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President Obama's Directive That the Labor Department "Update" and "Modernize" the FLSA Overtime Exemptions: What Does it Mean?

By Raymond W. Bertrand & Brit K. Seifert

Introduction

On March 13, 2014, President Obama issued a one-page memorandum to Secretary of Labor Thomas Perez entitled "Updating and Modernizing Overtime Regulations."[1] In it, the President proclaimed that the Federal Labor Standards Act ("FLSA") regulations creating the so-called "white collar" exemptions from overtime and minimum wage laws were "outdated."[2] The White House directed the Labor Department to simplify these executive, administrative and professional exemptions "to make them easier for both workers and businesses to understand and apply."[3] What should be expected from Washington in the coming months? What should employers be thinking about while awaiting this action? This article addresses these questions.

[1] Press Release, Office of the Press Secretary, The White House, *Presidential Memorandum - Updating and Modernizing Overtime Regulations* from President Barack Obama to Thomas Perez, Secretary of Labor (Mar. 13, 2014) ("White House Memorandum"), *available at* http://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-and-modernizing-overtime-regulations.

[2] White House Memorandum, *supra* note 1.

[3] White House Memorandum, *supra* note 1.

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By Raymond W. Bertrand & Brit K. Seifert

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The President's Directive to the Secretary of the Labor Department

Starting early this year, President Obama outlined what has been coined his "pen-and-phone" strategy for 2014. He has announced, repeatedly, that he is willing to use his executive branch actions - executive orders and administrative steps - to effect the changes that he and his administration desire if Congress does not implement those changes through legislation.

President Obama endeavors to promote increases in compensation for American workers. At the advent of his second term, an increase in wages sat at the top of his economic agenda, with his first efforts aimed directly at increasing the federal minimum wage. Under the FLSA, unless an employee qualifies for one of the statutory exemptions, he or she is "non-exempt" and entitled to be paid minimum wage at the hourly rate of $7.25, as well as overtime compensation at the rate of one-and-a-half times his or her regular hourly rate (often called "time-and-a-half").[4] In February 2014, the President issued an executive order increasing the federal minimum wage to $10.10 per hour for employees of federal contractors, which takes effect January 1, 2015.[5] Separately, in his 2013 State of the Union Address, he called on Congress to enact legislation increasing minimum wage for all employees;[6] the last hike occurred five years ago, in 2009.[7]

In March, the President turned to overtime pay. While an increase in the federal minimum wage requires legislative action by Congress, the FLSA specifically grants authority to the Department of Labor to promulgate - and amend when needed - the FLSA regulations that dictate which employees are exempt from the minimum wage and overtime pay laws.[8] Thus, the President could sidestep Congress and focus his next efforts directly on the Labor Department - which he did in his March 13th memorandum. Stating that the overtime regulations "have not kept up with our modern economy," the President explained to Labor Secretary Perez that the result is that "millions of Americans lack the protections of overtime and even the right to minimum wage."[9] The President went on to specifically instruct Secretary Perez that in the course of proposing such revisions,

> [the Labor Department] shall consider how the regulations could be revised to update existing protections consistent with the intent of the Act; address the changing nature of the workplace; and simplify the regulations to make them easier for both workers and businesses to understand and apply.[10]

The memorandum mentions no specific timeframe for such proposed changes.

The Changes Expected from the Labor Department

On March 13, 2014, the White House's directive to the Labor Department on overtime exemption rules was not the only government communication to issue on the topic. On that same day:

- The White House Press Secretary also issued a "Fact Sheet" entitled "Opportunity for All: Rewarding Hard Work by Strengthening Overtime Protections",[11] and
- Labor Secretary Tom Perez posted his comments on the Official Blog of the U.S. Department

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4 29 U.S.C. §§ 206(a)(1)(C), 207(a)(2).

5 Exec. Order No. 13,658, 79 Fed. Reg. 9851 (Feb. 20, 2014).

6 President Barack Obama, State of the Union Address (Jan. 28, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address.

7 29 U.S.C. § 206(a)(1)(C).

8 29 U.S.C. § 213(a)(1).

9 White House Memorandum, *supra* note 1.

10 White House Memorandum, *supra* note 1.

11 Press Release, Office of the Press Secretary, The White House, *Fact Sheet: Opportunity for All: Rewarding Hard Work by Strengthening Overtime Protections* (Mar. 13, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/03/13/fact-sheet-opportunity-all-rewarding-hard-work-strengthening-overtime-pr.

> of Labor. Using a title that mirrored the White House Fact Sheet, Perez's blog was entitled, "Opportunity for All: Fixing Overtime Rules to Reward Hard Work."[12]

Given the consistency of this messaging, it is reasonable to anticipate that the changes the Labor Department proposes to the regulations will be those sought by the Obama Administration.

Turning to the substance of these communications, the content and language selected by the White House and Labor Secretary afford insight into the types of changes that can be expected. Overall, the Labor Department will undoubtedly propose changes that make it *more difficult* for workers to qualify for exempt status under the three "white collar" exemptions specifically recited in the President's memorandum: the FLSA's executive, administrative, and professional employee exemptions. More stringent exemption standards means fewer exempt employees and an increase in the numbers of non-exempt employees entitled to minimum wage and overtime compensation.

