CALIFORNIA
LABOR & EMPLOYMENT LAW
UPDATE

April 2005

Supreme Court

Age Discrimination

Supreme Court Holds The ADEA Allows Disparate Impact Claims, But Employers Can Defend By Establishing "A Reasonable Factor Other Than Age." The City of Jackson, Mississippi gave pay raises to police officers to bring them up to the regional average. Officers with fewer than five years of service received raises that were proportionally higher than those given to the more senior officers. Most of the more senior officers were over the age of 40. The over-40 officers sued, alleging the pay raises were intentionally discriminatory (disparate treatment) and the raises adversely affected them (disparate impact). After summary judgment was granted on both claims, the Fifth Circuit affirmed dismissal of the disparate impact claim as not viable under the ADEA.

The Supreme Court reversed, finding that disparate impact claims may be brought under the ADEA. However, the Court also stated that under the facts of the case, the officers' disparate impact claim failed because it was not enough to show that two-thirds of the officers under 40 received raises of more than 10%, while less than half of those over 40 received similar raises. The officers did not isolate and identify "specific employment practices that are allegedly responsible for any observed statistical disparities," as is required to establish such a claim. In addition, the City's pay plan relied on a reasonable factor other than age - the need to raise salaries of junior officers to make them competitive within the labor market. *Smith v. City of Jackson*, 2005 U.S. LEXIS 2931 (U.S. Mar. 30, 2005).

> Practice Note: While employers can now be held liable under the ADEA for actions that have a disparate impact, they can take comfort in the "reasonable factor" defense. Unlike Title VII disparate impact claims (which require employers to justify their actions as a matter of business necessity), a defense against an ADEA disparate impact claim requires the employer's actions be reasonable.

Male Public School Coach Who Complained Of Sex Discrimination Against Girls He Coached May Maintain His Title IX Retaliation Claim. Plaintiff was a male teacher and girls' basketball coach at a public school in Alabama subject to Title IX. The coach complained that the girls' team was not receiving the same funding and access to equipment and facilities as the boys' team. The coach alleged his complaints were ignored, the school district began to give him negative evaluations, and he was eventually removed from his coaching position (but remained a teacher). The district court dismissed his suit finding that Title IX does not include retaliation claims. The Eleventh Circuit affirmed the dismissal. The Supreme Court reversed and reinstated the action.

The Court noted that Title IX has been interpreted liberally to allow a private right of action, monetary damages, and a prohibition against sex harassment in education. The text of Title IX prohibits discrimination on the basis of sex, and broadly speaking, "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action." *Jackson v. Birmingham Bd. Of Educ*. 2005 U.S. LEXIS 2928 (U.S. Mar. 29, 2005).

Certiorari Granted

Supreme Court To Consider The Scope Of First Amendment Protection For Public Employees. The Court has agreed to review a Ninth Circuit decision holding that an LA Deputy District Attorney's personal statements about alleged lies by a County Sheriff (in a search warrant affidavit) were protected when they are made as part of his job. *Garcetti v. Ceballos*, 361 F.3d 1168, *cert. granted*, 125 S. Ct. 1395 (2005).

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Certiorari Denied

Supreme Court Declines To Review Ninth Circuit Decision Preventing An Employer From Inquiring During Discovery About The Immigration Status Of Women Suing For National Origin Discrimination. Twenty-two female factory workers sued their employer when it required them to take a jobs skills test given only in English. The workers performed poorly on the test and were demoted, transferred, and eventually terminated. During discovery, the employer inquired as to the plaintiffs' immigration status. The employer argued it needed the information to determine the plaintiffs' entitlement to backpay. The district court granted a protective order barring the employer from obtaining the information, finding the questions were irrelevant at that juncture, but noted that such information could become relevant if backpay is awarded at trial. The Ninth Circuit upheld the protective order. *NIBCO, Inc. v. Rivera*, 2005 U.S. LEXIS 2264 (U.S. Mar. 7, 2005).

Federal Court

ADA/Privacy

Ninth Circuit Finds Pre-Employment Blood Tests Performed Before Non-Medical Background Checks Were Premature; Reinstates Plaintiffs' ADA Litigation. After Plaintiffs were interviewed for flight attendant positions, each was extended a conditional offer and directed to the medical department for an exam. Although all three were HIV positive, none disclosed this on their medical forms. Blood was drawn as part of the exam, but the company did not obtain written consent for the blood test, nor did it disclose that a complete blood count would be run. The company wrote each applicant requesting an explanation concerning the results. Each applicant disclosed his HIV-positive status. Because the three applicants did not meet American's medical guidelines for nondisclosure, their offers were rescinded. Each plaintiff sued for discrimination and invasion of privacy. The trial court granted summary judgment for American.

