warrant on the suspect's home for his connection with a nightclub shooting, the sheriff's SWAT team eventually broke into the house, using a flash bang device to create a diversion. The flash bang caused a fire and the suspect, refusing to leave the house, was found dead by firefighters an hour later. The plaintiffs contended that the use of the flash bang was unnecessary, as the suspect posed no danger to the officers. The County argued that the officers' actions were reasonable and that the suspect's death was his own fault, for refusing to leave his burning residence.

    Serrato v. Monterey County, LA Daily Journal, Verdicts & Settlements (October 18, 2013), US District Court – N.D. California Case No.: 5:11-cv-03642-RMW.

12. **$950,000 Settlement – Wage Violations** – A Bay Area construction firm settled with a class of employees for $950,000 over alleged wage and hour violations. The employees claimed that the firm did not provide legally-mandated rest and meal periods and did not pay all overtime wages owed. The employees also alleged that they were required to report to work before their shift started (without pay) to prepare their equipment, and were required to store and repair their equipment after the official shift end time.

Ramirez v. Ghilotti Bros., Inc., LA Daily Journal, Verdicts & Settlements (October 25, 2013), US District Court – N.D. California Case No.: 3:12-cv-04590-CRB.

13. **$920,000 Settlement – Employment Discrimination** – The Equal Employment Opportunity Commission settled with a San Diego staffing firm for $920,000 over charges of age, race, and sex discrimination. The firm was charged with engaging in a pattern of classifying and failing to refer job applicants based on race, sex, national origin, age, or disability.

    EEOC, Huyssen, Inc., Licensed to Use the Registered Service Mark Sedona Staffing, and Sedona Group Reach Agreement on Discrimination Case Involving Recruitment and Hiring, U.S. Equal Employment Opportunity Commission (October 22, 2013). http://www1.eeoc.gov/eeoc/newsroom/release/10-22-13.cfm

14. **Defense Verdict – Disability Discrimination** – An arbitrator granted summary judgment for an employer against an employee's claims that he was terminated because of his disability. The employee claimed he was diagnosed with cardiotrophic myopathy and later developed pneumonia, and that he was terminated for his disability. The employer successfully contended that the employee refused to engage in the interactive process, was not disabled under the terms of the Fair Employment and Housing Act ("FEHA"), and was terminated for poor performance (the employee did not make any sales during the last five months of his employment).

    Phi v. Xerox Corp., LA Daily Journal, Verdicts & Settlements (October 4, 2013), Orange Superior Arbitrator Case No.: 30-2011-00505001.

15. **Defense Verdict – Excessive Force** – A Southern District jury held that a San Diego sheriff's deputy did not use excessive force by releasing a police dog while scuffling with an arrestee. After the plaintiff was placed under arrest for drug possession, she physically resisted the deputy's attempts to handcuff her and both parties fell to the ground. When the deputy felt the plaintiff attempting to remove his gun from its holster he warned her to let go or he would release his canine partner. When the plaintiff refused, the deputy released the dog, which bit the plaintiff on the head. The deputy successfully argued that releasing the dog was reasonable under the circumstances and did not amount to excessive force.

    Hooper v. County of San Diego, LA Daily Journal, Verdicts & Settlements (October 25, 2013), US District Court – S.D. Cal. Case No.: 3:07-cv-01647-JAH-KSC.

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

Ed Zappia
THE ZAPPIA LAW FIRM, APC
Phone: (213) 814-5550
ezappia@zappialegal.com
www.zappialegal.com