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Tibble v. Edison International — The Decision and the First Six Months Following It

By Nicole A. Diller & Roberta H. Vespremi

Introduction

On May 18, 2015, the Supreme Court of the United States issued a unanimous decision in *Tibble v. Edison International*,[1] holding that an ERISA fiduciary has an ongoing duty to monitor plan investments, and that allegations of a breach of this duty may give rise to a timely claim even when a challenge to the fiduciary's initial selection of that same investment would be barred by the six-year statute of repose under the Employee Retirement Income Security Act of 1974[2] (ERISA).

In reaching this decision, the Supreme Court made clear that before finding a claim for breach of fiduciary duty untimely, courts must first "consider the contours of the alleged breach," which often means turning to the law of trusts.[3] Doing so, the Court found that ERISA, like trust law, imposes upon a plan fiduciary a "continuing duty to monitor trust investments and remove imprudent ones," which is distinct from the duty to prudently select the investment options in the first instance.[4] Thus, an allegation that a fiduciary breached the duty to monitor may be timely under ERISA's six-year period of repose,[5] even though the initial selection of the investment occurred outside of that period - and even

1 135 S. Ct. 1823 (May 18, 2015).

2 29 U.S.C. § 1001 et seq.

3 *Tibble*, 135 S. Ct. at 1826.

4 135 S. Ct. at 1826.

5 29 U.S.C. § 1113(2).

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Tibble v. Edison International — The Decision and the First Six Months Following It

By Nicole A. Diller & Roberta H. Vespremi

(Continued from page 397)

though there was no "significant change in circumstances" that would have caused the fiduciary to revisit its initial selection decision.[6]

The impact of the Supreme Court's ruling is clear in some respects, though remains to be seen in others as lower courts have only begun to contend with it. Following closely on the heels of another unanimous ruling in *Fifth-Third Bancorp v. Dudenhoeffer*,[7] which scuttled the fiduciary-friendly "presumption of prudence" previously applicable to claims challenging investments in employer stock, the Court's decision suggests a broad reading of ERISA's fiduciary duties that could open the door for additional "failure to monitor" claims. That said, the Court offered little insight into what an ERISA fiduciary's duty to monitor actually demands, and instead, remanded to the Ninth Circuit to address that question. Oral argument is scheduled at the Ninth Circuit for December 7, 2015. Although the full implications of the Supreme Court's decision and the scope of the duty to monitor therefore remain uncertain, *Tibble* confirmed that fiduciaries have a continuing duty to periodically monitor a plan's investment options.

Background and Lower Court Proceedings in *Tibble*

Under ERISA, a plaintiff generally must bring a claim for breach of fiduciary duty within no more than six years after "the date of the last action which constituted a part of the breach or violation."[8] This six-year period is considered a statute of repose which, as opposed to an ordinary statute of limitations, establishes "an absolute barrier to an untimely suit."[9] Lower courts have grappled with what constitutes the alleged breach in certain circumstances, including when selecting and maintaining an investment option in an ERISA plan. In particular, several courts have held that because ERISA's six-year limitations period is a statute of repose, the so-called "continuing violation" theory does not apply to convert an alleged breach that occurred outside of the limitations period into a timely claim merely because that breach continued into the limitations period.[10] Rather, in those circumstances, the six-year period of repose was triggered by the underlying breach, and absent some change in circumstances establishing a new or distinct breach, a plaintiff must sue within six years.

The plaintiffs in *Tibble* were participants in a 401(k) plan offered by Edison International who claimed that the plan's fiduciaries invested in a series of mutual funds that charged high fees, when identical - but cheaper - funds were readily available.[11] The district court agreed with plaintiffs, but only for three funds purchased for the plan in 2002, within six years of when plaintiffs filed suit in 2007.[12] Three other funds at issue were purchased in 1999, and the district court granted summary judgment after finding plaintiffs' claims untimely because more than six years had passed with no significant change in circumstances triggering a fiduciary obligation to re-evaluate offering those funds at their existing cost.[13] Finding that plaintiffs had alleged only that the initial breach - purchasing the mutual funds with excessively high fees - continued unabated into the six-year period of repose, the district court concluded that plaintiffs had failed to identify conduct within the six-year repose period triggering a new, distinct fiduciary breach.[14]

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6 *See Tibble*, 135 S. Ct. at 1827-28.

7 134 S. Ct. 2459 (2014).

8 29 U.S.C. § 1113.

9 Archer v. Nissan Motor Acceptance Corp., 550 F.3d 506, 508 (5th Cir. 2008); *see also* Ranke v. Sanofi-Synthelabo Inc., 436 F.3d 197, 202-05 (3d Cir. 2006).

10 *See, e.g.* Phillips v. Alaska Hotel & Restaurant Employees Pension Fund, 944 F.2d 509, 520-21 (9th Cir. 1991); Ziegler v. Connecticut Gen. Life Ins. Co., 916 F.2d 548, 550-552 (9th Cir. 1990); David v. Alphin, 817 F. Supp. 2d 764, 777-778 (W.D.N.C. 2011), *aff'd*, 704 F.3d 327, 342-43 (4th Cir. 2013).

11 *Tibble*, 135 S. Ct. at 1826.

12 These three instances involved the failure to inquire about the availability of a lower-fee share class of the same fund in which the plan's fiduciaries had already decided to offer as investments. 135 S. Ct. at 1826-27.

13 135 S. Ct. at 1826-27.

14 135 S. Ct. at 1827.

The Ninth Circuit affirmed the district court's ruling as to the three 1999 funds.[15] In doing so, the Ninth Circuit specifically rejected the plaintiffs' "continuing violation" arguments, reasoning that the mere continued offering of an allegedly imprudent investment, without more, cannot trigger a new breach upon which plaintiffs can base a timely claim.[16] The court wrote that such an approach "would make hash out of ERISA's limitation period and lead to an unworkable result."[17] Next, the Ninth Circuit pointed out that the district court had properly allowed plaintiffs the opportunity at trial to prove that "changed circumstances" occurring within the repose period would have prompted a full "due diligence" review and, in turn, led prudent fiduciaries to replace the existing mutual funds.[18] Because plaintiffs had failed to prove such changed circumstances at trial, however, the Ninth Circuit affirmed the district court's judgment that plaintiffs' claims were time-barred.[19]

The plaintiffs filed a petition for certiorari with the Supreme Court, which was granted on October 2, 2014.[20]

Supreme Court's Opinion

The Supreme Court framed the question for review as whether a fiduciary's retention of an investment can be an "action" or "omission" that triggers ERISA's six-year repose period. To answer this question, the Court began by criticizing the Ninth Circuit for incorrectly defining the breach at issue and, in particular, for failing to consider the "nature of the fiduciary breach" and the "role of the fiduciary's duty of prudence under trust law."[21] The Court next turned to the common law of trusts and observed that a trustee is required to conduct a regular review of trust investments "with the nature and timing of the review contingent on the circumstances."[22] The Court remarked that "a trustee has a continuing duty to monitor trust investments and remove imprudent ones," and that this duty exists - and can therefore be breached - separate and apart from the trustee's duty to act prudently when selecting plan investments.[23]

Accordingly, the Court held in rather broad language that a plaintiff may allege a separate breach of fiduciary duty claim under ERISA for the failure "to properly monitor investments and remove imprudent ones" and that such a claim would be timely so long as the alleged breach of this duty occurred within six years before filing suit.[24] The Court therefore disagreed with the Ninth Circuit's suggestion that only significantly "changed circumstances" could give rise to a new, separate breach falling within the repose period. At the same time, however, the Court declined to provide any specific guidance on what exactly the "duty to monitor" entails. Rather, the Court noted that the parties "disagree[d]" as to "the scope" of the duty to monitor, "express[ed] no view" on the scope of the defendants' duties in this case, and remanded to the Ninth Circuit to consider whether the defendants had "breached their duties [whatever they might have entailed] within the relevant 6-year period under § 1113, recognizing the importance of analogous trust law."[25]

Finally, in the closing sentences of its opinion, the Court briefly acknowledged Edison's argument that the plaintiffs had not raised any claim or argument below that the defendants had "committed new breaches of the duty of prudence by failing to monitor" plan investments after the during the period of repose.[26] The Court, however, elected to "leave any questions of forfeiture for the Ninth Circuit on remand."[27] Thus, although this portion of the opinion is easily glossed over, the Ninth Circuit's handling of the forfeiture issue on remand may well obviate any determination of the scope of the duty to monitor and whether that duty was actually violated in this particular case.

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15 135 S. Ct. at 1827.

16 135 S. Ct. at 1827.

17 729 F.3d 1110, 1119 (9th Cir. 2013).

18 *Tibble*, 135 S. Ct. at 1827.

19 135 S. Ct. at 1827.

20 *Tibble v. Edison Int'l*, 135 S. Ct. 43 (2014).

21 *Tibble*, 135 S. Ct. at 1827.

22 135 S. Ct. at 1828.

23 135 S. Ct. 1828.

24 135 S. Ct. at 1828-29.

25 135 S. Ct. at 1829.

26 135 S. Ct. at 1829. The parties vigorously disputed this forfeiture issue in their Supreme Court briefing and at oral argument. Plaintiffs argued that the district court, through its summary judgment decision, foreclosed a duty-to-monitor claim and effectively forced them to pursue a "changed circumstances" theory at trial. According to Edison, however, the "changed circumstances" theory was driven by plaintiffs' own expert, who opined that ordinary fiduciary monitoring would not have caused prudent fiduciaries to detect or address the allegedly excessive mutual fund fees.

27 135 S. Ct. at 1829.

Implications of *Tibble* and Impact Thus Far

In the more than six months since the *Tibble* decision, there have been few lower court decisions addressing it. The cases we have seen thus far focus on applying the six-year statute of repose, rather than what is sufficient to meet the duty to monitor. Briefing at the Ninth Circuit has taken place as to whether it should consider the scope of the duty to monitor on remand.

In light of *Tibble*, the Eleventh Circuit in *Stargel v. SunTrust Banks, Inc.*[28] brought back to life two putative class actions alleging that SunTrust Banks, Inc. selected poorly performing mutual funds managed by its affiliates for its employees' retirement plans. The Eleventh Circuit had previously affirmed the lower court's dismissal of one of the actions, finding that the limitations period began to run when defendants selected the funds at issue, which was more than six years before the filing of the lawsuit; as a result, claims for breach of fiduciary duties of loyalty and prudence were time-barred. In the other action, a Georgia district court found that similar claims against SunTrust were also time-barred. While appeals in both cases were pending, the Supreme Court issued *Tibble*. Following briefing on *Tibble*, the Eleventh Circuit remanded to the district court for additional proceedings.

In *Northstar Financial Advisors v. Schwab Investments*,[29] a California district court granted in part and denied in part a motion to dismiss breach of fiduciary duty claims, among others, brought by an investment advisory and financial planning services firm. The plaintiff's core allegations involved claims that defendants deviated from the Fund's investment objectives starting around 2007. Looking at *Tibble*, the district court found that plaintiff had adequately pled breach because its complaint was "replete" with allegations that defendants failed to conduct the "sort of regular monitoring" of investments after their initial selection described in *Tibble*.[30] Though the district court did not engage in a detailed analysis of the scope of the duty to monitor under *Tibble*, it described the core allegation of defendants permitting the Fund to deviate from its investment objectives as a failure of the duty to monitor.

The Southern District of New York in *In re Citigroup ERISA Litigation*,[31] concluded that *Tibble* did not warrant reconsideration of its prior decision to dismiss plaintiffs' breach of fiduciary claims, neither on the merits nor based on timeliness. The district court found *Tibble* distinguishable because the claims at issue involved allegations that defendants mismanaged employee stock ownership plans by continuing to permit plaintiffs to invest in company stock while the share price rapidly fell. The court described *Tibble*, in contrast, as involving allegations that defendants in that case acted imprudently by offering higher priced retail-class mutual funds in the plan's investment menu when there were nearly identical lower-priced institutional-class mutual funds available.

Conclusion

The divergence of the lower courts' application of *Tibble* suggests that the contours of the duty to monitor will become clearer as courts face a variety of facts and circumstances in which breach of that duty is alleged. In the meanwhile, plan sponsors and fiduciaries should revisit their existing process or procedures for monitoring the continued prudence of ERISA plan investments, keeping in mind that the precise scope of the duty to monitor remains uncertain.

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28 791 F.3d 1309 (11th Cir. 2015).

29 Case No. 08-CV-04119-LHK, 2015 U.S. Dist. LEXIS 135847 (N.D. Cal. Oct. 5, 2015).

30 2015 U.S. Dist. LEXIS 135847, at *35-36.