The President's directive reflects this objective. He stated: "Because these regulations are outdated, millions of Americans lack the protections of overtime and even the right to the minimum wage."[13] This reference that "millions of Americans lack the protections of overtime" means this Administration believes that too many (literally, "millions" of) employees currently qualify for an overtime exemption. Similarly, the White House Fact Sheet says that "improving the overtime regulations consistent with the Memorandum the President will sign today *could benefit millions of people* who are working harder but falling further behind."[14] Likewise, Secretary Perez's blog states that "[b]y updating who qualifies for overtime pay, we are *expanding* opportunity and making sure hard work pays."[15] The Secretary intimates that expanded numbers of employees will be paid more for more hours of ("hard") work - meaning more employees will be entitled to overtime compensation because they will fail the new, tougher overtime exemption rules.

This increase in non-exempt employees/decrease in exempt employees will likely be accomplished through two specific changes: an increase in the minimum salary requirement and changes to the primary duties test.

Expected Increase in the Minimum Amount of Salary That Must Be Paid for Exempt Status

At present, to qualify for the FLSA's white-collar exemptions, an employee must be paid a guaranteed salary or fee of at least $455 per week.[16] The messaging related to the President's mandate suggests that the Labor Department will propose an increase to this minimum weekly salary amount:

- The memorandum states that individuals "lack the . . . right to the minimum wage," indirectly referencing the minimum salary requirement for executive, administrative and professional employees.[17]

- The White House's "Fact Sheet" asserts that the FLSA's basic overtime protections have been eroded. It gives as an example a convenience store manager and fast food shift supervisor who may work 60 hours a week but effectively make less than the minimum wage of $7.25 per hour - and are not entitled to overtime.[18]

- Secretary Perez blogged that "[u]nfortunately, that salary threshold has only been updated twice in the last 40 years, so the exception is capturing employees who just don't make that much. . . . The current salary threshold is only $455 - below today's poverty line for a worker supporting a family of four. So under the current rules, even if you're poor, you may not qualify for overtime. That doesn't make sense."[19]

The precise amount that the weekly minimum salary will go up is not clear. But the White House's Fact Sheet suggests a basis for determining how to set the higher threshold. In particular, the Fact Sheet focuses on adjusting the minimum amount to account for inflation. The Department of Labor set the minimum salary at $250 per week in 1975, and increased it to $455 per week in 2004; adjusted for inflation, the current $455 weekly threshold amount established ten years ago would increase to $561.[20]

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12 Secretary Tom Perez, *Opportunity for All: Fixing Overtime Rules to Reward Hard Work*, Work in Progress, Official U.S. Labor Department Blog (Mar. 13, 2014), *available at* http://social.dol.gov/blog/fixing-overtime-rules-to-reward-hard-work.

13 White House Memorandum, *supra* note 1.

14 *See Fact Sheet*, *supra* note 11 (emphasis added).

15 *See* Perez, *Fixing Overtime Rules, supra* note 12 (emphasis added).

16 29 C.F.R. § 541.600.

17 White House Memorandum, *supra* note 1.

18 *See Fact Sheet*, *supra* note 11.

19 Perez, *Fixing Overtime Rules, supra* note 12.

20 *See Fact Sheet*, *supra* note 11.

In addition, given the focus in the communications on the few historical increases and directive to "streamline" the overtime regulations to align with the modern economy, it would not be surprising if the Labor Department proposes a minimum salary level tied to an index or formula ensuring the amount automatically bumps up, based on the underlying minimum wage or an inflationary index. California law incorporates this approach. In California, the salary basis requirement is tied to the state's minimum wage rate; the minimum salary amount is at least two times what a full-time, non-exempt employee would earn under the state's minimum wage rate for a forty-hour workweek.[21] When California's minimum wage increases to $9 per hour as of July 1, 2014, the white-collar exemption threshold automatically bumps up. California employees cannot qualify for exempt status as of July 1st unless they are paid at least $720 per week.

An automatic increase based on an inflationary index, instead of based on the minimum wage amount, seems more likely. The former avoids waiting for Congressional minimum wage legislation. Congress has only increased minimum wage three times in the last thirty years, and the President seems disinclined to await Congressional action when his "pen and phone" can accomplish his objectives.

Possible Changes to White-Collar Exemptions' "Primary Duties" Requirement

Separate from an increase of the minimum salary requirement, it is reasonable to anticipate changes to the "primary duties" test for the white-collar exemptions. The President's memorandum directs the Secretary to "modernize," "streamline," "update" and "simplify" existing overtime regulations. Exactly how the Labor Department will seek to "simplify" the duties test remains to be determined.

At present, the FLSA's primary duties requirement is a qualitative, not quantitative, test. In contrast, under California law, employees must spend more than 50 percent of their work time performing exempt duties to qualify for one of the "white collar" exemptions.[22] While adopting such a change might achieve the President's objective of making it more difficult for workers to qualify for exempt status, this standard has proved to be inordinately difficult to administer, as evidenced by the high number of misclassification lawsuits filed against California employers each year.

Timing: When Are the Labor Department's Revised Regulations Expected?

