

Supreme Court

Court Limits Exposure Under Section 1981; Privity of Contract Matters! (Part I). In *Domino's Pizza v. McDonald*, ___ U.S. ___, No. 04-593 (Feb. 22, 2006), the Court reversed the Ninth Circuit's ruling that a sole shareholder of a corporation could sue under 42 U.S.C. §1981 based on the corporation's contract. The issue surfaces most often when a minority owned and often closely held corporation's contract is terminated amid claims of racial animus. It can also arise in settings where the racial demographics of a corporation's workforce is alleged to have been a factor in the termination decision and the terminated contractor's employees choose to sue under this statute. Under prior Ninth Circuit law, if a non-party to the contract could establish "injuries distinct from the corporation" the court would permit the claim. See *Gomez v. Alexian Bros. Hospital of San Jose*, 698 F.2d 1019 (9th Cir. 1983). In an 8-0 decision with Justice Alito not participating, the court ruled that only the party to the contract can bring a 1983 action. Thus since the contract was between Mr. McDonald's corporation and Domino's, the claim of the sole shareholder here was barred.

Arbitrability Revisited. Who Decides the Issue if the Defense to Compelled Arbitration is That The Contract Is Illegal? The latest installment in the ongoing saga of enforcement of arbitration clauses arises from a non-employment case but is nonetheless significant to employers. In *Buckeye Check Cashing Inc. v. Cardegna*, ___ U.S. ___, No. 04-1264 (Feb. 21, 2006), the Plaintiff attempted to avoid arbitration by claiming the entire contract was void. This framed the question as to whether the court or arbitrator decides illegality. The Court found that issue was a question for the arbitrator relying on its prior decisions in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967) and *Southland Corp. v. Keating*, 465 U. S. 1, 4-5 (1984).

The Court said it reached this conclusion based on three previously established propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts, a point of significance as the case came to the Court through the Florida state court system. Applying these principles to the case, the court found that because the Plaintiffs

challenged the entire agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. Consequently, the illegality issue is decided by arbitrator.

Too Close to Call? Court to Rehear Public Employee Free Speech Case. The U.S. Supreme Court will rehear a public employee free speech case that was originally argued last October before Justice Alito joined the court. Justices generally do not vote on cases if they were not present for argument. The new hearing allows Alito to join in ruling on the case. Among the issues is whether a Los Angeles assistant prosecutor can claim he was retaliated against in violation of his First Amendment rights when he wrote an internal memo questioning whether a deputy sheriff had lied or misrepresented facts in an affidavit in support of a search warrant. *Garcetti v. Ceballos*, U.S., No. 04-473, *restored to calendar 2/17/06*. See Daily Lab. Rpt. No. 34 (Feb. 21, 2006), AA-1.

Federal Courts ERISA

Arbitration Agreement Does Not Bind Plan Participants to Arbitrate Claims Brought on Behalf of the Plan if They Were Not a Party to the Deal. Privity Matters! (Part II) In a case arising from the bursting of the telecom/tech stock bubble in early 2000, the participants of two ERISA plans sued the plan's investment advisor based on the concentration of plan assets in high-tech and telecom stocks. Plaintiffs sought relief on behalf of the plan. The investment advisor attempted to compel arbitration, pursuant to an arbitration clause that required claims and controversies between the plan trustees and the advisor to be submitted to binding arbitration. The federal trial court denied relief and the Ninth Circuit affirmed.

The Plaintiff participants were not bound by the arbitration clauses in the plans' investment management agreements because they had not signed the agreements. The court rejected the argument that the participants were third party beneficiaries finding no evidence that the signatories intended to give every beneficiary of the plans, including the plaintiff, the right to sue under the investment advisor agreement with the plan trustees. *Comer v. Micor, Inc.*, 2006 U.S. App. LEXIS 2442 (9th Cir. Feb. 1, 2006).

Title VII

Title VII Claim By Male Subordinate Against Female Manager Barred By Failure To Take Advantage of Known Anti-Harassment Policy. The employee claimed he was sexually harassed by his General Manager (GM), who made inappropriate sexual comments and touched the plaintiff in a sexual manner. The employee also claimed the GM retaliated against him after he rejected her advances. On one occasion, he said that she said “Don’t forget who got you to where you are,” after he rejected her sexual advance. He was also issued negative performance evaluations shortly after the manager told him “your number’s up,” and “It’s not going to be me that loses my job, it’s going to be you.” Shortly after receiving the negative performance evaluations, the plaintiff submitted a letter of resignation. The district court granted summary judgment.