31 No. 11 CV 7672 JGK, 2015 U.S. Dist. LEXIS 88045 (S.D.N.Y. July 6, 2015).

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Wage & Hour Advisor: 2016 Ballot Likely to Include Initiative to Establish $15 Statewide Minimum Wage

By Aaron Buckley

Introduction

California employers are gearing up for a host of new employment laws to take effect in 2016, including an increase in the state minimum wage from $9 to $10 per hour.[1] Several large cities in California, including Los Angeles, Oakland, San Francisco and San Jose, have enacted measures to raise their own minimum wages to $15 an hour in coming years.[2]

Employers throughout California could soon be affected by ballot initiatives championed by different factions of the Service Employees International Union (SEIU). Both measures would gradually raise California's state minimum wage to $15 an hour over a number of years.

The SEIU Initiatives

On May 27, 2015, the SEIU - United Healthcare Workers West (SEIU-UHW) submitted the Fair Wage Act of 2016 to the California Attorney General's office as a statewide ballot initiative.[3] This proposal would increase California's state minimum wage by $1 per hour each January 1 beginning in 2017, until it reaches $15 per hour in 2021, and thereafter would be adjusted each year to keep pace with the cost of living in California.[4]

On November 3, 2015, the SEIU-California, which purports to represent 700,000 workers, issued a press release announcing its own, more ambitious statewide ballot initiative, the Raise California's Wage and Paid Sick Days Act of 2016.[5] This proposal would raise the state minimum wage to $15 per hour by 2020, with small businesses getting an extra year to comply, double the state paid sick leave mandate from three days per year to six, and extend paid sick leave to home healthcare workers.[6]

It is unclear why different factions of the same union are supporting rival ballot measures, which could cause confusion among voters and potentially harm the likelihood that either will receive voter approval. But it is still possible that one or the other initiative will not qualify for the ballot, or that the different factions will unite behind a single proposal.

While neither initiative specifically addresses salaried employees, the state's minimum salary for white collar exempt (administrative, executive and professional) employees is pegged at twice the state's minimum wage.[7] A $15 minimum wage would raise the minimum white collar salary from $41,600 per year in 2016 (after the minimum wage rises to $10 per hour) to $62,400 per year. This could result in the reclassification of many workers from salaried to hourly status.

Conclusion

If either or both of these measures qualify for the 2016 general election ballot and are passed by California voters, they will begin to have an effect in 2017. California employers would be well advised to begin thinking about the potential impact these initiatives could have in coming years, and plan accordingly.

Aaron Buckley is a partner at Paul, Plevin, Sullivan & Connaughton LLP in San Diego. He represents employers in cases involving wage and hour, discrimination, wrongful termination and other issues. The bulk of Mr. Buckley's practice is devoted to the defense of wage and hour class actions.

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[1] Cal. Lab. Code § 1182.12.

[2] Los Angeles, Cal., City Council File No. 14-1371, Establishment of Minimum Wage in Los Angeles (June 10, 2015); Oakland, Cal., Municipal Code § 5.92.020; San Francisco, Cal., Admin. Code ch. 12R; San Jose, Cal., Municipal Code § 4.100.040.

[3] Letter from Steve Tossman and Arianna Jimenez to Ashley Johannson, Initiative Coordinator, Office of the Attorney General, Sacramento, CA (Apr. 27, 2015), *available at* https://oag.ca.gov/system/files/initiatives/pdfs/15-0026%20%28Minimum%20Wage%29.pdf.

[4] Tossman Letter, *supra* Note 3, at 2.

[5] Press Release, SEIU California, *California Workers File Initiative to Win $15 Wage by 2020* (Nov. 3, 2015), *available at* http://www.seiuca.org/2015/11/03/california-workers-file-initiative-to-win-15-wage-by-2020/.

[6] Press Release, *supra* Note 5.

[7] *See, e.g.*, Cal. Code Regs., tit. 8, § 11040, sections 1(A)(1)(f), 1(A)(2)(g), 1(A)(3)(d).

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Ninth Circuit Clarifies Standard for ADA Misconduct Cases

By Jonathan R. Mook

Introduction

Does the Americans with Disabilities Act (ADA) protect disabled employees who engage in misconduct due to their disabling condition? Most circuit courts have said "no," taking the position that an employer does not violate the ADA when it terminates an employee for having engaged in misconduct even if the misconduct was the result of an employee's disability.[1] In this regard, some courts reason that unacceptable behavior threatening the safety of others renders the employee unqualified under the ADA, even if the behavior stems from a mental disability.[2] Other courts have said an employer can terminate an employee for misconduct, even if the misconduct was caused by a disability, because the termination is for misconduct and not a pretext for disability discrimination.[3]

The U.S. Equal Employment Opportunity Commission (EEOC) has reached a similar conclusion. The EEOC recognizes that "[t]he ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability."[4] According to the Commission, an employee who "has a hostile altercation with his supervisor and threatens the supervisor with physical

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1 *See* Sista v. CDC Ixis North Am., Inc., 445 F.3d 161 (2d Cir. 2006) (where employer terminated employee because he made threats of violence to coworkers, employer did not violate the ADA even though employee suffered from depression and his conduct may have been due to his mental disability); Siefken v. Village of Arlington Heights, 65 F.3d 664 (7th Cir. 1995) (upholding dismissal of police officer who, after experiencing a diabetic reaction, drove his squad car erratically and in a dangerous fashion because the termination was due to the officer's failure to monitor his condition, not because of his diabetes); Burroughs v. City of Springfield, 163 F.3d 505 (8th Cir. 1998); Hamilton v. Southwestern Bell Tel. Co., 136 F.3d 1047, 1052 (5th Cir. 1998) ("the ADA does not insulate emotional or violent outbursts blamed on an impairment" and "[a]n employee who is fired because of outbursts at work directed at fellow employees has no ADA claim"); Palmer v. Circuit Court, 117 F.3d 351, 352 (7th Cir. 1997) ("if an employer fires an employee because of the employee's unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an issue under [the ADA]").

2 *See, e.g.*, Calef v. Gillette Co., 322 F.3d 75, 87 (1st Cir. 2003) (shouting and general threats scared several co-workers, supervisors, and the company medical staff; "the ADA does not require that an employee whose unacceptable behavior threatens the safety of others be retained, even if the behavior stems from a mental disability."); Sullivan v. River Valley Sch. Dist., 197 F.3d 804, 809, 813 (6th Cir. 1999) (teacher had several disruptive and abusive outbursts, including telling school board members after they denied one of his requests that "[y]ou'll be sorry for this" and "[y]ou will regret this"); *Palmer*, 117 F.3d at 352 (employee made several phone threats to the office and threatened to kill her supervisor, including "[s]he needs her ass kicked and I'm going to do it. . . . I want Clara bad and I want her dead"); Williams v. Motorola, Inc., 303 F.3d 1284, 1290-91 (11th Cir. 2002) ("An employee's ability to handle reasonably necessary stress and work reasonably well with others are essential functions of any position. Absence of such skills prevents the employee from being 'otherwise qualified.' . . . [T]here is overwhelming evidence of [the plaintiff's] inability to work with others, not to mention engaging in threats of violence, and insubordination.").

3 *See, e.g.*, Macy v. Hopkins County Sch. Bd. of Educ., 484 F.3d 357, 366 (6th Cir. 2007) (teacher "threatened to kill a group of boys"), *abrogated on other grounds*, Lewis v. Humboldt Acquisition Corp., 681 F.3d 312 (6th Cir. 2012); Jones v. Am. Postal Workers Union,192 F.3d 417, 429 (4th Cir. 1999) ("[T]here is absolutely no evidence to suggest that the Postal Service discharged [the plaintiff] for any reason other than the fact that he threatened the life of his supervisor . . . . [T]he ADA does not require an employer to ignore such egregious misconduct by one of its employees, even if the misconduct was caused by the employee's disability . . . ."); Sherman v. Runyon, 235 F.3d 406, 409 (8th Cir. 2000) ("Both actual violence and threats of violence are legitimate reasons for terminating an employee." (citation omitted.)); *Sista*, 445 F.3d at 173 (Plaintiff could "point to no evidence from which a reasonable jury could conclude that he was terminated on account of his mental illness rather than his past behavior."). *See also* J. Mook, *Disabled Employee Who Made Threats of Violence Still Qualified for Job*, 6 Bender's Lab. & Empl. Bull. 282 (June 2006).

4 U.S. Equal Empl. Opportunity Comm'n, Fact Sheet, *Applying Performance and Conduct Standards to Employees with Disabilities*, at Question 9, *available at* http://www.eeoc.gov/facts/performance-conduct.html.

harm" is no longer entitled to the ADA's protections.[5] Where an employee, because of a disability, violates a conduct rule that is job related for the position in question and consistent with business necessity, the EEOC has stated that "[a]n employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability."[6] Thus, "an employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property."[7]

Renegade Position: *Dark v. Curry County* and *Gambini v. Total Renal Care, Inc.*

The Ninth Circuit has staked out a different position from the EEOC and those courts that take the view that terminating an employee for misconduct caused by a disability does not constitute disability discrimination. In its 2006 decision in *Dark v. Curry County*, the Ninth Circuit stated that an employee's misconduct resulting from a disability does not qualify as a legitimate, non-discriminatory reason for termination.[8] *Dark* involved a heavy equipment operator who suffered from epilepsy and failed to inform his employer when he reported for work of the likelihood of his suffering an epileptic seizure. Later that day, the employee suffered a seizure and fell unconscious while driving a truck owned by the employer. The employer terminated the employee because he had "acted irresponsibly, recklessly, and with total disregard of the safety of himself, other employees, and members of the public."[9] Nonetheless, the Ninth Circuit held that the employee was entitled to a jury trial on whether his termination violated the ADA.[10] The appeals court adopted this position based upon the position first articulated by the circuit court in its 2001 decision in *Humphrey v. Memorial Hospital Association* where the court stated that "with few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination."[11]

The Ninth Circuit's decision in *Dark* has been the subject of criticism for being outside of the judicial mainstream and penalizing employers for disciplining employee misconduct, particularly in situations that threaten the health or safety of coworkers or the public.[12] Nonetheless, one year later, in *Gambini v. Total Renal Care, Inc.*, the Ninth Circuit reaffirmed the notion that terminating an employee for misconduct due to a disabling condition constitutes a violation of the ADA.[13] *Gambini* involved an employee who suffered from bipolar disorder and, as a result, was irritable and had difficulty concentrating or assigning priorities to tasks. When the employer convened a meeting to discuss the employee's performance, she began to cry and shake, uttered a stream of profanities, and warned her supervisors that they would "regret this." The employee was terminated for her outburst, but the Ninth Circuit allowed the case to proceed to trial to determine whether she "was terminated on the

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[5] U.S. Equal Empl. Opportunity Comm'n, *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, at Question 30 (Mar. 25, 1997), *available at* http://www.eeoc.gov/policy/docs/psych.html.

[6] U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, at Question 35 (Mar. 1, 1999), *available at* http://www.eeoc.gov/policy/docs/accommodation.html.

[7] U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, at Question 35 (Mar. 1, 1999), *available at* http://www.eeoc.gov/policy/docs/accommodation.html.

[8] Dark v. Curry County, 451 F.3d 1078 (9th Cir. 2006). Ten years prior to the *Dark* decision, the Ninth Circuit took a position more in line with that followed by the EEOC and other circuit courts. *See* Newland v. Dalton, 81 F.3d 904, 906 (9th Cir. 1996) ("Attempting to fire a weapon at individuals is the kind of egregious and criminal conduct which employees are responsible for regardless of any disability.").

[9] *Dark*, 451 F.3d at 1081-82.

[10] 451 F.3d at 1091. On remand, the case was tried before a jury, and the jury rendered a verdict in favor of the employer. *See* Jury Verdict, Dark v. Curry County, C.A. No. 1:03-cv-03041 (Dkt. No. 163, June 5, 2008).

[11] Humphrey v. Memorial Hosps. Ass'n, 239 F.3d 1128, 1139-40 (9th Cir. 2001)). *Humphrey* involved a medical transcriptionist whose obsessive compulsive disorder prevented her from regularly and predictably showing up for her job. The Ninth Circuit rejected the hospital's argument that she was not a qualified individual, holding the employee was still "qualified" because the hospital could have allowed her to do her job from home or take a leave of absence.

[12] *See* J. McDonald, *My Disability Made Me Do It?: Is Employee Misconduct Protected If It's Related to a Disability*, 50-SEP Orange County Law. 46 (Sept. 2008) (stating that "the notion that [disability discrimination] laws might protect employees who fail to show up for work, or steal, or sleep on the job, or operate heavy equipment knowing they are not fit to do so, or throw things and lash out at supervisors, is a peculiar one. Yet, the law seems to be moving in this direction, particularly in the Ninth Circuit"); J. Mook, *Ninth Circuit Rules That Misconduct Resulting from a Disability Does Not Constitute Non-Discriminatory Basis for Termination*, 6 Bender's Lab. & Empl. Bull. 426 (Sept. 2006).

[13] Gambini v. Total Renal Care, Inc., 486 F.3d 1087, 1093 (9th Cir. 2007).

impermissible basis of her disability." Even though there was no question that the employee had engaged in misconduct, the court ruled that she had "demonstrate[d] a causal link between the disability-produced conduct and the termination."[14]

Mayo v. PCC Structurals, Inc.