The Administrative Procedures Act[23] ("APA") requires that agencies like the Labor Department adhere to an "open public process"[24] when issuing regulations under laws passed by Congress, such as the FLSA. The APA's normal rulemaking process provides a framework for when employers can reasonably expect the Labor Department's proposed regulations. Under these notice-and-comment rulemaking procedures:

- *The Labor Department will publish a Notice of Proposed Rulemaking and the proposed rules in the Federal Register.*

  The proposed rules will set out the text of the proposed regulations in full. They will also contain a preamble containing a summary, date, and contact information where the agency will invite public comment on the proposed rule, set a deadline for those comments to be submitted, and describe specific methods by which comments can be provided. Most agencies prefer that comments are provided electronically, and instructions and steps for how to do so are displayed on the federal electronic comment portal called "Regulations.gov," which contains a "help" page.[25]

- *There will be a period of time for public comment, generally between 30-60 days, when employers, trade groups, and interested parties can file comments with the Labor Department that address the proposed regulations.*

  Generally, agencies accept comments from the public for a period ranging from 30 to 60 days, though that time period can extend to 180 days or more for complex rulemakings.[26] After the conclusion of the public comment period, members of the public can ask the Labor

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21 *See*, *e.g.*, IWC Wage Order No. 4-2001 at §§ 1.(A)(1)(f), 1.(A)(2)(g), 1.(A)(3)(d).

22 *See* Ramirez v. Yosemite Water Co., 20 Cal. 4th 785 (1999).

23 5 U.S.C. § 101 et seq.

24 Office of the Federal Register, *A Guide to the Rulemaking Process* (Jan. 2011), *available at* http://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

25 *See A Guide to the Rulemaking Process, supra* note 24.

26 *See A Guide to the Rulemaking Process, supra* note 24.

Department to accept comments, but the agency is not required to consider late-filed comments.[27]

- *There is a possibility that the public comment period could be re-opened or extended.*

  An agency like the Labor Department is entitled to extend or re-open a comment period if it is not satisfied that it has received sufficient high quality comments, or if the public comments make a good case for adding more time.[28] Likewise, the agency could find that public comments raise new issues not addressed in the initial proposed regulations.[29]

- *The Labor Department could publish supplemental proposed regulations, or proceed directly to final regulations.*

  New or persuasive data or policy arguments filed during the comment period could impact the agency's next steps. The agency may change the proposed regulations, and if the changes are significant, the agency could publish supplemental proposed regulations. If the changes are minor or sufficiently connected to the issues and solutions set forth in the original proposed rules, the agency will proceed with the final regulations.[30]

- *The final regulations are published in the Federal Register.*

  The final regulations are published in full in the *Federal Register*. The final regulations will also include a preamble, with a summary (addressing the societal problems and regulatory goals and explaining why the regulations are needed), an "Effective Date" generally at least 30 days later, and supplementary information including facts and data on which the agency relied, a response to major criticisms, and explanations about why the agency did not choose other alternatives.

- *The final regulations become effective no sooner than 30 days after publication in the Federal Register, and could become effective 60 days later, or longer.*

  New final regulations cannot take effect until they are sent to Congress and the Government Accountability Office for review. If the regulations are "major," meaning they are economically significant and/or raise important policy issues, they cannot be made effective until at least 60 days to allow for such review.[31]

These are general timeframes; the Labor Department's proposed regulations could move faster or slower.

The last time the overtime regulations were revised, ten years ago, the process took approximately 1½ years. The Labor Department issued proposed regulations in March 2003; the notice-and-comment period lasted a year (though the public comment period itself lasted only 90 days within that year); the Department of Labor published its amended regulations in March 2004; and the final regulations became effective on August 23, 2004. The public comment period garnered more than 75,000 comments in response to the proposed regulations.[32] The comments had a meaningful impact on the final regulations, prompting the Labor Department to make "numerous changes from the proposed rule to the final rule[.]"[33]

Steps Employers Should Take While Awaiting Labor Department Action

Ten years ago, employers had five months after the overtime regulations were published in final to take any internal steps to come into compliance. Employers awaiting the Department of Labor's actions this time may consider taking certain steps in preparation.

First, once the proposed regulations are published, employers should review them closely and evaluate how the proposed regulations would impact their business. Employers can align their business with chambers of commerce, organizational associations and trade groups, and legal counsel to submit any comments, concerns, and criticisms to the Labor Department in the public comment phase.

Second, as the regulations are proceeding through the notice and comment period, employers will want to prepare a plan for reviewing those job positions that they classify as exempt to determine if that classification remains accurate under the newly-proposed

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27 *See A Guide to the Rulemaking Process, supra* note 24.

28 *See A Guide to the Rulemaking Process, supra* note 24.

29 *See A Guide to the Rulemaking Process, supra* note 24.

30 *See A Guide to the Rulemaking Process, supra* note 24.

31 *See A Guide to the Rulemaking Process, supra* note 24.

32 Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, Final Rule, 69 Fed. Reg. 22121, 22122 (Apr. 23, 2004) (codified at 29 C.F.R. pt. 541), *available at* http://www.dol.gov/whd/regs/compliance/fairpay/preamble_final.htm.

33 *See* 69 Fed. Reg. 22121, 22122, *supra* note 32.

standards. Such a plan will also ensure they are ready to manage the groups of employees who may require increased salary levels or who may move into non-exempt positions.

