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— *Labor & Employment Law* —
Defending Employers Rights

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CONFIDENTIAL CLIENT LABOR & EMPLOYMENT LAW UPDATE

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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. HARASSMENT

1. **Sexual Harassment – Gender Stereotyping** – The Fifth Circuit Court of Appeals held that a male iron worker was sexually harassed by his supervisor “because he was not manly enough.” After the supervisor saw the employee using baby wipes instead of toilet paper, he began to regularly called him derogatory names, exposed his genitals, and pretended to “hump” the employee while he was bending over “two to three times a week.” In reaching its decision, the court focused on the supervisor’s subjective perception of the employee. The facts indicated that his harassing behavior was motivated by his perception of the employee’s masculinity and therefore constituted sexual harassment.

EEOC v. Boh Brothers Construction, Inc., (September 27, 2013, Ninth Cir.) ___ F.3d ___.
<http://www.ca5.uscourts.gov/opinions/pub/11/11-30770-CV2.wpd.pdf>

II. DISCRIMINATION

2. **Pregnancy Discrimination – Burden of Proof** – The California Court of Appeal clarified that an employee alleging pregnancy discrimination must prove that her pregnancy was a substantial reason for her employer’s adverse action. In overturning a jury verdict to an employee who was terminated while on maternity leave, the court found that the trial court erred by instructing the jury that the employee only had to prove that her pregnancy was a “motivating reason.”

Alamo v. Practice Management Information Corporation (2013) ___ Cal.App.4th ___.
<http://www.courts.ca.gov/opinions/documents/B230909A.PDF>

III. WAGE / HOUR

3. **Amendment to Labor Code Limits Employers' Attorney Fee Awards** – A recent amendment (SB 462) to the California Labor Code makes it more difficult for prevailing employers in wage actions to collect fees. The Labor Code provides attorney fees to prevailing parties in nonpayment of wages actions. The new language stipulates that if the prevailing party is not the employee, fees may only be awarded to the employer if the court finds that the employee brought the action in bad faith.

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB462

IV. LABOR/UNION LAW

4. **Upcoming US Supreme Court Decisions Could Hurt Unions** – The United States Supreme Court is set to hear two cases involving workers' right to be free from union activity. One case challenges an Illinois law requiring public sector employees to pay union dues that do not go to political activity, and the other contends that certain agreements between unions and private-sector employers setting conditions for unionizing a workplace constitute a form of impermissible bribery. Observers predict that decisions by the pro-employer court against the unions would constitute a "significant blow to the labor movement."

Workers and Employers Face Off At U.S. Supreme Court, Reuters (October 4, 2013), Lawrence Hurley and Amanda Becker.

<http://news.yahoo.com/workers-employers-face-off-supreme-court-051642955--finance.html>

5. **Unfair Labor Practice – Unilateral Action** – A National Labor Relations Board administrative law judge found that a non-profit school for troubled youth violated the National Labor Relations Act by making unilateral changes without first bargaining with the union. The union, which represented teaching assistants and aides, successfully alleged that the school discontinued certain positions and stipends without providing prior notice or the opportunity to negotiate.

Via Center Inc. and SEIU Local 1021, LA Daily Journal, Verdicts & Settlements (September 27, 2013), National Labor Relations Board 32-CA-094045.

6. **Working Retirees – Retirement Income** – The Ninth Circuit Court of Appeals held that retired skilled mechanics could hold manual labor jobs, such as flagging traffic or plowing snow, without sacrificing their union retirement income. The union's retirement plan mandated that retirees could work and receive their retirement income as long as they did not work in the same job classification or industry as their old union jobs. The court held that the union's interpretation of "same job classification" was unreasonable: the employees were working in unskilled jobs that were fundamentally different from their original jobs as skilled mechanics.

Tapley v. Locals 302 and 612, (September 6, 2013, Ninth Cir.) ___ F.3d ___.