Summary

Since the decisions in *Dark* and *Gambini*, the Ninth Circuit has not had occasion to revisit those rulings until recently when it decided *Mayo v. PCC Structurals, Inc.*, which involved an employee who had been treated for major depressive disorder and was terminated after he told several coworkers that he was thinking of killing some of his supervisors.[15] Notwithstanding the Ninth Circuit's prior statements that misconduct resulting from a disability is considered to be part of the disability and not a separate basis for termination, this time the court was not so forgiving of the employee's misconduct and held that his disability discrimination claim was properly dismissed.

Mayo's Employment with PCC Structurals

The *Mayo* case arose out of Timothy Mayo's employment as a welder with PCC Structurals, Inc., located in Portland, Oregon. Mayo had a history of major depressive disorder, but with the assistance of medication and professional treatment, he was able to work for PCC for several years without incident. Things changed, however, when Mayo told three coworkers that he "fe[lt] like coming down [to PCC] with a shotgun an[d] blowing off" the heads of a supervisor and another manager.[16]

Mayo told one coworker on several occasions that he planned to "com[e] down [to PCC] on the day [shift] . . . to take out management."[17] He told another coworker that he "want[ed] to bring a gun down [to PCC] and start shooting people."[18] Mayo then explained to a third coworker that she need not worry because she would not be working the shift when the killings would occur. Mayo said "all that [he] would have to do to shoot [his supervisor] is show up [at PCC] at 1:30 in the afternoon" because "that's when all the supervisors would have their walk-through."[19]

After Mayo's coworkers reported these statements to PCC, the senior human resources manager met with Mayo and asked if he planned to act on his threats. When Mayo said that "he couldn't guarantee he wouldn't do that," the manager immediately suspended Mayo.[20] PCC barred him from company property and also notified the police. When a police officer visited Mayo at his home to discuss the threats, Mayo admitted making the threatening statements. He told the officer he had two or three persons in mind, including his supervisor, whom he would shoot. Mayo said he owned several guns, although he had not decided which gun to use in his attack. When the officer asked if Mayo planned to go to PCC and start shooting people, he responded: "Not tonight."[21]

With Mayo's consent, the officer took Mayo to a hospital, where he was placed into custody because of the danger he posed to himself and others. Mayo remained in custody for six days, and then took medical leave under the Oregon and federal family and medical leave acts. Toward the end of his leave, Mayo's treating psychologist cleared him to return to work. The physician opined that Mayo was not a "violent person," but he recommended that a new supervisor be assigned to Mayo.[22] A treating nurse practitioner sent PCC a similar letter. Mayo also told PCC that he wanted to return to work, although there was disagreement as to whether Mayo promised that he would not repeat his threatening behavior. In any event, PCC did not allow Mayo to return to his job after his leave ended, but instead, terminated his employment.[23]

Mayo's Disability Discrimination Suit

Mayo sued PCC in state court, claiming that his termination constituted disability discrimination in

[14] *Gambini*, 486 F.3d at 1093. After remand to the district court, the case was settled prior to trial. *See* Order of Dismissal, Gambini v. Total Renal Care, Inc., C.A. No. 3:03-cv-05459 (Dkt. No. 176, Dec. 10, 2007).

[15] Mayo v. PCC Structurals, Inc., No. 13-35643, 2015 U.S. App. LEXIS 13065 (9th Cir. July 28, 2015).

[16] 2015 U.S. App. LEXIS 13065, at *2-3.

[17] 2015 U.S. App. LEXIS 13065, at *3.

[18] 2015 U.S. App. LEXIS 13065, at *3.

[19] 2015 U.S. App. LEXIS 13065, at *3.

[20] 2015 U.S. App. LEXIS 13065, at *3.

[21] 2015 U.S. App. LEXIS 13065, at *4.

[22] 2015 U.S. App. LEXIS 13065, at *4.

[23] 2015 U.S. App. LEXIS 13065, at *4.

violation of Oregon's counterpart to the ADA.[24] Mayo's suit alleged that his "disturbing statements and comments . . . were the symptoms of and caused by his disability," thus making his termination discriminatory.[25] PCC removed the case to federal court and moved for summary judgment, which was granted. Even assuming Mayo was disabled, the federal district court found that once he made his threats, he no longer was a "qualified individual" with a disability, and therefore, he was not entitled to protection under either Oregon law or the ADA.[26] Mayo appealed the dismissal of his lawsuit to the Ninth Circuit Court of Appeals.

On appeal, Mayo did not deny that he had made threatening statements about PCC's management, nor that such statements were unacceptable. Nonetheless, Mayo maintained that his statements did not disqualify him from the protections of the ADA because they resulted from his disability and, therefore, an individualized assessment should have been made to determine two things: first, whether he was an actual threat to the workplace, and second, whether reasonable accommodations for his disability could have reduced or eliminated whatever threat he posed and allowed him to conform his behavior to PCC's conduct standards.[27]

Mayo further contended that the district court had ignored Ninth Circuit precedent, in particular, the circuit court's decisions in *Dark* and *Gambini*. Mayo asserted that those decisions supported his position that he was discriminated against due to his disability because he was discharged for conduct arising from his depression. Like the employer in *Dark*, Mayo pointed out that PCC essentially had admitted to firing Mayo due to his behavior arising from his disability and the company's concern about future episodes of misconduct caused by his depressive disorder. Additionally, Mayo argued that whether his threatening statements should be considered more egregious than the conduct of the employees in *Gambini* and *Dark* was a factual determination that should have been decided by the fact finder.[28]

In response, PCC acknowledged the Ninth Circuit's prior decisions, but pointed out that the situations involved in *Dark* and *Gambini* did not involve workplace violence where an employee stated he wanted to "blow the heads off" his supervisors. PCC contended that the appeals court should use the *Mayo* case to create a "bright line exception" to the general rule set forth in those decisions that disability related misconduct is part of the disability.[29]

Ninth Circuit's Decision

The Ninth Circuit affirmed the dismissal of Mayo's lawsuit in an opinion written by Circuit Judge John B. Owens, and joined by Circuit Judge N. Randy Smith and District Court Judge William Q. Haynes (sitting by designation). In its opinion, the court reasoned that Mayo had failed to state a *prima facie* case of disability discrimination, which requires a plaintiff to show that he is a qualified individual with a disability in addition to showing that he is a disabled person within the meaning of the statute and suffered an adverse employment action because of his disability. Like the district court, the Ninth Circuit found that *M*ayo could not demonstrate that he was qualified to perform his job and, therefore, the court held that Mayo's claim could not survive PCC's motion for summary judgment.[30]

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[24] The Oregon state law, Or. Rev. Stat. § 659A.100, et seq., mirrors the provisions of the federal ADA, 42 U.S.C. § 12101, et seq. *See* Wheeler v. Marathon Printing, Inc., 157 Or. App. 290, 301, n.6, 974 P.2d 207 (1998). Thus, the state's disability discrimination statutory scheme is to "be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act of 1990" and its amendments. Or. Rev. Stat. § 659A.139(1); *see also* Washburn v. Columbia Forest Prods., 340 Or. 469, 474, 134 P.3d 161, 163 (2006) (Or. Rev. Stat. § 659A.112 is "statutorily required to be interpreted in step with federal disability decisions").

[25] 2015 U.S. App. LEXIS 13065, at *4-5.

[26] *Mayo v. PCC Structurals, Inc.*, 2013 U.S. Dist. LEXIS 91767, *13 (D. Or. July 1, 2013). The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability on the basis of disability." 42 U.S.C. § 12112(a). A "qualified individual" is defined as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position such individual holds or desires." 42 U.S.C. § 12111(8). Oregon law similarly states that "an individual is qualified for a position if the individual, with or without reasonable accommodation, can perform the essential functions of the position." Or. Rev. Stat. § 659A.115.

[27] Brief of Appellant, Mayo v. PCC Structurals, Inc., Case No. 13-35643, Ninth Circuit Court of Appeals (Dkt. No. 11, Dec. 16, 2013), at 20.

[28] Brief of Appellant, *supra* Note 27 at 19.

[29] Brief of Appellee, Mayo v. PCC Structurals, Inc., Case No. 13-35643, Ninth Circuit Court of Appeals (Dkt. No. 19, Apr. 25, 2014), at 19. PCC also argued that *Gambini* arose under different facts and was decided under Washington state law which, unlike Oregon law, does not necessarily rely on the ADA as precedent. *Gambini*, 486 F.3d at 1090-91.

[30] *Mayo*, 2015 U.S. App. LEXIS 13065, at *14.

In reaching this conclusion, the appellate court explained that "[a]n essential function of almost every job is the ability to appropriately handle stress and interact with others."[31] The court acknowledged that "an employee can be qualified despite adverse reactions to stress."[32] Nonetheless, the court said "he is not qualified when that stress leads him to threaten to kill his coworkers in chilling detail and on multiple occasions (here, at least five times)."[33] "[T]his vastly disproportionate reaction" convinced the appeals court that Mayo could not perform an "essential function" of his job.[34] Hence, Mayo was not a "qualified individual" with a disability entitled to invoke the protections of the statute. Importantly, the appeals court said that "[t]his is true regardless of whether Mayo's threats stemmed from his major depressive disorder."[35] As the court explained, "[a] contrary rule would place employers in an impossible position."[36]

By adopting this line of analysis, the Ninth Circuit fell in line with the view of what the appeals court termed "our sister circuits" as well as the EEOC that "[a]n employee whose stress leads to serious and credible threats to kill his coworkers is not qualified to work for the employer, regardless of why he makes those threats."[37] Not only did the appeals court find this principle to be well grounded in the law but, according to the court, it also is "common sense."[38] In reaching this conclusion, the court rejected three arguments advanced by Mayo that his discrimination claims should be heard by a jury.

First, the Ninth Circuit rejected Mayo's argument that to justify his termination, PCC had to come forward with an individualized assessment to establish that he posed a "direct threat" in the workplace - an affirmative defense.[39] In this circumstance, the direct threat defense was inappropriate because, as the court explained, that "defense focuses on a prospective threat of violence; it allows an employer to terminate an employee who 'pose[s] a danger to other employees' or has demonstrated a 'potential of future violence.' "[40] In Mayo's case, his termination was permissible not because his threats demonstrated that he posed a risk of future violence, but because the threats themselves constituted egregious misconduct.[41]

Second, the Ninth Circuit rejected Mayo's argument that notwithstanding his death threats, he still was a "qualified individual." As the appeals court stated, "Mayo's credible, detailed, and unwavering plan to kill his supervisors more than adequately demonstrated that he lacked the ability to appropriately handle stress and interact with others."[42] According to the court, this was not a situation where, as Mayo suggested, he simply needed a reasonable accommodation in the form of different supervisors. Indeed, Mayo did not dispute that "another disturbing incident might have occurred if he had returned to PCC and faced similar stressful conditions," even with a different supervisor.[43] "A different supervisor," the court noted "would not have changed his inappropriate response to stress - it would have just removed one potential stressor and possibly added another name to the hit list."[44]

Third, the Ninth Circuit rejected Mayo's argument that requiring him to comply with conduct standards prohibiting violent threats was not necessarily "fundamental" to his work as a welder.[45] As the court opined, "compliance with such fundamental standards is an 'essential function' of almost every job."[46] The court acknowledged there could be some "isolated jobs that involve little interaction with others" and where such conduct standards would not arguably be essential, but, as the court made clear, this "is not one of those rare exceptions."[47]

In reaching its decision in *Mayo*, the court of appeals did not disown its prior rulings in *Humphrey*, *Dark* and

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31 2015 U.S. App. LEXIS 13065, at *7 (citing Williams v. Motorola, Inc., 303 F.3d 1284, 1290 (11th Cir. 2002)).

32 2015 U.S. App. LEXIS 13065, at *7.

33 2015 U.S. App. LEXIS 13065, at *7.

34 2015 U.S. App. LEXIS 13065, at *7.

35 2015 U.S. App. LEXIS 13065, at *7.

36 2015 U.S. App. LEXIS 13065, at *7.

37 2015 U.S. App. LEXIS 13065, at *8 & n.2.

38 2015 U.S. App. LEXIS 13065, at *8.

39 The direct threat defense is embodied both in Oregon and federal disability discrimination law. *See* Or. Admin. R. 839-006-0244(1) "[A]n employer may refuse to employ an individual with a disability posing a direct threat to the health or safety of others."); 42 U.S.C. § 12113(b) (ADA analogue).

40 *Mayo*, 2015 U.S. App. LEXIS 13065, *9-10 (quoting Curley v. City of North Las Vegas, 772 F.3d 629, 633 (9th Cir. 2014)).

41 2015 U.S. App. LEXIS 13065, at *9-10.

42 2015 U.S. App. LEXIS 13065, at *11.

43 2015 U.S. App. LEXIS 13065, at *11.