Third, once the final regulations issue, employers must be prepared for the consequences. It is most likely that employers will need to increase the salary for certain exempt employees and, after conducting the review of exempt-classified positions (as addressed in the item above), reclassify certain positions to non-exempt status. These changes should be made consistent with a communications strategy. Also, the conversion to non-exempt status triggers a number of decisions that must be made about how to pay the employees based on the various options available, how to schedule their work shifts or hours, how to keep track of their time, and how to bring them under the federal, state and local wage hour laws that apply to non-exempt employees generally.

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WAGE & HOUR ADVISOR: Recent Decision Shows How Employers Can Defend Against Off-the-Clock Work Claims

By Aaron Buckley

Introduction

Among the most common wage and hour claims are those for "off-the-clock" work. In these claims, employees typically assert they worked outside their normal schedule, but were pressured or ordered not to record or report the extra time worked. Off-the-clock claims are easy to bring, because all that is required is for an employee to claim to have performed work that was not recorded. But these claims are hard to defend, because it is difficult for an employer to prove a negative - i.e., that the employee who brought the claim did *not* work off the clock.

The very nature of a claim for off-the-clock work means it probably cannot be resolved by referring to records, so resolving the claim often becomes a question of who is to be believed - the employee or the employer. This makes it difficult for employers to obtain summary judgment in these cases. But a recent California appellate decision shows how employers can establish policies and practices to successfully defend against claims for off-the-clock work.

Jong v. Kaiser Foundation Health Plan, Inc.[1]

Henry Jong and two other former outpatient pharmacy managers ("OPMs") brought a putative class action against Kaiser Foundation Health Plan, Inc., in which they alleged numerous wage and hour violations, including a cause of action for unpaid overtime based on an allegation that they worked off the clock.[2] OPMs had previously been classified as exempt from overtime, but in November 2009 the position was reclassified as non-exempt after Kaiser settled a wage and hour class action alleging that OPMs had been misclassified.[3] In their complaint, Jong and the other two plaintiffs alleged that when Kaiser reclassified the position, the company implemented a policy that prohibited the payment of overtime to OPMs, while requiring them to work overtime in order to complete all their required work.[4]

Kaiser brought motions for summary judgment against all three plaintiffs.[5] The trial court denied Kaiser's motions as to the other two plaintiffs based on evidence of conversations with their supervisors indicating awareness of off-the-clock work, but granted summary judgment against Jong.[6] Jong appealed summary judgment only as to his claim for unpaid overtime.[7]

The appellate court noted the "basic premise" governing claims for off-the-clock work, which is that in order to prevail, a plaintiff must prove the employer had actual or constructive knowledge - meaning the employer either knew or should have known - of the employee's off-the-clock work.[8]

Applying this principle, the court affirmed summary judgment based largely on admissions Jong made during his deposition. Specifically, Jong had admitted the following: (1) Kaiser's policy required OPMs to be clocked in whenever they were working; (2) he was always paid for time he recorded on Kaiser's timekeeping system, including overtime; (3) he was instructed he was eligible to work overtime and be paid for it; (4) he was never denied approval to work overtime when he requested to do so; (5) he was paid for working overtime even when he did not seek pre-approval; (6) no Kaiser manager or supervisor ever told him to work off-the-clock; and (7) he had signed an attestation form agreeing not to work off-the-clock.[9]

Faced with these admissions, Jong cited other evidence that he contended could establish Kaiser's constructive knowledge of his alleged off-the-clock work. He cited evidence from the earlier misclassification case showing that prior to reclassification, many OPMs worked substantially more than 40 hours per week.[10] The court

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1 No. A138725, 2014 Cal. App. LEXIS 436 (May 20, 2014).

2 2014 Cal. App. LEXIS 436, at *1-2.

3 2014 Cal. App. LEXIS 436, at *2.

4 2014 Cal. App. LEXIS 436, at *2-3.

5 2014 Cal. App. LEXIS 436, at *2.

6 2014 Cal. App. LEXIS 436, at *5-6.

7 2014 Cal. App. LEXIS 436, at *6.

8 2014 Cal. App. LEXIS 436, at *8.

9 2014 Cal. App. LEXIS 436, at *13-14.

10 2014 Cal. App. LEXIS 436, at *8.

rejected this argument, reasoning that in light of Jong's admissions regarding Kaiser's post-reclassification policies and practices, evidence that OPMs worked over 40 hours a week *before* reclassification would not support a finding that Kaiser knew or should have known that Jong worked off-the-clock *after* reclassification.[11]

Jong also cited a post-reclassification email from a Kaiser executive acknowledging reports of employees working off-the-clock.[12] But the court rejected the sufficiency of this evidence in light of a later email to pharmacy directors ordering them to ensure that all staff were informed that working off-the-clock was unacceptable, and requiring OPMs to sign attestations acknowledging that off-the-clock work is unacceptable and could subject them to discipline.[13]

Finally, Jong cited data from the pharmacy's alarm system indicating that Jong had disarmed the system before he reported beginning work, and argued that Kaiser could have compared the alarm system data to his time records and concluded he was not recording all his work time.[14] The court rejected this argument, noting that the standard for constructive knowledge of off-the-clock work is "*should* have known," not "*could* have known," and that even if such data were available, there was no reason for Kaiser to conclude that Jong was necessarily performing compensable work between the time he disabled the alarm and the time he reported beginning work.[15]

Conclusion

The *Jong* case shows how thoughtful, well-drafted policies communicated to employees, combined with management training and follow-through, can help employers defeat claims for off-the-clock work. Every employer should have a policy strictly prohibiting off-the-clock work, together with a policy that all work will be compensated, even when an employee fails to obtain pre-approval for working overtime. Employers should also document how policies prohibiting off-the-clock work are communicated to employees, and might wish to consider using an attestation form similar to the form used by Kaiser whereby employees acknowledge that off-the-clock work is prohibited. Finally, supervisors and managers should be trained to spot evidence of off-the-clock work, and to investigate, report and correct any infractions.

