CALIFORNIA
LABOR & EMPLOYMENT LAW
UPDATE

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Supreme Court

Supreme Court Lets Stand Ruling That Reaffirms An Employee's Right To Choose Which Union Representative Will Act On His Behalf In Disciplinary Proceeding. The United States Supreme Court denied a petition to review the Fourth Circuit Court of Appeals' split decision in *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267 (4th Cir. 2003). The court upheld the NLRB's "representation rule," which states that, absent extenuating circumstances, an employee subjected to potential discipline has the right to the union representative of his choice. *Anheuser-Busch Inc. v. NLRB*, 2004 U.S. LEXIS 2575 (U.S. Apr. 5, 2004).

Supreme Court To Decide If Employer Can Be Held Strictly Liable For Harassment That Leads To Constructive Discharge. On March 31, 2004, the United States Supreme Court heard oral argument in *Pennsylvania State Police v. Suders*, 325 F.3d 432 (3d Cir.), *cert. granted*, 124 S. Ct. 803 (U.S. Dec. 1, 2003). Plaintiff Nancy Drew Suders alleged that she was the victim of a sexually hostile environment created by her supervisors and that her employer, the Pennsylvania State Police Department, was liable because the conduct resulted in her constructive discharge (where the employee quits due to "intolerable" working conditions created by her supervisors). The Police Department contended that it had an affirmative defense (under *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)), namely that it took reasonable steps to prevent the misconduct and that the employee unreasonably failed to invoke the employer's non-harassment policy. Under *Ellerth/Faragher*, however, an employer has no affirmative defense and is liable if the harassment has culminated in a "tangible employment action." The issue the Supreme Court will decide is whether a constructive discharge constitutes a "tangible employment action," thereby rendering *Ellerth/Faragher* inapplicable.

Federal Laws and Individual Rights

Labor

California Law That "Regulates" An Employer's Advocacy In Favor Of Or Against Union Organizing Is Preempted By The NLRA And Is Therefore Invalid. The Ninth Circuit Court of Appeals struck down a California law that forbids employers who receive state grants or funds in excess of $10,000 from using such funding to advocate against or in favor of union organizing. The court effectively invalidated the statute by determining that it was preempted by the NLRA pursuant to the long-standing *Machinists* preemption doctrine (*Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976)). The Machinists preemption doctrine is premised on the notion that by regulating certain parts of the union organizing process, Congress intended other parts to be free from state regulation. According to the court, because the California statute "directly regulates the union organizing process itself . . . it interferes with an area Congress intended to leave free of state regulation." Consequently, the court determined that, under *Machinists*, the law is preempted. *Chamber of Commerce v. Lockyer*, 2004 U.S. App. LEXIS 7578 (9th Cir. Apr. 20, 2004).

Title VII

Plaintiffs' Immigration Status Not Discoverable. Twenty-three Latina and Southeast Asian female factory workers sued their former employer NIBCO for national origin discrimination. During the litigation, as part of the discovery process, NIBCO sought information regarding plaintiffs' immigration status. In response to deposition questions aimed at eliciting this information, plaintiffs moved for an order from the court barring any further discovery on the subject. The trial judge entered an order that allowed only minimal questioning regarding the plaintiffs' personal backgrounds. NIBCO appealed.

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On appeal, NIBCO argued that plaintiffs' immigration status was discoverable because of its direct relevance to potential remedies. NIBCO cited, in support of its position, the U.S. Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002) (finding that the NLRB cannot award back pay to undocumented workers). Without deciding whether *Hoffman Plastic* applies to an action under Title VII, the court determined that the chilling effect the discovery would have on civil rights actions warranted the protective order. Moreover, according to the Court, the plaintiffs' immigration status is irrelevant to the question of liability. *Rivera v. NIBCO, Inc*., 2004 U.S. App. LEXIS 7119 (9th Cir. Apr. 13, 2004). (Editor's note: California law reaches the same result by statute. *See* Labor Code Section 1171.5(b).)

State Laws and Individual Rights

Arbitration

Arbitration Agreement With One-Sided Venue Clause, Unfair Fee Clause, And Limited Discovery Is Unenforceable. An employer sought to have an employee's sexual harassment claim arbitrated. The employee reluctantly signed an employment agreement that required arbitration of all employment-related disputes. However, the California Court of Appeal found the agreement to be unenforceable. First, the court determined that the agreement was "procedurally unconscionable" as there was an imbalance of bargaining power: the employee was told she would not get a paycheck until she signed the agreement and she had no opportunity to negotiate the agreement's terms. Second, the court determined that the agreement was "substantively unconscionable," or unfairly one-sided, because 1) the venue clause was more favorable to the employer, 2) the agreement's fee provision, which required the party filing for arbitration to pay the fees, was contrary to existing law, which requires the employer to pay fees, and 3) discovery under the arbitration agreement was limited. Therefore, the trial court did not err in refusing to compel arbitration. *United Revenue Serv., Inc. v. Prall*, 2004 Cal. App. Unpub. LEXIS 3051 (4th Dist. Apr. 5, 2004).