44 2015 U.S. App. LEXIS 13065, at *11.

45 2015 U.S. App. LEXIS 13065, at *11.

46 2015 U.S. App. LEXIS 13065, at *11.

47 2015 U.S. App. LEXIS 13065, at *12.

Gambini, but rather distinguished the facts in those cases from those present in Mayo's situation. As the Ninth Circuit explained, "[n]one of these cases featured an employer that persuasively argued that the employee was not a 'qualified individual' because of his or her disability."[48] In this case, the court found that "PCC has done so here."[49]

Implications of Mayo Decision

The Ninth Circuit's decision in *Mayo* serves as a useful midcourse correction to the circuit's principle that conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination. It certainly would have been better had the court renounced and totally abandoned its questionable interpretation of the ADA set forth in *Humphrey*, *Dark* and *Gambini*. Nonetheless, the *Mayo* decision makes clear that the appeals court will not follow its prior precedent blindly and require employers to retain employees who threaten to wreak havoc in the workplace.

The facts in *Mayo* represent an extreme case in which, as the Ninth Circuit pointed out, "an employee . . . makes serious and credible threats of violence toward his coworkers."[50] In such a situation, the Ninth Circuit made clear that the employee is not a qualified individual and may not invoke the protections of the ADA or state disability law. However, the court of appeals sought to emphasize the "extreme facts" in the case, and that its opinion should not be read to "suggest that off-handed expressions of frustration or inappropriate jokes necessarily render an employee not qualified," or to imply "that employees who are simply rude, gruff, or unpleasant fall in the same category as Mayo."[51] Such employees still may be qualified individuals and, hence, entitled to the protections of the ADA and state law.

Finally, even though the result in *Mayo* was a ruling against an employee who suffered from major depression, the Ninth Circuit took pains to point out that it did not seek to "minimize the struggles of those who suffer from these ailments or suggest that all such individuals are incapable of working."[52] The court acknowledged that "[d]epression and mental illness are serious problems that affect millions of Americans, including many lawyers and judges."[53] Nevertheless, the court said that in extreme situations, such as that presented by *Mayo*, the ADA did not require that "employers must simply cross their fingers and hope that violent threats ring hollow."[54] The court recognized the realities of workplace violence and noted that "[a]ll too often Americans suffer the tragic consequences of disgruntled employees targeting and killing their coworkers."[55] Thus, "[w]hile the ADA and Oregon disability law protect important individual rights, they do not require employers to play dice with the lives of their workforce."[56] In *Mayo*, the Ninth Circuit sought to strike that delicate balance between the rights of employees with mental disabilities and the rights of those who employ them. Only time will tell if the Ninth Circuit's formulation proves to be successful.

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48 2015 U.S. App. LEXIS 13065, at *15.

49 2015 U.S. App. LEXIS 13065, at *15.

50 2015 U.S. App. LEXIS 13065, at *12, n. 4.

51 2015 U.S. App. LEXIS 13065, at *12, n. 4.

52 2015 U.S. App. LEXIS 13065, at *14-15.

53 2015 U.S. App. LEXIS 13065, at *14.

54 2015 U.S. App. LEXIS 13065, at *15.

55 2015 U.S. App. LEXIS 13065, at *15.

56 2015 U.S. App. LEXIS 13065, at *15.

Trade Secret Litigation Survives Anti-SLAPP Motion Absent Evidence of Protected Employee Speech or Conduct

By Enedina Cardenas

Introduction

Suppose a company discovers that a former employee is misusing its trade secret information to compete against it. The company decides it needs to move quickly to enjoin the misuse. An employee might consider responding to the lawsuit with an anti-SLAPP motion. In order to fend off an anti-SLAPP motion, the company must show that it has a probability of prevailing on the trade secret misappropriation claim. This may be difficult to prove at such an early stage of the suit when an investigation may be ongoing, or the company may only be relying on circumstantial evidence to bring the claim.

Despite this apparent threat to a company's trade secrets, California courts are striking a balance between protecting a company's proprietary information and protecting an individual's right to engage in protected communicative conduct - such as suing his former employer - when ruling on anti-SLAPP motions in trade secret litigation.

Two recent California appellate courts have ruled on the use of anti-SLAPP motions in trade secret litigation, with two different results for those seeking to protect their trade secrets. In one case, the court protected the trade secrets of a company where the former employee could not prove that he took the company's trade secret to engage in protected activity.[1] In the other case, the court found that the individual was engaging in protected conduct and, therefore, protected his right to file suit and permitted him to use a company's trade secrets to do so.[2]

The SLAPP Statute

Before a defendant gets embroiled in costly and contentious litigation, he may be able to move for a swift dismissal under the Strategic Lawsuit Against Public Participation (SLAPP) statute codified in California Code of Civil Procedure section 425.16. The statute permits the court to strike a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech."[3] The anti-SLAPP motion is an efficient device to dispose of a case early on, well before engaging in expensive fact discovery. Anti-SLAPP motions are generally brought by activists trying to defeat defamation, libel, and slander claims. In the employment context, they tend to appear in public sector cases, but they have a place in the private sector as well.

The SLAPP statute was enacted to quickly to dispose of "a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights."[4] Courts engage in a two-step analysis to determine whether to strike a cause of action under the SLAPP statute. First, the defendant must prove that the acts complained of in the underlying cause of action arise from protected activity.[5] Then, the burden shifts to the plaintiff to show that it has demonstrated a probability of prevailing on the claim.[6]

Protected acts under the SLAPP statute include:

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law,

(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law,

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1 West Hills Research & Dev. v. Wyles, No. B255768, 2015 Cal. App. Unpub. LEXIS 5009 (July 17, 2015) (unpub.).

2 Finton Construction, Inc. v. Bidna & Keys, APLC, 238 Cal. App. 4th 200 (2015).

3 Cal. Civ. Proc. Code § 425.16(b)(1).

4 Wilcox v. Superior Court, 27 Cal. App. 4th 809, 815, n.2 (1994) (disapproved on other grounds by Equilon Enterprises v. Consumer Cause, Inc., 29 Cal. 4th 53, 68, n.5(2002)).

5 Gerbosi v. Gaims, Weil, West & Epstein, LLP, 193 Cal. App. 4th 435, 443 (2011).

6 193 Cal. App. 4th at 443.

(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or

(4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.[7]

Protected acts include "communicative conduct such as the filing, funding, and prosecution of a civil action,"[8] as well as "qualifying acts committed by attorneys in representing clients in litigation."[9] Acts protected by the litigation privilege codified at Civil Code section 47(b) are also protected acts under the SLAPP statute.[10]

Use of Trade Secret to Engage in Competitive Activity Is Not Protected

Competitive activity and soliciting customers is not protected activity as that term is defined in the anti-SLAPP statute since it does not implicate free speech or the right to petition.[11] Accordingly, a former employee who uses trade secrets to compete against an employer will be unable to use the anti-SLAPP device to dispose of litigation arising from such activity. In *West Hills v. Wyles*, West Hills sued its former in-house legal counsel for misappropriation of trade secrets, intentional interference with economic advantage, negligent interference with economic advantage, computer fraud and abuse, conversion, breach of loyalty, breach of confidence, and unfair competition after it discovered that he was using West Hills' trade secrets to set up a competing business.[12]

Wyles asserted that he engaged in protected activity by arguing that he only took documents relevant to a contemplated derivative shareholder lawsuit that he intended to bring against the company.[13] He argued that his intent to blow the whistle on the company's executives or officers who allegedly embezzled money was protected activity under the litigation privilege codified at Civil Code section 47(b).[14]

The court acknowledged that the conduct articulated in the anti-SLAPP statute paralleled the conduct protected under the litigation privilege, but declined to find that Wyles' activities fit under the statutory scheme.[15]

The court focused on the "principal thrust or gravamen" of West Hills' complaint, which was not the contemplated derivative action or the allegation of embezzlement.[16] Rather, West Hills alleged, and presented convincing evidence, that Wyles took the trade secrets solely to compete against it.[17] Thus, the privilege did not apply to Wyles' activities in furtherance of establishing a competing business. The court may have come to a different conclusion had Wyles actually taken affirmative steps to bring the lawsuit, reported the alleged embezzlement to authorities, sought the advice of counsel on the claims, or actually filed the lawsuit against the company.

This is consistent with a different appellate court's holding in *World Financial Group v. HBW Insurance & Financial Services, Inc.*[18] The plaintiff alleged that defendants misappropriated its trade secrets and attempted to solicit customers and associates.[19] The court properly rejected the anti-SLAPP motion finding that competitive business activity "motivated solely by the competitor's desire to increase its sales ranks" did not implicate the public interest and therefore failed to constitute protected activity.[20] These cases show that courts will protect trade secrets from misuse by a competitor.

An Employee's Right to Pursue a Claim Against an Employer Trumps Trade Secret Protection

However, trade secrets may not be protected when they are used as evidence in a lawsuit against a former employer, since the SLAPP statute protects "communicative conduct such as the filing, funding and prosecution of a civil action."[21] This may extend protection to one using a company's trade secrets to file and prosecute a civil action.

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7 Cal. Civ. Proc. Code § 425.16(e).

8 *Finton*, 238 Cal. App. 4th at 210.

9 238 Cal. App. 4th at 210.

10 *Wyles*, 2015 Cal. App. Unpub. LEXIS 5009, at *9.

11 2015 Cal. App. Unpub. LEXIS 5009, at *14.

12 2015 Cal. App. Unpub. LEXIS 5009, at *14.

13 2015 Cal. App. Unpub. LEXIS 5009, at *2-3.

14 2015 Cal. App. Unpub. LEXIS 5009, at *3.

15 2015 Cal. App. Unpub. LEXIS 5009, at *9-10.

16 2015 Cal. App. Unpub. LEXIS 5009, at *11-14.

17 2015 Cal. App. Unpub. LEXIS 5009, at *13-14.

18 172 Cal. App. 4th 1561 (2009).

19 172 Cal. App. 4th at 1564.

20 172 Cal. App. 4th at 1573.

21 *Finton*, 238 Cal. App. 4th at 210 (citing Rusheen v. Cohen, 37 Cal. 4th 1048, 1056 (2006)).

In *Finton Construction, Inc.* v. *Bidna & Keys*,[22] the plaintiff, Finton Construction, Inc. (FCI), brought an action seeking to recover a flash drive in the possession of defendants, Bidna & Keys, a law firm and its attorneys, which FCI argued contained proprietary information belonging to it.[23] The defendants' client, Michael Reeves, a former partner of FCI, provided the flash drive to defendants as evidence to be used in support of Reeves' own lawsuit against FCI.[24] In his complaint, Reeves alleged that his one-third ownership interest in FCI had been reduced by the other two partners, and that the partners ousted him from the company.[25] Reeves demanded an accounting and damages.[26]

FCI then filed a cross-complaint against Reeves for unfair competition, conversion, and misappropriation of trade secrets.[27] FCI alleged that Reeves and some former FCI employees formed a separate company and competed with FCI for business.[28] The cross-complaint also alleged that proprietary information belonging to the corporation had been taken on a flash drive containing "client lists, project plans, specifications, bid books, and contact information for valued vendors, suppliers and subcontractors."[29] The parties agreed to have an expert make a copy of the flash drive for each side.[30]

Despite this agreement, FCI filed a separate action against Reeves' attorneys for conversion, receipt of stolen property, and injunctive relief enjoining the defendant attorneys from using the data on the flash drive.[31] The law firm defendants filed their anti-SLAPP motion, which the trial court granted.[32] The court of appeal affirmed, finding that defendants only possessed the hard drive due to their representation of Reeves in the underlying action.[33]

A California appellate court in *Fox Searchlight Pictures, Inc. v. Paladino*, also permitted a former employee to use trade secrets to prepare to file a wrongful termination action against her former employer.[34] Similar to FCI, Fox sued Paladino after she allegedly disclosed confidential documents to her attorneys so that they could prepare a complaint against Fox.[35] The appellate court reversed the trial court's denial of Paladino's anti-SLAPP motion, finding that employer confidences can be disclosed to an attorney if they are relevant to the preparation of an action against the employer.[36]

Conclusion

Companies should not fret the SLAPP statute when it comes to trade secret litigation. In light of the *Finton* and *Wyles* opinions, courts are likely to give latitude to a former employee in very limited circumstances. A former employee might be permitted to dismiss a case if she, like Paladino or Reeves, discloses trade secrets relevant to prosecute a civil suit against the company, or if they are used as evidence in such litigation. A defendant involved in trade secret misappropriation in that context should be prepared to point to actual and deliberate steps made towards filing a lawsuit. The *Wyles* case demonstrates that courts may not be inclined to use the device in favor of an individual when strong evidence makes clear he is misusing a company's trade secrets to compete against the company.

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22 238 Cal. App. 4th 200 (2015).

23 238 Cal. App. 4th at 205-07.

24 238 Cal. App. 4th at 205-07.

25 238 Cal. App. 4th at 205.