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11 2014 Cal. App. LEXIS 436, at *14.

12 2014 Cal. App. LEXIS 436, at *14-15.

13 2014 Cal. App. LEXIS 436, at *15.

14 2014 Cal. App. LEXIS 436, at *15.

15 2014 Cal. App. LEXIS 436, at *16.

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The DFEH Litigates to Illuminate Gender Identity and Expression Protections in Workplace Facilities

By Laura J. Maechtlen & Kristen Verrastro

Introduction

The California Fair Employment and Housing Act[1] ("FEHA") includes gender identity and gender expression as protected characteristics, and now, there is a California case discussing some of the contours of transgender employees' protections in the workplace. On March 13, 2014, in an unpublished case of first impression, *Department of Fair Employment and Housing ("DFEH") v. American Pacific Corporation ("AMPAC")*, the Sacramento Superior Court overruled the employer's (AMPAC) demurrer, finding that the plaintiff (DFEH) sufficiently stated a FEHA employment discrimination claim based on sex, gender, gender identity, and gender expression and the employer's restrictions on restroom and changing facilities.[2]

Before discussing the case, a review of basic terminology is instructive. Each individual has a sex assigned at birth, a gender identity, and a gender expression.

- Sex: Assignment of "male" or "female" at birth, usually by a medical professional, and often based upon an examination of the baby's genitals and/or chromosomes.
- Gender Identity: An individual's internal, intrinsic feeling of being male, female, something other, or in-between.
- Gender Expression: A person's external demonstration of gender, such as dress, behaviors, speech, and body characteristics. A gender non-conforming individual is someone who has, or is perceived to have, a gender expression that does not fit a society's current vision of traditional gender roles.
- Transgender (adj.): An umbrella term that describes individuals whose gender identity or gender expression departs from those generally associated with their sex assigned at birth.
- Sexual Orientation: Distinguishable from gender identity or expression, sexual orientation is an individual's emotional and sexual attraction to another person based on the other person's gender. Examples include lesbian, gay, bisexual, heterosexual, or asexual.

DFEH v. AMPAC

In *DFEH v. AMPAC*, the DFEH sued on behalf of an employment applicant, Nick Lozano, a transgender man. Lozano's sex assigned at birth was female, but because Lozano's gender identity is male, Lozano identifies as a transgender man. Lozano presented as male (in accordance with his gender identity) when he applied for a job with AMPAC, and he received an employment offer. Lozano then was required to undergo a background check, and he disclosed to AMPAC's Human Resources that his birth-assigned sex was female, but he was transitioning to male to match his gender identity. Lozano did not present any legal or medical documents reflecting his correct gender identity, and he had not had sex reassignment surgery.

Because Lozano wanted to use the men's restroom and locker room, AMPAC asked Lozano if he could delay his start date until after he had sex reassignment surgery. Otherwise, AMPAC required Lozano to use the women's restroom and locker room until Lozano had sex reassignment surgery, at which point AMPAC would consider Lozano's transition "complete."

DFEH alleged three FEHA claims: (1) discrimination based on sex, gender, gender identity, and gender expression; (2) failure to prevent discrimination based on the same; and (3) failure to take all reasonable steps to prevent discrimination based on the same. AMPAC demurred, arguing that FEHA does not prohibit employers from requiring restroom and changing room access to be based on birth-assigned sex.

DFEH contended that FEHA is clear and unambiguous on its face, protecting gender identity and expression

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[1] Cal. Gov't Code § 12900 et seq.

[2] Minute Order, *DFEH v. AMPAC*, Case No. 34-2013-00151153-CU-CR-GDS, Sacramento Superior Court (Mar. 13, 2014), *available at* http://www.dfeh.ca.gov/res/docs/Announcements/Lozano%20final%20order.pdf.

in the workplace.[3] DFEH also argued that California nondiscrimination statutes must be construed together to achieve uniformity. Specifically, the DFEH asserted that because the California Education Code explicitly permits students to use school facilities in accordance with their gender identity, FEHA must comport. Additionally, the DFEH cited several other jurisdictions that have found that denying transgender individuals the right to use facilities that correspond with their gender identity violates applicable nondiscrimination laws.

Turning to AMPAC's arguments, the Sacramento Superior Court found that "Defendant's hypothetical assertions of emotional discomfort about sharing facilities with transgender individuals are no different than similar claims of discomfort in the presence of a minority group, which formed the basis for decades of racial segregation."[4]

The court also dismissed AMPAC's speculation that DFEH's position would result in employers being forced to permit male employees making false claims of female gender identity to disrobe or perform bodily functions with female coworkers, stating "[i]ndividuals who claim a different gender from day to day, or who do so simply to be disruptive or to sexually harass other employees do not meet the definition of transgender."[5]

Ultimately, the court held that the DFEH, on behalf of Lozano, pled sufficient facts to state a FEHA claim for employment discrimination where the employer required a transgender employee to use the bathroom and locker room of the employee's birth assigned sex until the employee had sex reassignment surgery, i.e. when the employer deemed his gender transition "complete."