Class Certification

Class Certification Continues In Wal-Mart "Off-The-Clock" Overtime Case. The California Supreme Court declined to block class certification of some 250,000 Wal-Mart employees who allege that Wal-Mart required them to work "off-the-clock." *Wal-Mart Stores Inc. v. Superior Court*, No. S122640 (Cal. Apr. 14, 2004). *See* Daily Lab. Rep. (BNA) No. 73 at A-8 (Apr. 16, 2004).

Retaliatory Discharge

County Estopped From Raising Failure To Exhaust Administrative Remedies Defense Where County Led Plaintiff to Believe She Did Not Have Administrative Recourse. A psychiatrist, who worked on a probationary basis, supervised other psychiatrists and medical staff at the county Juvenile Forensic Services Facility. This psychiatrist determined that the psychiatrists and the medical staff that she supervised were engaging in what she believed were unethical, negligent, and unlawful practices. She raised these concerns with the psychiatrists she supervised as well as her own supervisors, but the matters were ignored. She then raised her concerns with counsel for the county, after which she was terminated.

The psychiatrist claimed that the county dismissed her in retaliation for advocating medically appropriate health care. The county claimed that the psychiatrist had failed to exhaust her administrative remedies. The trial court agreed and dismissed the case. The appellate court, however, reinstated the case, finding that it was unclear whether a probationary psychiatrist was entitled to an administrative remedy. In addition, the court concluded that the county was estopped from asserting that the psychiatrist failed to exhaust her administrative remedies because county officials had led the psychiatrist to believe that she did not have an administrative recourse. *Shuer v. County of San Diego*, 117 Cal. App. 4th 476 (2004).

Workers' Compensation

Workers' Compensation "Exclusive Remedy Rule" Did Not Bar Negligence Action Where Employee Was Not Acting In Course Of Employment When Injured. Plaintiff worked as a pool technician at a water park operated by Lake Dolores Group ("LDG"). One afternoon, after the park closed and before plaintiff's shift began, plaintiff asked another employee to turn on a water slide. Plaintiff rode the slide and, due to an insufficient amount of water in the run-off lane, crashed into a dam, rendering him a paraplegic.

Plaintiff sued LDG for negligence. A jury found LDG 52% at fault. The trial court granted LDG's post-trial motion, which argued that workers' compensation was the employee's exclusive remedy. The appellate court, however, reinstated the jury's verdict. The court concluded that the employee was not acting in the course of his

employment when he was injured because plaintiff was not performing a service incidental to his employment and LDG had expressly prohibited all employees from riding the slides after the park was closed. Thus, the workers' compensation exclusive-remedy rule did not bar the negligence action. *Mason v. Lake Dolores Group, LLC*, 2004 Cal. App. LEXIS 492 (4th Dist. Apr. 9, 2004).

Legislative Updates

Federal Developments

New FLSA Overtime Regulations. On April 20, 2004, the Department of Labor issued its long-awaited final regulations governing who is exempt from the overtime requirements of the FLSA. For further information regarding these new regulations, please see the Seyfarth Shaw Management Alert available at http://www.seyfarth.com/db30/cgi-bin/pubs/043004DOL.pdf.

State Developments

Workers' Compensation Overhaul. Governor Schwarzenegger recently signed legislation reforming the state's beleaguered workers' compensation system. In a nutshell, the law now contains the following features:

- Limitation of benefits for some medical care and temporary disability.
- Redesign of the mechanism and provision of medical care, coupled with shortened periods to respond regarding authorization and reporting.
- Fundamental change in the determination of permanent disability, with the expansion of apportionment to cause, and application of new guidelines and factors including lost income from consequences of injury.
- Re-establishment of vocational rehabilitation with a sunset provision for its termination, and replacement of a reduction or increase in permanent disability, depending on employer's ability to bring the employee back to worksite. Also provided is state reimbursement for ergonomic improvements to the workplace when employers return disabled employees to work.
- Expanded application to all industries of the stand-alone alternative dispute system for unionized employers, to guarantee underlying benefits and due process.

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