26 238 Cal. App. 4th at 205.

27 238 Cal. App. 4th at 205.

28 238 Cal. App. 4th at 205.

29 238 Cal. App. 4th at 205.

30 238 Cal. App. 4th at 207.

31 238 Cal. App. 4th at 207.

32 238 Cal. App. 4th at 207-08.

33 238 Cal. App. 4th at 210.

34 89 Cal. App. 4th 294 (2001).

35 89 Cal. App. 4th at 298-99.

36 89 Cal. App. 4th at 310.

CASE NOTES

AGE DISCRIMINATION

France v. Johnson, No. 13-15534, 2015 U.S. App. LEXIS 17915 (9th Cir. October 14, 2015)

On October 14, 2015, the U.S. Court of Appeals for the Ninth Circuit ruled that the district court erred in granting summary to the agency on the agency employee's claim under the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1), because the employee showed a genuine dispute of material fact on whether the agency's nondiscriminatory reasons for not promoting the employee were pretextual.

John France ("France") was a border patrol agent assigned to the Tucson Sector of Border Patrol, an agency of the United States Department of Homeland Security. In 2007, the newly appointed Tucson Sector Chief Patrol Agent, Robert Gilbert ("Gilbert"), established a pilot program named "Architecture for Success," which split Assistant Chief Patrol Agents ("ACPA") into two categories: operations and administration. Before the pilot program, all ACPAs, including France, were at the GS-14 pay grade, a pay grade in administration. Four GS-15 ACPA positions were created as a result of the pilot program. Twenty-four eligible candidates applied. The selection commenced. Gilbert then invited 12 candidates for interviews. After the interviews, the panel of interviewers selected six top-ranked candidates for final consideration; France was not selected. Gilbert recommended four of the six to Chief Border Patrol Agent David Aguilar ("Aguilar"), who in turn recommended the same four candidates to Deputy Commissioner Jayson Ahern ("Ahem"). When the selection was made, France was 54 years old, and the four selected candidates, all of whom were in the top-ranked group, were 44, 45, 47, and 48 years old. France sued the agency, alleging that the agency's decision to not promote him was age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). After discovery, the agency moved for summary judgment and offered nondiscriminatory reasons for not promoting France. Gilbert said that France lacked the leadership and judgment for the GS-15 positions. Aguilar gave six reasons why he did not recommend promoting France, including France's lack of leadership, flexibility, and innovation. The district court concluded that although France established a prima facie case of age discrimination, he did not demonstrate a genuine dispute of material fact on the agency's nondiscriminatory reasons for not selecting him. The district court granted summary judgment in favor of the agency. France timely appealed before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit determined that the district court erred in concluding that Gilbert's discriminatory statements were insufficient to create a genuine dispute of material fact because Gilbert had a limited role in the ultimate hiring decision, in two respects. First, as a matter of law, to create a genuine dispute of material fact on pretext, a speaker of discriminatory statements need not be the final decisionmaker of an employment decision. Here, France produced evidence showing Gilbert's influence and substantial involvement in the hiring decisions, including that Gilbert was the person who created the GS-15 positions in the first place; that other interviewers deferred to Gilbert because he would be supervising the promoted ACPAs; and that Gilbert recommended the four finalists to Aguilar, who then recommended the same people to Ahern. Even though Aguilar and Ahern had the authority to change the finalists recommended by Gilbert, they did not do so, and in the total circumstances Gilbert's recommendations had substantial influence on the decision made, because both Aguilar and Ahern deferred to Gilbert's recommendation. A reasonable fact finder could infer that Gilbert—the subordinate employee with a discriminatory animus—was involved in and influenced the hiring decisions. The court concluded that there was a genuine dispute of material fact as to whether Gilbert influenced or was involved in the hiring decisions of the GS-15 positions, despite that he was not the final decisionmaker. Furthermore, Gilbert was the person who established the Architecture for Success pilot program and who created the GS-15 positions for which France applied. Also, Vitiello, one of the three interviewers, said that he deferred to Gilbert at the interview because Gilbert would be supervising the selectees in the Tucson Sector. A reasonable fact finder could infer that Gilbert's role in the decisionmaking process was significant and influential. The court concluded that the district court erred in finding that Gilbert had a limited role in the decisionmaking process.

The Ninth Circuit found that the district court did not consider Gilbert's repeated retirement discussions with France in assessing whether Gilbert's articulated nondiscriminatory reasons were pretextual. Although these retirement discussions standing alone were insufficient direct evidence of discrimination, the district court erred in disregarding this evidence, which was presented with circumstantial evidence, for the purpose of determining the agency's pretext. The timing of the retirement discussions was significant. The close proximity in time could allow a reasonable fact finder to find by a preponderance of the evidence that France's non-selection based on grounds other than age was pretextual. The district court erred in granting summary judgment finding that France did not show a genuine dispute of material fact on whether the agency's nondiscriminatory reasons were pretextual.

Accordingly, the Ninth Circuit reversed the district court's summary judgment in favor of the agency.

References. See e.g., Wilcox, *California Employment Law*, § 41.31, *Age Discrimination*; § 41.130, *Governing Law* (Matthew Bender).

ARBITRATION

Garrido v. Air Liquide Industrial U.S. LP, No. B254490, 2015 Cal. App. LEXIS 946 (October 26, 2015)

On October 26, 2015, a California appellate court ruled that a truck driver who transported his employer's products across state lines was a transportation worker under 9 U.S.C. § 1 and was exempt from the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., although he had signed an alternative dispute resolution agreement stating the FAA applied.

Mario Garrido ("Garrido") was hired as a truck driver by Air Liquide Industrial U.S. LP ("Air Liquide") for transportation of industrial gases produced and distributed by Air Liquide throughout the United States. Upon his hiring, Garrido entered into an Alternative Dispute Resolution Agreement ("agreement") which provided that all disputes arising out of Garrido's employment with Air Liquide would be resolved by arbitration, and the agreement prohibited class arbitration. According to its terms, the agreement, and any arbitration proceedings, was governed by the Federal Arbitration Act ("FAA"). Garrido's employment with Air Liquide was terminated. Garrido filed a class action complaint against Air Liquide, alleging that it failed to provide mandated timely meal periods and accurate itemized wage statements, failed to pay compensation due upon separation of employment, and committed unfair business practices. Air Liquide promptly moved to compel arbitration of Garrido's claims. Air Liquide argued that the agreement was binding and required Garrido to arbitrate all claims, and that the agreement's class action waiver should be enforced. Garrido opposed the motion, arguing that the FAA did not apply to transportation workers like Garrido under 9 U.S.C. § 1, and that the agreement was unenforceable under the California Arbitration Act [Code Civ. Proc. § 1280 et seq.] ("CAA"). The trial court denied Air Liquide's motion to compel individual arbitration. It found that the FAA applied due to the express terms of the agreement, which stated that the agreement and any proceedings were governed by the FAA. The court found, however, that, even under the FAA, the agreement could not be enforced pursuant to *Gentry v. Superior Court*,[1] because by denying the ability to bring a class claim, the agreement stood as an obstacle to an employee's right to vindicate statutory labor rights. Air Liquide timely appealed before the California appellate court.

The California appellate court noted that a transportation worker's employment agreement does not become subject to the FAA simply because the agreement declares that it is subject to the FAA. By stating that it is subject to and governed by the FAA, the agreement necessarily incorporates FAA § 1, which includes the exemption for transportation workers. Accordingly, courts have found that transportation workers' employment agreements exempt from the FAA, even when the agreements purport to be governed by the FAA. In the instant case, Garrido worked as a truck driver transporting Air Liquide gases, frequently across state lines. Air Liquide cited to no authority holding that a truck driver whose responsibility was to move products across state lines did not fall under FAA § 1. Thus, because Garrido was a transportation worker, the FAA did not apply to the agreement.

The California appellate court further observed that in the trial court, Air Liquide moved for an order compelling arbitration and staying this civil action pending arbitration based on the valid and enforceable arbitration agreement that required Garrido to bring his claims in arbitration, and in his individual capacity. Although Air Liquide erroneously argued that arbitration should proceed under the FAA, it did not contend that arbitration was not compelled or was improper under the CAA. Moreover, after Garrido argued in his opposition that the FAA was inapplicable, Air Liquide

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[1] 42 Cal. 4th 443, 64 Cal. Rptr. 3d 773, 165 P.3d 556 (2007) (*Gentry*).

replied that the agreement was enforceable under California law. Under these circumstances, there was no cause to find that Air Liquide waived the right to move for arbitration under the CAA.

The California appellate court also noted that the California Supreme Court, following the trial court's ruling denying Air Liquide's motion to compel arbitration finding that the agreement's class waiver provision was improper under the test laid out in *Gentry*, held in *Iskanian v. CLS Transportation Los Angeles, LLC*,[2] that *Gentry*'s rule against employment class waivers was preempted by the FAA. In light of *Iskanian*, if this matter were governed by the FAA, arbitration would likely be required. However, this matter was not subjected to the FAA and *Gentry*'s holding had not been overturned under California law in situations where the FAA did not apply. Accordingly, the court found that the agreement's class waiver provision was unenforceable.

The California appellate court held that the trial court correctly found that a class proceeding in the instant case would be a significantly more effective way of allowing employees to vindicate their statutory rights. Air Liquide moved exclusively for individual, not class arbitration, and neither party had indicated an intent or willingness to engage in class arbitration. Based on its finding that the class waiver constituted an unlawful exculpatory clause, the trial court properly denied the motion to compel arbitration.

Accordingly, the trial court's order was affirmed.

References. See, e.g., Wilcox, *California Employment Law*, § 90.02, *State Law* (Matthew Bender).

Miranda v. Anderson Enterprises, Inc., No. A140328, 2015 Cal. App. LEXIS 905 (October 15, 2015)

On October 15, 2015, a California appellate court ruled that the death knell doctrine applied to allow interlocutory appeal of an order compelling arbitration of an employee's individual claim under the Labor Code Private Attorneys General Act of 2004 (PAGA), Lab. Code § 2698 et seq., because a mandatory waiver of class or collective arbitration meant that no employees could assert a representative PAGA claim, which made the order effectively a final judgment for nonparty employees' PAGA claims, and the low damages created a risk that no final judgment would be entered. Although the class claims had been dismissed without prejudice, the death knell doctrine did not require that they be terminated with prejudice, and it was sufficient that the representative PAGA claim could not proceed.

Isidro Miranda ("appellant") was a former employee of Anderson Enterprises, Inc.; Andy Hansen was the company's general manager. During his employment, appellant signed an alternative dispute resolution policy by which he, among other things, agreed to arbitrate all employment claims and waived the right to arbitrate claims as a class or collective action. Appellant filed the instant class action lawsuit against Anderson Enterprises, Inc. and Andy Hansen (collectively "respondents") asserting various wage and hour claims, including a PAGA claim. Respondents filed a petition to dismiss appellant's class and representative claims, compel arbitration of his individual claims, and stay the superior court proceedings. The trial court granted respondents' petition. The trial court found the arbitration agreement valid and enforceable, dismissed appellant's class and representative claims without prejudice based on the arbitration agreement's waiver, directed appellant to arbitrate his individual claims, and stayed the superior court proceedings pending completion of the arbitration of appellant's individual claims.

Appellant filed an appeal before a California appellate court challenging the trial court's order only with respect to his representative PAGA claim, arguing it was contrary to a subsequently issued California Supreme Court opinion, *Iskanian v. CLS Transportation Los Angeles, LLC*.[3] Respondents claimed the death knell doctrine applied only to the dismissal of class claims, not representative PAGA claims. The California appellate court observed that the differences between the two forms of representative actions, that is, class actions and representative PAGA actions were not material for purposes of the death knell doctrine. The rationale underlying the death knell doctrine—that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination, thereby rendering the order effectively immunized by circumstance from appellate review—applied equally to representative PAGA claims.

Respondents next argued the death knell doctrine applied only when the class claims were terminated with prejudice, not the case here. The California

[2] 59 Cal. 4th 348, 173 Cal. Rptr. 3d 289, 327 P.3d 129 (2014) (*Iskanian*).

[3] 59 Cal. 4th 348, 173 Cal. Rptr. 3d 289, 327 P.3d 129 (2014) (*Iskanian*).

appellate court disagreed. It observed that the death knell doctrine requires the order be a de facto final judgment for absent plaintiffs. Respondents provided no explanation of how appellant's representative PAGA claim could proceed. In theory, a different plaintiff who has not signed the alternative dispute resolution policy could be substituted in as the representative plaintiff for this claim. However, respondents submitted a declaration to the trial court stating all personnel who commenced or continued employment were required to comply with the arbitration policy. According to this evidence, there were no employees who could assert the representative PAGA claim and the order was therefore effectively a final judgment for the nonparty employees' PAGA claims.