Discussion

So what does this mean for California employers and transgender employees and applicants?

Currently, California law protects gender identity and expression, including "gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."[6] However, California employers may continue to impose "reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity or expression."[7]

Many transgender individuals never have sex reassignment surgery. There are a variety of reasons why a transgender person may not have surgery, including but not limited to, health, benefit coverage, affordability, or desire. Accordingly, employers should be aware that whether an employee has sex reassignment surgery or takes hormones is not the measure of gender identity; indeed, the law would consider an individual to be a transgender person regardless. This order illustrates that making decisions in the workplace on the basis of whether an employee had sex reassignment surgery could be discriminatory. In addition, asking for a diagnosis or for other medical facts from an employee in California potentially could infringe on an employee's right to privacy.

Employers must also keep in mind that FEHA is broad and protects not only gender identity, but also gender expression (regardless of whether an employee self-identifies as a transgender person). Therefore, employers should remember that an employee's gender expression, including presenting in a way that does not comport with traditional gender roles, should not be a basis to treat an employee differently in California. This type of treatment may also be viewed as sex discrimination, and a claim could potentially be pursued under a sex stereotyping theory.

Although the *AMPAC* decision is a California trial court order that arose on demurrer and only applies to the named parties, anecdotally, more cases involving employment protections based on gender identity and expression are arising.

Under federal law, unlike in California, there is no statute addressing employment discrimination based on gender identity and/or gender expression. However, the Equal Employment Opportunity Commission ("EEOC") has found, in *Macy v. Holder,*[8] that discrimination against a transgender individual is a form of sex discrimination under Title VII.[9]

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[3] Indeed, FEHA states: "[i]t is an unlawful employment practice . . . [f]or an employer, because of the . . . sex, gender, gender identity, gender expression . . . of any person, to refuse to hire or employ the person or . . . to discriminate against the person in compensation or in terms, conditions, or privileges of employment." CAL. GOV'T CODE § 12940.

[4] Minute Order, *supra* note 2 at 4.

[5] Minute Order, *supra* note 2 at 4.

[6] CAL. GOV'T CODE § 12926(r)(2).

[7] CAL. GOV'T CODE § 12949.

[8] Macy v. Holder, EEOC Appeal No. 0120120821 (E.E.O.C. Apr. 20, 2012), *available at* http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt.

[9] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

In *Macy v. Holder*, plaintiff Mia Macy, a transgender woman, applied for a position in the Walnut Creek office of the Bureau of Alcohol, Tobacco, Firearms, and Explosives.[10] Macy spoke with the Director of the office, who offered her the position pending a background check. At the time of her offer, Macy was presenting as male. During the course of her background check, Macy disclosed her transition from male to female, along with her gender and new name. Shortly thereafter, Macy received a letter stating that the position was no longer available due to budget cuts. Because of the swift change in the situation, Macy spoke to an Equal Employment Opportunity ("EEO") officer about her concerns. The EEO officer informed Macy that the position was not cut and, in fact, was filled by another person.

Macy filed her EEOC complaint as discrimination on the basis of her "sex, gender identity (transgender woman) and on the basis of sex stereotyping."[11] The EEOC said in a letter to Macy that, although they would process her claims of sex (female) stereotyping under Title VII, her gender identity stereotyping claims would not be processed under the Title VII adjudication procedure, but an alternative system. On appeal within the EEOC, the Commission found that discrimination against a transgender person is a form of sex discrimination under Title VII. The EEOC's rationale in *Macy* gives federal judges a basis to hold that transgender people are protected by prohibitions on sex and sex stereotyping under Title VII.

Conclusion

Given the DFEH's involvement in the *AMPAC* case and their recently expanded powers to file cases directly in court, the DFEH can effectively function similarly to the EEOC in pursuing litigation. Therefore, California employers are wise to educate themselves, and their work force, on gender identity and expression issues in the workplace.

Some basic considerations include: modifying and/or updating current policies regarding employee dress codes, facilities access, and inclusive healthcare benefits; understanding appropriate name and pronoun usage; considering privacy concerns for employees; providing training on gender identity and gender expression to the employer's work force; and implementing protocol for immediate response to/investigation of gender identity and gender expression related complaints. Transgender employees are like any other employee - intelligent, capable, well-trained to perform their job duties, and entitled to respect in the workplace. Colleagues should welcome and build relationships with transgender employees the same as they would any new colleague. And just like all non-transgender employees, transgender employees' personal lives are just that - personal. Mindfulness in speaking respectfully and avoiding invasive topics like sexuality or health care is necessary for all employees. When crafting policies and training their workforce, employers should consider what is appropriate to discuss with employees generally, and treat transgender employees in the same way.

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10 *Macy, supra* note 8.

11 *Macy, supra* note 8.

Verdicts & Settlements

By Deborah J. Tibbetts

Below are summaries of recent labor and employment cases in California state and federal courts with published verdicts or settlements.