The Ninth Circuit affirmed and noted that the employer could defend the action under the *Ellerth/Faragher* affirmative defense because the plaintiff failed to take advantage of preventative or corrective opportunities. The court rejected the claim that he was subject to constructive discharge as a result of his manager’s harassment, noting that the last time the manager made inappropriate comments or sexual advances was March 2001, and plaintiff did not resign until August 31, 2001. No reasonable person in his position would have felt that he was forced to quit so long after the harassment.

The court found that the employer exercised reasonable care to prevent and promptly correct any harassing behavior. The company had an anti-harassment policy and the plaintiff was familiar with the policy. Further, the employer took reasonable steps to correct the problems by promptly investigating his complaint. The plaintiff failed, however, to provide the company’s investigator with any details concerning the alleged harassment, and asserted that he wanted to handle the problem by himself. The investigator followed up two weeks later, and the plaintiff confirmed that he did not want help confronting the problem. The court concluded that this response by the employer was prompt and reasonable as a matter of law. *Hardage v. CBS Broad. Inc.*, 2006 U.S. App. LEXIS 3017 (9th Cir. Feb. 8, 2006).

California Courts

Torts

“Put Down the @\$%^ Phone and Drive” - Employer not Liable for Injuries Resulting from Intemperate Driving Behavior of Employee. One Sunday afternoon that would eventually end in a redeye business flight, the employee left his home to run some errands. On his way to meet family members for dinner, he became involved in a road rage incident resulting in a collision with another car containing the eventual plaintiff. Unfortunately, the collision left the plaintiff a quadriplegic.

After the collision, the employee continued on to dinner and went directly from dinner to the airport. The plaintiff sued the employer of the alleged driver of the other vehicle, among others, arguing that employee caused the accident while acting in the course and scope of his employment. The jury found for the employer.

Affirming the verdict on appeal, the court ruled that the employee was not acting within the course and scope of his employment when he caused the accident. Although the accident occurred on the route from his home to the airport, he left his house five hours before his flight and for purely personal reasons. Further, he was motivated entirely by personal malice or compulsion, not by an intent to serve his employer’s interests in the road rage incident. The connection between the incident and employment was far too tenuous to hold this employer vicariously liable for his egregious and intentional conduct. *Kephart v. Genuity, Inc.*, 2004 Cal. App. LEXIS 128 (Cal. App. 3rd Dist. Feb. 1, 2006).

Wage & Hour

“It’s a Penalty!”...“No, It’s Wages!”...“It’s Both”... “No It’s Not”...“Is So” What is the Proper Characterization of Money Due To Employees For Missed Breaks? Supreme Court Will Decide. The issue is whether the amount equal to one hour of pay provided for under Labor Code § 226.7 as a remedy against employers who require employees to skip rest or meal periods is an owed wage or a penalty. The distinction matters for a number of reasons. First, the characterization is the difference between exposure to a one year statute of limitation or a three year statute. Second, payment of wages is a deductible business expense to the employer. Whether a penalty is as deductible is a topic for another article. Third, if its wages and it was due during the pay period when the break or meal period was missed, then it can be support for additional waiting time penalties.

The Second District Court of Appeals recently cast its vote for “penalty.” The plaintiff had argued that the statutory language that requires employers to “pay the employee one additional hour of pay” should be interpreted as requiring employers to compensate employees in wages for missed breaks. Finding § 226.7 to be ambiguous as to whether the payment was a penalty or wage, the court looked to its legislative history, which showed that the payment for missed breaks was intended to be a penalty. *Mills v. The Superior Court of Los Angeles County*, 2006 Cal. App. LEXIS 98 (Cal. App. 2d Dist. Jan. 27, 2006).

The California Supreme Court has agreed to review *Murphy v. Kenneth Cole Productions*, in which the 1st District Court of Appeal, like the 2nd District in *Mills*, determined that payments under § 226.7 are penalties, not wages.

Employers May Be Paying For More Changing Time But Not For A Voluntary Ride on a Parking Lot Shuttle Bus. In 1998, Disneyland relocated one of its employee parking lots to a satellite location. Employees who were assigned to park in this lot could take a company-provided shuttle to enter the theme park and begin their work day. The plaintiff brought a proposed class action on behalf of all employees who parked in the satellite lot, arguing that the company was required to compensate the employees for travel time on the shuttle.

The trial court granted the defendant's motion for summary judgment, and the court of appeals affirmed. Unlike putting on protective gear or being hauled from job to job without choice, whether to ride the shuttle was a matter of employee choice. The court stressed that employees were not required to travel on the company shuttles - indeed, about 10% of the employees assigned to the satellite lot did not drive to work at all - and those who did drive to work and park in the satellite lot were free to walk or bicycle from the lot to the theme park. Thus, because the employer-provided transportation was not mandatory, time spent traveling on the shuttle did not create compensable "hours worked." *Overton v. Walt Disney Co.*, 2006 Cal. App. LEXIS 126 (Cal. App. 2d Dist. Jan. 4, 2006), amended at 2006 Cal. App. LEXIS 127 (Cal. App. 2d Dist. Feb. 1, 2006).