Respondents did not argue appellant failed to meet the second prong of the death knell doctrine: that the persistence of viable but perhaps de minimis individual plaintiff claims creates a risk no formal final judgment will ever be entered. Appellant's attorney submitted a declaration below stating his firm could not represent individual employees outside of the class action context because of the low damages, and has represented to the court that appellant would not file for arbitration of his individual claims. The court was satisfied that the requisite risk no final judgment would be entered was present. Accordingly, the trial court's order was appealable. The order dismissing appellant's representative PAGA claim and compelling arbitration of appellant's individual PAGA claim was reversed, and the matter was remanded.

References. See, e.g., Wilcox, *California Employment Law*, § 90.21[10], *Appeal of Ruling on Motion to Compel Arbitration* (Matthew Bender).

CLASS CERTIFICATION

Alberts v. Aurora Behavioral Health Care, No. B248748, 2015 Cal. App. LEXIS 913 (October 16, 2015)

On October 16, 2015, a California appellate court ruled that a theory of liability alleging that an employer routinely denied meal and rest periods, failed to pay overtime compensation, and demanded off-the-clock work contrary to Lab. Code §§ 1194, 226.7, because of intentional understaffing and other uniform practices and policies presented a common question under Code Civ. Proc. § 382, well-suited for class treatment.

Valerie Alberts and others (hereafter, "plaintiffs"), formerly employed as members of the nursing staff at two acute care psychiatric hospitals owned and operated by Aurora Behavioral Health Care ("Aurora"), filed the instant wage and hour lawsuit alleging, on behalf of themselves and a class of similarly situated individuals, that Aurora's uniform practices and de facto policies routinely denied nursing staff employees meal and rest periods required by California law. Plaintiffs alleged that Aurora intentionally understaffed its hospitals while simultaneously requiring nursing staff to remain at their posts and monitoring patients unless relieved, resulting in class members being denied meal and rest breaks (and failing to receive additional compensation required by California law). Plaintiffs further alleged that Aurora required nursing staff members to complete outstanding assignments before leaving at the end of a shift, but actively discouraged or denied requests for overtime compensation and instructed employees to finish outstanding tasks off the clock. Plaintiffs proposed five subclasses: the meal break subclass, the rest break subclass, the overtime subclass, and two derivative subclasses for waiting time penalties owed and inaccurate wage statements. The trial court denied plaintiffs' motion for class certification, finding a lack of "commonality" among the subclasses. Plaintiffs filed this timely appeal before the California appellate court.

The California appellate court held that reversal was required with respect to the meal and rest break claims because the trial court's order denying class certification rested on erroneous assumptions, improper criteria, and, in some respects, insubstantial evidence. While plaintiffs' theory of liability with respect to the meal and rest break claims presented a common question suitable for class treatment, it was unclear from the record whether individual issues, such as damages, or common issues would predominate—that is, whether a class proceeding was not only manageable but superior to the alternatives. Accordingly, the court remanded for further consideration.

The California appellate court further held that reversal was required with respect to the overtime and off-the-clock compensation claims because the trial court's order denying class certification rested on improper criteria, erroneous legal assumptions and, in some respects, insubstantial evidence. However, as with the meal and rest break claims, it was unclear from the record whether common issues predominate over individual ones so as to make a class proceeding superior to the alternatives.

The California appellate court remanded plaintiffs' remaining claims regarding certification of subclasses for waiting time penalties and inaccurate itemized wage statements, which were predicated on the claims for rest

and meal breaks and overtime for further consideration regarding predominance and manageability.

Accordingly, the order denying the motion for class certification was reversed and remanded for further consideration.

References. See, e.g., Wilcox, *California Employment Law*, § 9.10, *Certification Under California Code of Civil Procedure Section 382* (Matthew Bender).

MAXIMUM INDEMNITY PAYMENTS

Larkin v. Workers' Comp. Appeals Bd., No. S216986, 2015 Cal. LEXIS 8129 (October 26, 2015)

On October 26, 2015, in a case involving a salaried peace officer who sustained injuries to his face and body in the course of duty, the California Supreme Court concluded that Lab. Code § 4458.2, which provides maximum indemnity levels to volunteer peace officers, does not extend to regularly sworn, salaried peace officers.

John Larkin ("Larkin") while employed as a police officer by the City of Marysville ("Marysville") sustained injuries to his face and body in the course of duty. A workers' compensation judge ("WCJ") was assigned to review Larkin's application for benefits. The WCJ determined that Larkin was indeed entitled to workers' compensation benefits, but not to the maximum indemnity levels available under Lab. Code § 4458.2. Interpreting Lab. Code §§ 4458.2 and 3362, the WCJ found that they did not apply to regularly sworn, salaried officers like Larkin. In light of the WCJ's ruling, Larkin was not entitled to the maximum indemnity levels set out in § 4453. Larkin petitioned the Workers' Compensation Appeals Board ("Board") for reconsideration. He argued that the two statutes' plain language entitled regularly sworn, salaried peace officers to maximum indemnity levels. The Board disagreed, finding the WCJ's reasoning persuasive and denying Larkin's petition. Larkin then sought a writ of review from the Court of Appeal. The Court of Appeal concluded that §§ 4458.2 and 3362 applied only to volunteer peace officers. Larkin filed a petition for review before California Supreme Court which was granted to address a single question of whether § 4458.2 applies also to regularly sworn, salaried peace officers.

The California Supreme Court noted that under the clause of § 4458.2, if an active peace officer of any department as described in § 3362 suffers injury or death while in the performance of his or her duties as a peace officer, then that officer is entitled to certain maximum indemnity levels as provided in § 4453. Under the language of Lab. Code § 4458.2, § 3362 performs a limiting function, where the statutory text did suggest its inapplicability to regularly sworn, salaried peace officers.

Further, the California Supreme Court noted that regularly sworn, salaried police officers are employees, as defined under § 3351, and entitled to workers' compensation benefits under that statute. Without § 3362, regularly sworn, salaried peace officers would still be entitled to workers' compensation. But volunteer peace officers would not be. And if § 3362 is indeed understood to reach only volunteer officers and not regularly sworn, salaried officers, then it would operate much like §§ 3366 and 3362.5—also referenced in § 4458.2. They too draw those performing certain law enforcement functions—as a member of a "posse comitatus." Unlike these categories of peace officers, those employed as regularly sworn, salaried officers may already enter the workers' compensation realm without any specially designed statute. So given the structure of the benefits scheme and the extent to which § 4458.2 depends on § 3362, it made little sense for § 4458.2 to apply to regularly sworn, salaried peace officers.

The California Supreme Court determined that the construction of §§ 4458.2 and 3362 matched the conclusion of the Board. The Board found it would be illogical and unnecessary to create a statute like § 3362 to confer employment on a person who is an employee under § 3351 for purposes of workers' compensation. Given, too, § 3362's role in the statutory scheme and its relationship to § 4458.2, the Board determined that the latter provision did not apply to regularly sworn, salaried peace officers like Larkin. Nothing in the Board's construction was unauthorized in light of the statute's text and structure. Also, the legislative history associated with §§ 3362 and 4458.2 was in accord with its analysis based upon the textual and structural considerations of the statutes. Consistent with the interpretation of the Board, the Supreme Court held that § 4458.2 did not extend maximum disability indemnity levels to regularly sworn, salaried peace officers.

Accordingly, the court affirmed the judgment of the Court of Appeal.

References. See, e.g., Wilcox, *California Employment Law*, § 20.20[2][b], *Employee Defined* (Matthew Bender).

PREGNANCY DISCRIMINATION

United States EEOC v. McLane Co., No. 13-15126, 2015 U.S. App. LEXIS 18702 (9th Cir. October 27, 2015)

On October 27, 2015, the U.S. Court of Appeals for the Ninth Circuit held that in an Equal Employment Opportunity Commission (EEOC) subpoena enforcement action in its investigation of a sex discrimination charge filed by a former employee who was fired when she failed to pass a strength test after returning from maternity leave, a subpoena request for pedigree information for each test taker, which included each test-taker's name, social security number, last known address, and telephone number, should have been enforced under 42 U.S.C. § 2000e-8(a) because this information was relevant to the charge since the information would enable the EEOC to assess whether the employer's test resulted in a pattern or practice of disparate treatment.

Damiana Ochoa ("Ochoa"), a former employee of a subsidiary of McLane Company ("McLane") in Arizona, filed a charge with the Equal Employment Opportunity Commission ("EEOC") against McLane alleging sex discrimination (based on pregnancy) in violation of Title VII of the Civil Rights Act of 1964. Ochoa alleged that when she tried to return to work after taking maternity leave, McLane informed her that she could not resume her position as a cigarette selector—a position she had held for eight years—unless she passed a physical capability strength test. Ochoa took the test three times but failed to receive a passing score. Based on her failure to pass the test, McLane terminated her employment. The EEOC notified McLane of Ochoa's charge and began an investigation. McLane voluntarily provided general information about the test and the individuals who had been required to take the test. That information included each test taker's gender, job class, reason for taking the test, and score received (pass or fail). However, McLane refused to disclose "pedigree information" for each test taker (name, social security number, last known address, and telephone number). McLane also refused to disclose the reasons for terminating employees who had previously taken the test. The EEOC issued an administrative subpoena demanding production of the withheld information. Upon McLane's continued refusal to provide the disputed information, the EEOC filed this subpoena enforcement action. The district court granted in part and denied in part the EEOC's request for enforcement. The court refused to enforce the subpoena to the extent it required McLane to disclose the pedigree information for each test taker; and for those employees who were terminated after taking the test, the reasons for termination. With respect to the pedigree information, the court concluded that the EEOC did not need such information to determine whether McLane had used the test to discriminate on the basis of sex. Thus, the information was not relevant at this stage of the EEOC's investigation. EEOC appealed the district court's order before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit determined that the pedigree information was relevant to the EEOC's investigation. Ochoa's charge alleged that McLane's use of the strength test discriminated on the basis of sex. To decide whether there was any truth to that allegation, the EEOC could speak to Ochoa about her experience with taking the test. But the EEOC also wanted to contact other McLane employees and applicants for employment who have taken the test to learn more about their experiences. Speaking with those individuals could have cast light on the allegations against McLane—whether positively or negatively. The EEOC could have learnt through such conversations that other female employees had been subjected to adverse employment actions after failing the test when similarly situated male employees had not. Or it might have learned the opposite. Either way, the EEOC would have been better able to assess whether use of the test has resulted in a "pattern or practice" of disparate treatment. To pursue that path, however, the EEOC first needed to learn the test takers' identities and contact information, which would have been enough to render the pedigree information relevant to the EEOC's investigation. Therefore, the district court erred by refusing to enforce the subpoena's request for production of that information.

The Ninth Circuit found that the district court provided no explanation for refusing to require production of pedigree information. It was clearly relevant to the EEOC's investigation; McLane did not argue otherwise. McLane nonetheless attempted to defend the district court's ruling on the ground that producing this information would pose an undue burden. McLane prevailed on this argument in the parallel subpoena enforcement action the EEOC brought against McLane under the Age Discrimination in Employment Act (ADEA), but the EEOC's request there was more onerous than the one at issue in the instant case. In the ADEA action, the EEOC sought information for employees whose dismissal was triggered by failure to pass the test, but McLane represented that its human resources database did not capture such "triggering" information and that it was not otherwise readily available. In the instant case, the EEOC was not seeking such "triggering"

information; it requested instead McLane's reasons for terminating employees who had previously taken the test, regardless of any linkage between the two. Because the issue raised in this action was not the same as the issue raised in the ADEA action, the EEOC was not precluded from litigating the undue burden issue in the instant case.

Accordingly, the Ninth Circuit reversed in part, vacated in part the district court's order, and remanded so that the district court could rule on whether requiring McLane to produce that information would in fact be unduly burdensome.

References. See, e.g., Wilcox, *California Employment Law*, § 40.20[3], *Enforcement and Remedies* (Matthew Bender).

RETALIATION

Sheridan v. Touchstone Television Productions, LLC, No. B254489, 2015 Cal. App. LEXIS 920 (October 20, 2015)

On October 20, 2015, a California appellate court ruled that plaintiff, who sued defendant under Lab. Code § 6310, was not required to exhaust her administrative remedies under Lab. Code §§ 98.7 & 6312, before filing suit; before they were amended in 2013, §§ 98.7 & 6312, permitted but did not require plaintiffs to resort to administrative procedures.