Atkins et al. v. City of Los Angeles et al., Case No. BC449616, Los Angeles Superior Court (May 5, 2014) (Hon. Frederick C. Shaller).[1]

Summary: A jury awarded injured police recruits $12,304,368 in total damages, finding that the employer police department engaged in disability discrimination, failed to engage in the interactive process, and failed to accommodate the injured recruits' disabilities when it failed to offer them alternate temporary employment until they recovered and, instead, terminated them or forced them to resign if they could not immediately begin working as police officers.

Plaintiff's Case: In November 2009, Los Angeles Police Department ("LAPD") recruits who were unable to perform the duties of a police officer due to injuries suffered during police academy training were told that they needed to immediately start work, quit, or be fired. Although the injured recruits had been in the LAPD's "recycle" program that temporarily assigned injured recruits to light duty work, the LAPD stated that the recruits were in violation of the "two-year rule," which requires California peace officers to complete their training and probation within two years. Several of the injured recruits, including Ryan Atkins, Douglas Boss, Justin Desmond, Anthony Lee, and Eriberto Orea[2] could not return to work at that time as they were not medically cleared to do so. Accordingly, these recruits were forced to either quit or be terminated.

In order to be eligible for unemployment benefits, four of these recruits opted to be terminated, and one resigned. All five sued the City of Los Angeles and the Police Chief,[3] alleging disability discrimination, failure to accommodate, failure to engage in the interactive process, and breach of contract.[4]

During an eight day trial, the plaintiffs argued that the City wrongfully denied them the opportunity to temporarily work in available city jobs while they were recovering from police academy training injuries. They also asserted that the City abruptly terminated the ten-year-old "recycle" program because it no longer wanted to pay for injured recruits. Plaintiffs further contended that the City's stated reason for insisting that the injured recruits either immediately return to work, resign, or be terminated - i.e., that the recruits were in violation of the two-year rule - was pretext because the 1) the two-year rule does not begin to "tick" until an officer is sworn in at the end of academy training, and the injured recruits had not yet been sworn in; 2) the LAPD knew the two-year rule did not apply because it had specifically changed when officers were sworn in to avoid compliance issues with the rule; and 3) the change in swear-in timing was part of a negotiated agreement between the union and the LAPD, whereby the parties agreed that the swearing-in of recruits would change from the beginning of academy training to the end and, in exchange, if recruits were injured, the LAPD agreed to find them temporary jobs elsewhere in the City. Accordingly, the plaintiffs argued, the LAPD had specifically changed the swear-in date to avoid application of the two-year rule to academy recruits and, therefore, its claim that the rule applied to the injured recruits' was false and mere pretext for unlawful disability discrimination.

Plaintiffs sought recovery of past and future lost earnings as a result of having been terminated or forced to resign, as well as recovery of past and future non-economic damages, which included mental suffering and humiliation as a result of their treatment.

Defendant's Case: Defendant argued that as recruits, plaintiffs were only "conditional employees" who were not yet able to perform the essential functions of their jobs and, accordingly, there was no obligation to find them temporary positions elsewhere. Defendant also asserted that because the recruits' injuries were not permanent and stationary, Defendant had no duty to accommodate them.

Plaintiffs' countered that there is no such "permanent-and-stationary" injury requirement under the Fair

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1 2014 Jury Verdicts LEXIS 4037.

2 Two additional plaintiffs originally filed suit, however, they were dismissed from the case before trial.

3 The police chief was dismissed from the case prior to trial.

4 Plaintiffs agreed not to pursue their breach of contract claims at trial.

Employment and Housing Act[5] (''FEHA''), the City Charter (which allows for transfers to civilian positions within the City), or the agreement with the union that the LAPD would find injured recruits temporary, alternate employment.

Award: After deliberating for three days, the jury found for the plaintiffs on all causes of action, which included their claims of disability discrimination, failure to accommodate, and failure to engage in the interactive process. The jury awarded plaintiffs a total of $12,304,368 in damages. Of the total damages amount, $4,550,000 was awarded for past and future non-economic losses, including mental suffering.

Jordan v. City of Long Beach, et al., Case No. BC450055, Los Angeles Superior Court (Apr. 25, 2014) (Hon. William A. MacLaughlin).[6]

Summary: A jury awarded a city employee $1,168,165 in total damages, finding that her supervisor engaged in disability discrimination, failed to accommodate her disability, failed to engage in the interactive process, and retaliated against her for filing a discrimination complaint by terminating her employment.

Plaintiff's Case: Sharon Jordan, a secretary for the City of Long Beach for 16 years, sued the City, the Port of Long Beach, and her supervisor, Samara Ashley, alleging that Ashley had discriminated against Jordan on the basis of disability, failed to accommodate her disability, and retaliated against her for engaging in protected activity. Jordan asserted that the City and the Port were vicariously responsible for Ashley's conduct.

During a three week trial, Jordan asserted that for 14 years, she had consistently received good performance appraisals until her husband suffered a stroke in 2008. Shortly thereafter, Jordon claimed, she rebuffed Ashley's attempt to be kept informed regarding the medical condition of Jordon's seriously ill husband. Jordon argued that as a result of her refusal to disclose her husband's medical status to Ashley, Ashley retaliated against her by beginning to criticize her work performance. Jordan claimed that Ashley's retaliatory conduct caused Jordan to suffer stress, anxiety, and depression, which forced her to take medical leave under the Family Medical Leave Act[7] (''FMLA''), and to request a transfer.