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/09/06/11-35220.pdf>

V. **OTHER**

7. **Attorney Fees – Duty to Indemnify Employees** – The California Court of Appeal held that a radio station was not required to pay the attorney fees of an employee who retained a lawyer of his own choosing instead of one provided by the employer’s insurance company. After a woman died from acute water intoxication during a “Hold your wee for a Wii” contest, her family filed suit against the station and the employee, a part-time assistant who handed water bottles to the contestants. Although the station’s insurer agreed to defend the employee and appointed an attorney to do so, the employee declined the offer, instead choosing his own attorney. After the lawsuit was settled, the employee sought indemnity from the station for over \$800,000 in attorney fees and costs. The court noted that although an employee must be indemnified for expenditures incurred as a direct consequence of discharging an employer’s duties, there is no automatic obligation to pay for an attorney of the employee’s choice. The court found that since the insurer agreed to defend the employee and assigned a lawyer to defend him it was unreasonable for the employee to retain his own counsel.

Carter v. Entercom Sacramento LLC (2013) ___ Cal.App.4th ___.
<http://www.courts.ca.gov/opinions/documents/C066751.PDF>

VI. **“In the Trenches” (The Blow by Blow of Active Court Cases)**

8. **\$4,098,698 Verdict- Excessive Force** – A Los Angeles judge awarded over \$4 million in damages to a homeless husband and wife who were shot by Los Angeles Sheriff’s deputies during the search for a wanted parolee. While searching a residential lot where the parolee was believed to be hiding, the deputies entered a shed in the backyard where the couple was staying. After seeing a BB gun (that the husband kept to shoot rats) the deputies opened fire, shooting the husband fourteen times. The couple contended that the deputies used excessive force and entered their dwelling without a warrant or legal justification. The deputies unsuccessfully argued that the shed did not appear to be a habitable structure and the only person in it would have been the parolee.

Lancaster Couple Awarded \$4.1 Million in Sheriff’s Shooting, Los Angeles Times (August 14, 2013), Hailey Branson-Potts.
<http://articles.latimes.com/2013/aug/14/news/la-ln-lancaster-sheriffs-shooting-20130814>

9. **\$1,250,000 Verdict – Sexual Harassment** – A Riverside jury awarded \$1,250,000 in damages to a former mall manager who alleged that the owner of the mall informed her that a raise was contingent on her performance of sexual favors. The manager claimed that after she declined the owner yelled at her, sent her pornography, and finally terminated her after she called in sick.

Karen Moran v. Sureshchandra Shah, LA Daily Journal, Verdicts & Settlements (September 6, 2013) Riverside Superior Court Case No.: INC087504.

- 10. \$1,100,000 Verdict – Retaliation** – A Southern District of California jury awarded \$1,100,000 in damages to a former federal law enforcement officer who claimed he was terminated for refusing to answer questions relating to his medical history during a physical examination. The officer successfully contended that it was within his rights under the Americans with Disabilities Act to refuse to answer the questions.

Scott v. Napolitano, LA Daily Journal, Verdicts & Settlements (September 6, 2013), US District Court – S.D. California Case No.: 08cb0735.

- 11. \$540,917 Verdict – Sexual Harassment** – A Riverside jury awarded the former general manager of a towing company \$540,917 in damages for sexual harassment and discrimination. The plaintiff manager claimed that he was harassed by the company's owner and fellow employees for being gay, even though he was actually heterosexual. This treatment included the use of slurs, photoshopping his face onto pictures of women, and trapping him inside a portable toilet. The employer unsuccessfully claimed that the plaintiff was a sexual predator who preyed on other male employees.

Greene v. Yucaipa Towing Inc., LA Daily Journal, Verdicts & Settlements (September 13, 2013), Riverside Superior Court Case No.: RIC10022388.

- 12. Defense Verdict – Pregnancy Discrimination** – A Sacramento jury found for the defendant employer regarding a terminated employee's pregnancy discrimination claims. The employee alleged that her position was eliminated after she returned from maternity leave, in retaliation for her pregnancy and absence. The employer successfully contended that she was fired for legitimate business reasons as the company was in poor financial condition at the time of her termination.

Cortez v. Gardener Group LLC, LA Daily Journal, Verdicts & Settlements (September 27, 2012), Sacramento Superior Court Case No.: 2011-00114176.

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

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