Touchstone Television Productions, LLC ("Touchstone") hired actress Nicollette Sheridan ("Sheridan") to appear in the television series *Desperate Housewives*, a show created by Marc Cherry ("Cherry"). Sheridan sued Touchstone under Lab. Code § 6310, alleging that Touchstone fired her in retaliation for her complaint about a battery allegedly committed on her by Cherry. Touchstone demurred, arguing that Sheridan failed to exhaust her administrative remedies by filing a claim with the Labor Commissioner under Lab. Code §§ 98.7 and 6312. The trial court overruled the demurrer. Touchstone filed a petition for writ of mandate with the California appellate court. The Third Appellate District in *MacDonald v. State of California*[4] held that an employee must exhaust the administrative remedy set forth in § 98.7 before filing a complaint for retaliatory discharge in violation of § 6310. The California appellate court denied Touchstone's petition for writ of mandate without prejudice to Touchstone filing a motion for reconsideration in the trial court in light of *MacDonald*. Touchstone renewed its demurrer in the trial court. The trial court found that *MacDonald* controlled the instant case and thereby sustained the demurrer and dismissed Sheridan's complaint without leave to amend because she failed to exhaust her administrative remedies. The California Supreme Court denied the petition for review in *MacDonald* and ordered the opinion depublished. In 2013, the Legislature amended the Labor Code, adding two new provisions effective January 1, 2014 [Stats. 2013, ch. 577 § 4; ch. 732 § 3]. Lab. Code § 244 provides in relevant part that an individual is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision of this code, unless that section under which the action is brought expressly requires exhaustion of an administrative remedy. The newly enacted subdivision (g) of § 98.7 similarly provides that in the enforcement of this section, there is no requirement that an individual exhaust administrative remedies or procedures. Sheridan filed a motion for a new trial and a motion for reconsideration, arguing that, in light of *MacDonald*'s depublication and the statutory amendments, it was clear she was not required to exhaust administrative remedies. The trial court denied Sheridan's motion for a new trial on the basis that there was "no new law stated." However, the trial court subsequently granted Sheridan's motion for reconsideration, overruled Touchstone's demurrer, and ordered that a case management conference be held. Touchstone filed another writ petition in the California appellate court. The appellate court issued an alternative writ of mandate, requiring the trial court to enter a new order denying Sheridan's motion for reconsideration on the ground that the trial court lacked jurisdiction to consider the matter. The trial court vacated the order granting Sheridan's motion for reconsideration and entered a new order denying the motion on the said ground. Sheridan timely appealed before the appellate court. The question to be considered was whether §§ 98.7 and 6312 required Sheridan to exhaust her administrative remedies before filing suit under § 6310.

The California appellate court noted that the plain language of §§ 6312 and 98.7 before the 2013 amendments did not require exhaustion. Both stated that a person who believed that he or she had been discriminated against in violation of the relevant Labor Code provisions "may," not "shall," file a complaint with the Labor Commissioner or the Division of Labor Standards Enforcement. As provided in § 15, "shall" is mandatory and "may" is permissive. Thus, a straightforward reading of the statutes establishes that an administrative claim is permitted, but not required. Given that exhaustion was not required under the pre-2013 versions of §§ 6312 and 98.7, the 2013 enactment

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[4] 219 Cal. App. 4th 67, 161 Cal. Rptr. 3d 520 (2013) (*MacDonald*).

of § 244(a) and § 98.7(g) merely clarified existing law. Thus, those enactments applied to Sheridan's lawsuit. Contrary to Touchstone's contentions, the purported requirement of exhaustion of the administrative remedies under §§ 98.7 and 6312 had not been "finally and conclusively" decided by the courts before the 2013 enactments. *MacDonald*, the now-depublished decision on which the trial court relied in sustaining Touchstone's demurrer, was not definitive authority. Furthermore, *Lloyd v. County of Los Angeles*[5] had held that exhaustion under § 98.7 was not required before filing suit under § 1102.5. Thus, exhaustion of the remedy provided by § 98.7 was not required, and the 2013 enactments simply clarified this point. The same reasoning applied to § 6312, which, like § 98.7, did not require administrative exhaustion and had not been finally and definitively interpreted. Sheridan therefore was not required to exhaust her administrative remedies under §§ 98.7 and 6312 before filing suit for a violation of § 6310.

Accordingly, the trial court's judgment of dismissal in favor of Touchstone was reversed and the matter was remanded to the trial court.

References. See, e.g., Wilcox, *California Employment Law*, § 60.03, *Statutory Prohibitions and Limitations on Employer's Right to Terminate or Discipline Employees* (Matthew Bender).

Cardenas v. M. Fanaian, D.D.S., Inc., No. F069305, 2015 Cal. App. LEXIS 872 (October 1, 2015)

On October 1, 2015, a California appellate court ruled that a Lab. Code § 1102.5 retaliation cause of action stood on its own and did not require proof of a violation of public policy; a Lab. Code § 1102.5 claim was not limited to protecting against employer retaliation for reporting violations of law arising out of the employer's business activities.

Rosa Lee Cardenas ("Cardenas") was terminated from her employment as a dental hygienist after she reported to the Reedley Police Department that her coworker might have stolen her wedding ring at her workplace. Cardenas filed a lawsuit against her employer, M. Fanaian, D.D.S., Inc. ("defendant"), and against Masoud Fanaian, D.D.S., individually, seeking to recover compensatory damages based on two distinct causes of action: retaliation in violation of Lab. Code § 1102.5 (forbidding employers from retaliating against employees who report violations of law to a law enforcement agency) and wrongful termination in violation of public policy under *Tameny v. Atlantic Richfield Co.*[6] The jury found in favor of Cardenas on both causes of action and awarded her $117,768 in damages. The trial court entered judgment on the verdict against defendant. Defendant appealed before the California appellate court.

The California appellate court noted that § 1102.5 cause of action stands alone and does not require proof of a violation of public policy, as under *Tameny*. The appellate court found that Cardenas's claim for retaliation in violation of § 1102.5 was distinguishable from a common-law *Tameny* claim, since the former entailed a statutory right of action for damages. The special verdict findings brought the instant case squarely within the parameters of § 1102.5. The jury determined that Cardenas reported a workplace theft of her property to the police. The jury found that she was subsequently terminated from her employment and that her report to the police was a motivating reason for her termination. Thus, she engaged in protected activity, was subjected to an adverse employment action, and there was a causal link between the two. She met all of the statutory elements of a claim under § 1102.5. She was not required to prove anything more.

The California appellate court further noted that the language under § 1102.5(b) that an employer shall not retaliate against an employee for disclosing information to a government or law enforcement agency if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute plainly applied to the factual scenario of the instant case. In the instant case, Cardenas reported to a law enforcement agency that she believed a theft had occurred at the workplace. The words used in § 1102.5(b) contained no ambiguity, nor had one been identified by defendant. Therefore, § 1102.5 did not contain any language which would limit the statute's protections to reports of wrongdoing concerning the employer's business enterprise.

The California appellate court finally held that the plain and unambiguous language of § 1102.5(b) creates a cause of action for damages against an employer who retaliates against an employee for reporting to law enforcement a theft of his or her property at the workplace. In the instant case, the employee, Cardenas, had met all of the statutory elements of a claim under § 1102.5 because the jury had found that she reported a workplace theft of her property to the police, that she

[5] 172 Cal. App. 4th 320, 90 Cal. Rptr. 3d 872 (2009) (*Lloyd*).

[6] 27 Cal. 3d 167, 164 Cal. Rptr. 839 (1980) (*Tameny*).

was subsequently terminated from her employment, and that her report to the police was a motivating reason for her termination.

Accordingly, the California appellate court affirmed the decision of the Board.

References. See, e.g., Wilcox, *California Employment Law*, § 60.03, *Statutory Prohibitions and Limitations on Employer's Right to Terminate or Discipline Employees* (Matthew Bender).

WAGE AND HOUR

Valencia v. SCIS Air Security Corp., No. B255199, 2015 Cal. App. LEXIS 909 (October 16, 2015)

On October 16, 2015, a California appellate court ruled that because compliance with California labor and employment laws did not implicate any price, route, or service of an airline for purposes of federal preemption under 49 U.S.C. § 41713(b)(1), an employee's meal and rest break claims under Lab. Code §§ 512(a), 226.7, against a contractor that provided airline security services were not preempted.

Amanda Valencia ("Valencia") worked for SCIS Air Security Corporation ("SCIS") as a security coordinator at Los Angeles International Airport. She initiated this suit alleging that SCIS violated state labor and unfair competition laws, specifically the following causes of action: failure to pay wages for all hours worked, such as requiring Valencia to work before clocking in and after clocking out and not paying for those times; failure to pay overtime wages; failure to provide required meal breaks; failure to provide required rest breaks; paying a lower wage than the statutory minimum, as SCIS did not pay for all hours worked, overtime, and the additional hour for each missed rest and meal break; failure to provide accurate wage statements, as SCIS's statements did not reflect all hours worked or the appropriate pay rates; failure to timely pay all wages upon termination of employment; unfair competition, as SCIS's conduct allowed it a competitive advantage over other companies that did comply with California labor laws; and civil penalties allowed under Lab. Code § 2699 for the labor law violations alleged above. The trial court grouped Valencia's claims into those related to rest and meal breaks (claims 3, 4, and 8) and those related to wages (claims 1, 2, 5–7, and 9). The trial court granted summary adjudication finding that an employee's meal and rest break claims [Lab. Code §§ 512(a), 226.7] were federally preempted [49 U.S.C. § 41713(b)(1)] along with an unfair competition cause of action and wage and penalty claims [Lab. Code §§ 1194, 2699]. Based on that ruling, the trial court denied Valencia's motion for class certification. The issue on appeal before California appellate court was a threshold one: whether Valencia's claims that SCIS violated California meal and rest break laws and wage laws were preempted by the federal Airline Deregulation Act of 1978 ("FADA").

On appeal, the California appellate court noted that requiring SCIS to comply with California meal and rest break laws did not relate to any airline's price, route, or service, and therefore Valencia's meal and rest break claims were not preempted by the FADA. Whether SCIS provided meal and rest breaks to its employees was independent of the price, route, or service that airlines provided to its customers. Further, there was no evidence (and SCIS pointed to none) that Congress enacted the FADA to allow companies to avoid state meal and break laws. Instead, Congress intended the FADA preemption provision to ward off state laws interfering with the prices that airlines provide to its passengers and the corresponding flight routes and services. Despite SCIS's urging to the contrary, nothing in the FADA preemption clause provided for "security" or "safety" as a basis for preemption. The plain language of the statute recited only "price, route, or service," and the trial court ought to adhere to such a clear mandate from Congress. In sum, the trial court erred in holding Valencia's claims 3 and 4 (alleging SCIS violated state meal and rest break laws) preempted by the FADA.

The California appellate court further found that Valencia's unfair competition cause of action (claim 8) was based on her labor and employment causes of action, specifically meal and rest break labor laws (claims 3 and 4). As the court explained above, those latter claims were not preempted; therefore, neither was the former.

The California appellate court also held that the trial court erred in holding Valencia's wage law claims (claims 1, 2, 5, 6, and 9) were preempted solely because they were offshoots of or based entirely on the rest and meal break claims (claims 3, 4, and 8) that it had deemed preempted. As Valencia's rest and meal break claims were not preempted by the FADA, the trial court's reasoning could not stand.

The California appellate court finally found that the trial court denied certification for the remaining proposed class and subclass definitions based on its legal holding that the FADA preempted several of Valencia's claims. Because that legal holding was incorrect, the trial court's class certification order could not stand. In light of its substantive ruling on the preemption

issue, the court remanded the question of certification to the trial court for reconsideration in the first instance.

Accordingly, the judgment was reversed.

References. See, e.g., Wilcox, *California Employment Law*, § 1.07, *Preemption* (Matthew Bender).

WORKERS' COMPENSATION

Batten v. Workers' Comp. Appeals Bd., No. B260916, 2015 Cal. App. LEXIS 964 (October 28, 2015)

On October 28, 2015, a California appellate court ruled that in a case in which a claimant retained a qualified medical expert at her own expense, pursuant to Lab. Code § 4064(d), the admission of a medical evaluation the claimant obtained from the privately retained expert was barred by § 4061(i). Although § 4605 permits the admission of a report by a consulting or attending physician, and § 4061(i) permits the admission of an evaluation prepared by a treating physician, neither section permits the admission of a report by an expert who is retained solely for the purpose of rebutting the opinion of the agreed medical expert's opinion.

Margaret Batten ("Batten") sustained injury arising out of and in the course of employment as a registered nurse for Long Beach Memorial Hospital ("Long Beach"). She also claimed that she sustained injury to her psyche as a result of these physical injuries. The parties selected Joseph Stapen ("Stapen") as the agreed psychiatric panel qualified medical examiner. Stapen opined that 47% of Batten's psychiatric condition was caused by industrial factors. Therefore, Batten's psychiatric injury was not a compensable industrial injury because it was not 51% caused by industrial factors. The Workers' Compensation Judge ("WCJ") authorized Batten to retain her own qualified medical expert, Gary Stanwyck ("Stanwyck"), to obtain a psychological evaluation at her own expense pursuant to Lab. Code § 4064(d). Stanwyck opined that over 51% of Batten's psychiatric condition was due to her work-related injuries, and therefore, she sustained a compensable psychiatric industrial injury. The WCJ admitted Stanwyck's report into evidence. The WCJ found Stanwyck "convincing and persuasive" and questioned Stapen's logic and conclusions. The WCJ found Batten sustained injury to her psyche arising out of and in the course of employment. On reconsideration, the Workers' Compensation Appeals Board ("Board") concluded that Stanwyck's report was not admissible and the WCJ should have relied on the opinion of Stapen. The Board concluded that § 4064(d) provides that medical-legal evaluations obtained outside the procedures of §§ 4060, 4061, 4062, 4062.1, and 4062.2 are not admissible. Batten sought a writ of review from the California appellate court. The appellate court granted her petition and requested briefing addressing the applicability of Lab. Code § 4061(i), which was not expressly referenced by the Board.