Workers' Compensation

Injury Suffered In Off-Duty Basketball Game Was Not Compensable Under Workers' Compensation. The plaintiff injured his leg while off duty, playing a pickup game of basketball in a private facility. The workers' compensation judge determined that the injury arose out of and occurred during the plaintiff's course of employment because officers were expected to exercise and stay fit. The WCAB affirmed but the Court of Appeal reversed the award of benefits.

Injuries are compensable if, at the time of the injury, "the employee is performing service growing out of and incidental to his or her employment." The injury must be one that "does not arise out of voluntary participation in any off-duty ... athletic activity ... except where these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment." The appellate court rejected the plaintiff's argument that his employer's requirement that he stay fit made this a compensable injury. The evidence did not support a finding that the plaintiff subjectively believed that his employer required him to engage in a pickup game of basketball because: 1) the employee knew that the department did not subject officers to any kind of physical fitness testing or examination; 2) the pickup basketball games were not part of the officer's training regimen - he only played about once a month; and 3) the officer did not believe basketball was necessary to maintain his physical fitness. Further, the game had no connection to the employer, and the employer did nothing to sponsor, encourage,

or condone the activity. *City of Stockton v. WCAB*, 2006 Cal. App. LEXIS 95 (Cal. App. 3rd Dist. Jan. 27, 2006).

Injuries Occurring Before January 1, 2005 Must Be Evaluated Under The Procedures Established By Former Labor Code § 4062. At issue was whether the employer had the right to order a medical evaluation for an employee represented by counsel who sustained injuries from a fall in July 2002. In 2005, the employer objected to continuing medical treatment, and the parties could not agree on a physician to conduct a medical evaluation. Using the procedure of former § 4062, the employer arranged for a medical evaluation by a doctor but the employee refused to attend the evaluation, and the employer requested an order compelling the employee to attend a rescheduled evaluation. The administrative law judge signed the order, and this appeal followed.

On appeal, the employee first argued that the employer could not request a medical evaluation under § 4062 because the employer denied compensability. The court rejected this argument, pointing out that the employer's denial was limited to the nature and extent of the injury, the employer had already provided benefits to the plaintiff, and the employer admitted the injury to the court. Next, the employee argued that former § 4062 could not be applied because the section was repealed by Senate Bill 899, and newly-enacted § 4062.2 only applies to cases where the date of injury occurs on or after January 1, 2005. The legislature did not provide a procedure for injuries occurring before that date. Thus, the court was forced to decide whether the old statutory provisions remained in place for cases such as this, or whether there was a void in the law. The court held that the old statutory provisions remained in effect for injuries occurring before the January 1, 2005 trigger date; the Legislature did not intend total deregulation of the abuses associated with medical evaluation and reporting in workers' compensation. *Nunez v. WCAB*, 2006 Cal. App. LEXIS 157 (Cal. App. 2d Dist. Feb. 7, 2006); see also *Cortez v. WCAB*, 2006 Cal. App. LEXIS 166 (Cal. App. 2d Dist. Feb. 8, 2006).

Legislative/Regulatory Updates

Revised EEO-1 Report Approved By OMB. On January 27, 2006, the Office of Management and Budget approved the EEOC's revisions to its EEO-1 Report. This is the first major overhaul of the EEO-1 Report in 40 years. Beginning with the 2007 reporting cycle, covered private employers (100 or more employees) and federal contractors (50 or more employees) will be required to use the revised survey form. Because the revised survey form will not be effective until 2007, it is recommended that employers delay implementing any changes to their data collection systems until after they have submitted their 2006 report.

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LMRDA Reporting Obligations. Early last year, the U.S. Department of Labor (DOL) announced that it will begin enforcing certain filing requirements under the Labor Management Reporting Disclosure Act (LMRDA), 29 U.S.C. § 401 et seq. Under the LMRDA, both employers and unions must report when anything of value is given to a labor organization or its representatives. Employers must report transactions on a DOL Form LM-10. Employers must be aware of this new requirement and act accordingly.

This change in enforcement is both trickier and more potentially dangerous to unionized employers than may appear to be the case on the surface. “Anything of value” is a broad concept that can conjure up images of validated parking, discounts, odd free lunches etc.

FMLA And Cafeteria Plan and Multiemployer plan Contributions. DOL issued opinion letters to the effect that an employer must continue making 125 plan contributions for health care plans even during unpaid leave portion of FMLA leave. It issued a similar ruling regarding multiemployer plan contributions.

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