The Ninth Circuit reversed finding the medical examinations were unlawful because they were premature. The ADA and the FEHA regulate the sequence of the hiring process. "Both statutes prohibit medical examinations and inquiries until *after* the employer has made a 'real' job offer to an applicant." A job offer is real if the employer has evaluated all relevant non-medical information it can obtain. The offers were not "real" here because American had not compiled all non-medical information, such as a background check, prior to the medical exam. An employer may not "require applicants to disclose personal medical information - and penalize them for failing to do so - before it assures them that they have successfully passed through all non-medical states of the hiring process." It made no difference to the court that American evaluated the non-medical information before the medical information.

The court further concluded the complete blood count violated the applicants' right to privacy. Under California law, applicants have a diminished expectation of privacy during a pre-employment medical examination, and if they allow blood to be drawn, they have consented to some form of blood test, but not a complete blood count. American failed to present evidence that conducting a complete blood count without notice or consent is standard practice. *Leonel v. American Airlines, Inc.*, 400 F.3d 702 (9th Cir. 2005).

Arbitration

Arbitrators, Not Courts, Are To Decide Whether An Agreement That Contains An Arbitration Clause Is Unenforceable Because It Was Non-Negotiable. Plaintiff entered into an agreement with MailCoups, Inc. to operate one of the company's mail-advertising franchises. The parties signed a document containing an arbitration clause. After two years, the business failed and the plaintiff unilaterally terminated the agreement. Believing the plaintiff owed MailCoups money, it initiated arbitration proceedings in Boston (in accordance with the agreement). The plaintiff initially participated in the prehearing procedures but then stopped and filed suit in California. The trial court found the agreement was valid and dismissed the lawsuit.

Affirming the dismissal, the Court of Appeals addressed whether a court or an arbitrator should decide whether the agreement continuing the arbitration clause was procedurally unconscionable because it was unfairly one-sided. The court held an arbitrator must decide whether an agreement continuing an arbitration clause is a contract of adhesion because the issue pertains to the making of the agreement as a whole and not to the arbitration clause specifically. In so ruling, the Ninth Circuit joins the Second, Fifth and Sixth Circuits who have previously ruled an arbitrator should decide this issue. *Nagrampa v. MailCoups Inc.*, 2005 U.S. App. LEXIS 4562 (9th Cir. Mar. 21, 2005).

Class Actions

When Nominal Damages Are Awarded In A Civil Rights Class Action, Every Member Of The Class Is Entitled To The Nominal Damages (Not Just The Named Parties). Seven named plaintiffs in the class action were nonunion employees of the State of California. The state deducted "fair share" fees from the employees' paychecks. Plaintiffs sued on behalf of 37,000 nonunion employees alleging the union had improperly withheld agency fees without providing

constitutionally mandated procedural safeguards.

The district court ruled only the seven named plaintiffs were to receive the $1 nominal award. Reversing, the Ninth Circuit explained that nominal damages are awarded to vindicate rights. The court held each class member whose rights were violated is entitled to receive the nominal damages. The purpose of the class action - to obviate the need for each person to file a separate lawsuit - would be defeated if only the class representatives received the award. *Cummings v. Connell*, 2005 U.S. App. LEXIS 4954 (9th Cir. March 29, 2005).

Gender Discrimination

Female Electrician Fails To Defeat Summary Judgment By Using Her EEOC Reasonable Cause Determination As Evidence Of Discrimination. In 1998, five male electricians were notified they were to be laid off due to a department restructuring. However, rather than lay off the employees, they were permitted to participate in an experimental on-the-job training program. Six months later, the plaintiff, a female electrician, was similarly facing layoff (from a different department than the five male electricians) and requested she be afforded the same experimental training program. Her request was denied and she sued for gender discrimination. The district court granted summary judgment for the employer finding the plaintiff failed to present any direct evidence of discriminatory animus towards her and the indirect evidence of pretext was never specific nor substantial.

Affirming summary judgment, the appellate court found the employer presented legitimate, nonpretextual reasons for denying plaintiff's request for on-the-job training: it was not efficient and economical. In so ruling, the court rejected the plaintiff's argument that she presented sufficient direct and circumstantial evidence of discrimination by offering the EEOC reasonable cause determination. An EEOC letter stated there was "reasonable cause to believe [the employer] discriminated against [the plaintiff] because of her sex…" The court likened plaintiff's argument to seeking a "free pass through summary judgment." The court stated no case has held that an EEOC determination letter alone is sufficient to overcome summary judgment. *Mondero v. Salt River Project*, 2005 U.S. App. LEXIS 4257 (9th Cir. Mar. 15, 2005).