The California appellate court rejected Batten's argument that § 4064(d) permitted the admission of her privately retained expert's report. Section 4061(i) prohibits the admission of privately retained reports, unless they are prepared by a treating physician. Section 4061(i) does not nullify § 4064(d), but it does prohibit the admissibility of reports by privately retained experts. Had the Legislature intended to permit the admission of additional comprehensive medical reports, obtained at a parties' own expense for the sole purpose of rebutting the opinion of the qualified medical expert, it would have said so. The plain and unambiguous language of Lab. Code § 4061(i) precludes such an interpretation.

Further, the California appellate court agreed with the Board's conclusion that the term "consulting physician" in § 4605 means a doctor who is consulted for the purposes of discussing proper medical treatment, not one who is consulted for determining medical-legal issues in rebuttal to a panel QME. The court noted that § 4605 provides that an employee may provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires. When an employee consults with a doctor at their own expense, in the course of seeking medical treatment, the resulting report is admissible. This reading of § 4605 is consistent with § 4061(i). Section 4605 permits the admission of a report by a consulting or attending physician and § 4061(i) permits the admission of an evaluation prepared by a treating physician. Neither section permits the admission of a report by an expert who is retained solely for the purpose of rebutting the opinion of the agreed medical expert's opinion.

Accordingly, the California appellate court affirmed the decision of the Board.

References. See, e.g., Wilcox, *California Employment Law*, § 20.30, *Procedure for Obtaining Benefits* (Matthew Bender).

Vebr v. Culp, No. G050730, 2015 Cal. App. LEXIS 967 (October 28, 2015)

On October 28, 2015, a California appellate court ruled that in an action for negligence and premises liability filed by an employee of a painting contractor,

who was hired to paint defendant homeowners' home, the employee was unqualified for workers' compensation benefits under Lab. Code § 3352(h) from the homeowners because he had not worked 52 hours or earned $100 within the 90 days before the accident. Even assuming the homeowners might be potentially held liable in tort to the employee as an employer under the doctrine of respondeat superior and § 2750.5, no triable issue of material fact existed regarding such liability. The trial court did not err by concluding that the evidence before it did not show all three conditions of the res ipsa loquitur presumption were satisfied.

Tomas Vebr ("Vebr") was employed by OC Wide Painting, a painting contractor, which contracted with defendants Gary A. Culp and Georgia M. Culp ("Culps") to paint the interior of their home. The Culps were insured under a homeowners' insurance policy which provided workers' compensation coverage for residence employees; Vebr did not qualify as a residence employee under that coverage. An hour into working in the Culps' home, Vebr fell 12 to 15 feet from an extension ladder provided by the painting contractor and was injured. Vebr sued the Culps for negligence and premises liability based on allegations that his fellow painters were negligent. The Culps filed a motion for summary judgment on the ground that there were no facts to show they were liable for Vebr's injuries. The trial court granted the motion for summary judgment. Vebr filed an appeal before a California appellate court.

The California appellate court observed that Vebr did not seek workers' compensation benefits from the Culps or penalties for their failure to provide them. He did not allege in the complaint that the Culps engaged in any form of direct negligence. In any event, there was no evidence that showed the Culps directly engaged in any negligent act. The evidence showed Vebr fell from a ladder provided by OC Wide Painting, not the Culps. Neither of the Culps was present at the time of the accident. There was no evidence that the Culps' residence had any hazardous condition, much less one that had any causal connection to Vebr's accident. Thus, no triable issue of material fact existed regarding any liability for direct tortious activity.

Instead, Vebr sought to hold the Culps liable in tort under the theory of respondeat superior as Vebr's employer pursuant to Lab. Code § 2750.5, in light of OC Wide Painting's unlicensed and uninsured status. The California appellate court did not need to decide whether the Culps might be potentially held liable in tort to Vebr as his employer under the doctrine of respondeat superior because, even assuming the Culps might be held so liable, no triable issue of material fact existed regarding such liability. The complaint alleged Vebr's claims for general negligence and premises liability were solely based on employees for OC Wide Painting negligently securing the ladder which was unsuitable for the job. There was no evidence showing that any of OC Wide Painting's employees negligently secured the ladder or the ladder was unsuitable for the job. There was no evidence that Vebr's helpers left his post, or otherwise failed to do what he was supposed to do with the ladder. Vebr had never identified any hazardous condition at the residence, much less one that played any role in the accident.

Vebr argued the rebuttable presumption of negligence against employers, which is codified at § 3708, applied to the Culps as Vebr's statutory employer under § 2750.5. Therefore, Vebr's argument continued, it was not his burden in opposing the motion for summary judgment to produce evidence showing the existence of a triable issue of material fact as to his negligence or premises liability claims, but it was the Culps' burden to rebut the presumption of negligence. The California appellate court held that Vebr's argument failed because the language of § 3708 provides that the presumption does not apply to circumstances such as those presented in this case. Vebr, as an employee hired to paint the ceiling of a home, readily fell within the description of the class of employees who are hired to repair or remodel a residence, to come within the § 3351(d) exception of § 3708.

Vebr also argued that the trial court improperly denied him the opportunity to prove the Culps were negligent under the doctrine of res ipsa loquitur. The California appellate court held that the undisputed facts showed that the cause of Vebr's fall was a mystery. There was no evidence showing what had occurred or that Vebr was free from negligence himself. There was no evidence, for example, that at the time of the fall, he was holding on the ladder with two hands and did not cause the fall himself by losing his balance. On this record, there was no reasonable and logical inference that Vebr's helpers or anyone else present in the residence at the time of the accident was negligent. Someone might have been negligent, but the court did not and likely never would know whether that was the case. The trial court did not err by concluding that the evidence before the court did not show that all three conditions of the res ipsa loquitur presumption were satisfied.

Accordingly, the judgment was affirmed.

References. See, e.g., Wilcox, *California Employment Law*, § 20.44, *Suits Against Third Parties* (Matthew Bender).

New York Knickerbockers v. Workers' Comp. Appeals Bd., No. B262759, 2015 Cal. App. LEXIS 869 (October 1, 2015)

On October 1, 2015, a California appellate court ruled that an employer seeking review of a decision of the California Workers' Compensation Appeals Board was required to file a verified petition in accordance with Lab. Code § 5954, and Code Civ. Proc. §§ 1069, 2009, even though no rule provided for verification because under Cal. Const. art. 6, § 6(d), a rule could not be inconsistent with statute.

Durand Macklin ("Macklin"), a professional basketball player claimed a cumulative trauma injury arising out of and occurring during the course of his employment while employed by multiple National Basketball Association ("NBA") teams. Macklin was employed by the Atlanta Hawks ("Atlanta"), New York Knickerbockers ("petitioner"), Albany Patroons and Los Angeles Clippers ("Clippers"). Macklin testified that he was never advised about his right to file for workers' compensation benefits while he was playing. He first learned about his workers' compensation rights in approximately June 2011 from an NBA player and filed his claim two months thereafter. While with Atlanta, Macklin received treatment for his back and other body parts. With petitioner, he engaged in intense workouts and felt stress and strains all over his body. He had other physical maladies such as dehydration and low back pain. The Workers' Compensation Judge ("WCJ") found that Macklin had sustained various injuries to his lower back and elsewhere as a result of his employment as a basketball player. The WCJ concluded that the August 24, 2011 claim was not barred by the applicable statute of limitations because Macklin first learned in June 2011 that his physical injuries were related to his employment as a professional basketball player and that he had potential or actual rights to workers' compensation. The WCJ also determined that the doctrine of laches did not bar the claim because the date of injury was delayed by the failure of Atlanta, petitioner, and Clippers to advise or give notice to Macklin of his potential or actual rights to workers' compensation. Macklin was found to be 76 percent permanently disabled with no apportionment of the cause of the injury with other, nonindustrial reasons.

Petitioner sought reconsideration on the ground that there was no subject matter jurisdiction because there was an insufficient relationship between California and the injuries suffered and lack of a legitimate interest in the matter to determine that California workers' compensation law should apply as it pertained to petitioner. The WCJ recommended that reconsideration be denied. The Workers' Compensation Appeals Board ("Board") affirmed the WCJ's award. The Board concluded that there was no denial of due process in exerting subject matter jurisdiction over petitioner because California had a legitimate interest in allocating liability among Macklin's employers during the period of injury exposure. Petitioner filed a timely, but unverified, petition for writ of review asserting a lack of subject matter jurisdiction. Macklin objected to consideration of the petition because it was not verified. Macklin also objected to petitioner's so-called forum selection of the Second District. The California appellate court granted the petition for a writ of review.

The California appellate court determined that Cal. Rules of Court, R. 8.495 specifically governing petitions for writs of review addressing decisions of the Board does not require verification. Other California rules of court, such as Rule 8.496(a)(1), which governs petitions to review decisions of the Public Utilities Commission, explicitly require verification. Code Civ. Proc. § 1069 specifically requires verification, and this provision is made applicable to petitions to review decisions of the Board by Lab. Code § 5954. The California Constitution requires the Judicial Council to adopt rules for court administration, and practice and procedure, not inconsistent with statute [Cal. Const. art. 6, § 6(d)]. To the extent that Rule 8.495 did not require verification for petitions for writs of review addressing Board decisions, that rule would be inconsistent with Code Civ. Proc. § 1069 and Lab. Code § 5954 and therefore not controlling. As noted, the authorities provided that verification was required, there was no authority to the contrary, and there was dictum in at least one decision that supported the conclusion that verification was required. The appellate court concluded that petitions for writs of review addressing decisions of the Board ought to be verified. Because courts generally permit a party to cure such defects as the failure to file a required verification, following oral argument, the appellate court granted petitioner's request to file a verified petition.

The California appellate court further noted that although Lab. Code § 5950 requires a petitioner to file in the district of the petitioner's residence, when that is not possible, as in the instant case, the district of the petitioning carrier's residence is an acceptable venue.

In any event, filing in the wrong district was not a jurisdictional defect.

The California appellate court finally determined that under Lab. Code § 5500.5(a), liability is limited to employers who employed Macklin during one year immediately preceding either the date of the injury or during one year preceding the last date on which the employee was employed in the occupation that exposed him to the hazards of the cumulative injury, whichever first occurred. As the Board correctly explained, petitioner's liability was predicated on the fact that petitioner was Macklin's employer during that one year period. The allocation of liability in cumulative injury cases under Lab. Code § 5500.5(a) was not the same as determining whether California could apply its workers' compensation law to Macklin's injuries. As he admittedly was petitioner's employee for part of the critical year, Lab. Code § 5500.5(a) applied.

Accordingly, the award of the Board was affirmed and the case was remanded to the Board for the purpose of awarding Macklin his reasonable attorney fees for services rendered in connection with the petition for writ of review.

References. See, e.g., Wilcox, *California Employment Law*, § 80.102[4][ii], *Allegations and Verification*; § 20.30, *Procedure for Obtaining Benefits* (Matthew Bender).

CALENDAR OF EVENTS

2015

Dec. 2	CALBAR Labor and Employment Section Webinar: Are Your Wage Statements in Compliance? An In Depth Review of California Labor Code § 226	12:00 PM – 1:00 PM
Dec. 2	NELI: Ethics in Labor & Employment Law - Teleconference	10:00 AM – 12:00 PM
Dec. 3-4	NELI: Employment Law Conference	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Dec. 10	CALBAR Labor and Employment Section Webinar: SIMPLY SEX – Sex, Sexual Orientation, Gender, Gender Identity, and Gender Expression Bias in the Workplace and Beyond	12:00 PM – 1:00 PM
Dec. 16	CALBAR Labor and Employment Section Webinar: Using Unpaid Interns, Apprentices, Volunteers, and Trainees: It Could Cost You!	12:00 PM – 1:00 PM

2016

Jan. 8	CALBAR Labor and Employment Section Webinar: Successful Mediation of an Employment Case with Represented and Un-represented Litigants	12:00 PM – 1:00 PM
Jan 15	CALBAR Labor and Employment Section, Basic Wage and Hour Conference	State Bar of California 180 Howard Street San Francisco, CA 94105
April 7-8	NELI: ADA & FMLA Compliance Update	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
July 13	NELI: California Employment Law Update	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
July 14-15	NELI: Employment Law Update	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Aug. 18-19	NELI: Public Sector EEO and Employment Law Conference	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000

Oct. 12	NELI: Affirmative Action Workshop	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Oct. 13-14	NELI: Affirmative Action Briefing	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000

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