State Courts

Administrative Remedies

Employee Must Exhaust Administrative Remedies Before Suing For Retaliatory Termination Under The Whistleblower Statutes. The plaintiff, a senior architect at the University of California, San Francisco, sued claiming that while acting on behalf of the Regents, she was directed to prepare bid documents that limited competition by restricting specifications. After she reported her concerns to the FBI, she was reassigned, took an extended disability leave, returned to work, and then was discharged. She filed an internal complaint under UCSF's Personnel Policies for Staff Members (PPSM). UCSF responded that the PPSM complaint resolution process excluded allegations of retaliation for whistleblowing. Plaintiff was notified her complaint should be filed under UCSF's Policy and Procedures for Reporting Improper Governmental Activities (Policy and Procedures). The plaintiff did not file an additional internal complaint, instead, she filed a whistleblower claim in state court. The trial court found for the Regents which was affirmed on appeal. The California Supreme Court affirmed, finding the plaintiff had to exhaust the University's internal administrative remedies before filing a complaint in state court, including whistleblower claims. *Campbell v. Regents of The Univ. of Cal.*, 35 Cal. 4th 311 (2005).

Arbitration

A Non-Signatory Can Compel Arbitration Where The Plaintiff's Claims Against The Non-Signatory Presume The Existence Of The Agreement. Plaintiff entered into a three-year employment agreement with Financial Title. The agreement contained an arbitration clause. Financial transferred its Southern California operations and assets to Alliance Title. The plaintiff was to work for Alliance, but Alliance refused to honor the plaintiff's contract with Financial and plaintiff refused to enter into a new agreement with Alliance. Plaintiff was terminated and sued both Alliance and Financial. Alliance and Financial sought to invoke the arbitration clause in the plaintiff's agreement with Financial. Plaintiff opposed the motion to compel arbitration, arguing that Alliance, as a nonsignatory to the employment contract, could not compel arbitration. The trial court ordered arbitration as to Financial, but not Alliance.

The Court of Appeals reversed, holding that both Financial and Alliance could require the plaintiff to arbitrate his claims because equitable estoppel applies. Under both Federal and California law, "a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action are 'intimately founded in and intertwined' with the underlying contractual obligations." The plaintiff's claims, "rely on, make reference to, and presume the existence of" the plaintiff's agreement with Financial. Thus, according to the court, the plaintiff is equitably estopped from avoiding arbitration of his claims with Alliance. *Alliance Title Co., Inc.* v. Boucher, 127 Cal. App. 4th 262 (2d Dist. 2005).

FEHA

Doctor's Retaliation Claim Fails Because She Could Not Prove She Suffered An Adverse Employment Action. A doctor who worked for the California Department of Corrections (CDC) sued claiming discrimination and retaliation. She claimed the adverse employment action was, either individually or cumulatively, an instructional letter she received, a 30-day suspension that was issued but never implemented, and a forced transfer to a new facility. At trial, the jury returned a verdict for the CDC on the plaintiff's discrimination claim but awarded plaintiff damages on her retaliation claim.

The Court of Appeals reversed, finding the employee failed to prove she had suffered an adverse employment action. First, the letter of instruction did not result in any loss of pay, status or job responsibilities, nor did it alter the terms and conditions of her employment. Second, the 30-day suspension was not an adverse employment action because the plaintiff did not learn of the suspension, which was not implemented anyway. Finally, while the plaintiff felt the newly-assigned facility had a poor reputation, there was no evidence to support her claim. Other alleged inconveniencies - such as the lack of a lab coat and the need to share a desk at the newly-assigned facility - were insufficient to amount to a tangible injury. The court concluded the decision to transfer the plaintiff was not retaliation but rather was made because her relationship with her co-workers had deteriorated. *McRae v. Dep't of Corr.*, 2005 Cal. App. LEXIS 384 (1st App. Dist. Mar. 18, 2005).

Workers' Compensation

New Labor Code Sections Requiring Apportionment Apply Prospectively Irrespective Of When The Injury Occurred. The plaintiff, a special agent for the State of California, claimed industrial injuries from work. While his claim was pending, the Legislature enacted S.B. 899, which requires apportionment based on causation under new Labor Code §§ 4663 and 4664. The plaintiff claimed the new Labor Code sections did not apply because his injuries occurred before the enactment of S.B. 899. The WCAB adopted the administrative judge's decision applying the new apportionment provisions to the plaintiff's case. The California Court of Appeals held the Legislature intended new Labor Code §§ 4663 and 4664 to apply prospectively from the date S.B. 899 was enacted (April 19, 2004) regardless of the date of injury. *Kleeman v. WCAB*, 127 Cal. App. 4th 274 (2d App. Dist. 2005).

Legislative Updates

State Developments

New Hospital Nursing Staff Ratios In Effect. Despite efforts by the Governor to block them, the new hospital nursing staff ratios are in effect. See Daily Lab. Rpt. No. 68 (Apr. 11, 2005), A-3; Daily Lab. Rpt. No. 51 (Mar. 17, 2005), A-3.

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