When her transfer request was denied, Jordan filed a discrimination complaint against Ashley for retaliation and failure to accommodate. Jordan argued that after she filed her complaint, Ashley further retaliated against her by continuing to criticize her job performance and directing her to drop her complaint. Jordan claimed that when she refused, she was terminated.

Jordan contended that Ashley's actions caused her to suffer stress, anxiety, and depression, which required that she take medical leave while she was still employed with the City. As a result of her termination, Jordan claimed she lost her medical insurance and was forced to relocate her comatose husband, who subsequently died in January 2011, and lost her home, which forced her to move to Georgia.

Defendant's Case: Defendants argued that Jordan was unprofessional and insubordinate, and that her termination was based on this legitimate, nondiscriminatory reason.

Award: After deliberating for two days, the jury found for plaintiff on all claims, awarding plaintiff $1,168,165 in total damages: $693,165 in economic damages and $475,000 in non-economic damages.

Ducey-Hardos v. Los Angeles World Airports, Case No. 8:12-cv-01720-BRO-MLG, United States District Court, Central District of California (Apr. 16, 2014) (Hon. Beverly Reid O'Connell).[8]

Summary: A jury returned a defense verdict, finding that an independent consultant's diagnosis of cancer was not the sole motivating cause of an airport oversight and operations department's adverse employment actions with respect to the approval, terms and conditions, and nonrenewal of the consultant's contracts.

Plaintiff's Case: On July 9, 2009, plaintiff Mary ''Peggy'' Ducey-Hardos entered into a one-year contract with defendant Los Angeles World Airports (''LAWA''), the airport oversight and operations department for the city of Los Angeles, to develop an aviation regionalization strategy to market Ontario International Airport, instead of Los Angeles International Airport, for Disneyland visitors. In February 2010, Ducey-Hardos informed LAWA that she had been diagnosed with breast cancer. Ducey-Hardos claimed that when she originally met with LAWA in April 2010 to discuss renewal of her contract, it was agreed that she would be given a two-year contract for $355,000. However, plaintiff alleged that LAWA delayed approval of her second contract, causing her

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5 Cal. Gov't Code § 12900 et seq.

6 2014 Jury Verdicts LEXIS 4036.

7 29 U.S.C. § 2601 et seq.

8 2014 Jury Verdicts LEXIS 3572.

to work without a contract or pay for six months. As a result, plaintiff claimed, she had to delay her cancer treatment and almost lost her medical insurance.

Ducey-Hardos complained about the delay in her contract approval and, thereafter, the Board of Airport Commissioners approved her second contract and paid her for the outstanding six months of work. However, Ducey-Hardos alleged, the terms of her contract were reduced to one year and $149,000, and the scope of her work was also limited. LAWA did not offer Ducey-Hardos a third consulting contract.

Ducey-Hardos sued LAWA, alleging disability discrimination and retaliation under the federal Rehabilitation Act.[9]

During a four day trial, Ducey-Hardos argued that LAWA actions in delaying approval of her contract were motivated by discriminatory animus based on her cancer diagnosis. She also asserted that after she complained about the delay, LAWA retaliated against her by limiting the terms of her second contract and failing to offer her a third consulting contract. Thus, Ducey-Hardos argued that LAWA subjected her to adverse employment actions based on disability discrimination and retaliation.

Ducey-Hardos sought recovery of emotional distress damages resulting from LAWA's discrimination and retaliation, as well as recovery of past and future lost wages and benefits, plus interest.

Defendant's Case: LAWA denied that any of its decisions regarding Ducey-Hardos' contract were motivated by her breast cancer diagnosis. LAWA admitted that there was an administrative delay in obtaining final approval of Ducey-Hardos' second consulting contract, but argued that its executive management tried to get the contract approved as quickly as possible, and that Ducey-Hardos was ultimately paid in full under both contracts. LAWA further asserted that during the term of her second contract, Ducey-Hardos failed to make adequate progress on its strategic regionalization plan and, therefore, it determined she was not an effective liaison on regionalization issues. Accordingly, LAWA argued, it had a legitimate, nonretaliatory reason for not offering her a third contract. LAWA also claimed that it ultimately decided not to obtain further regionalization consulting services, and did not hire another consultant to replace Ducey-Hardos.

LAWA also argued that Ducey-Hardos did not suffer any economic or other damages as a result of its actions.

Verdict: The jury unanimously returned a defense verdict, finding that Ducey-Hardos' breast cancer was not the sole motivating factor for any adverse employment actions by LAWA.

Equal Employment Opportunity Commission et al. (Dahmubed) v. Riviera Consulting and Management LLC, et al., Case No. 13-cv-03079 LHK, United States District Court, Northern District of California (Apr. 15, 2014) (Hon. Lucy H. Koh).[10]

Summary: The EEOC entered into a $100,000 settlement of a claim for disability discrimination with several consulting companies, on behalf of a bookkeeper terminated for a degenerative eye condition, whereby the companies also agreed to provide employee training and work with a consultant to modify their anti-discrimination policies, as well as to report their compliance to the EEOC for a period of three years.

Plaintiff's Case: Farhang Dahmubed suffered from retinitis pigmentosa, a degenerative eye condition that causes severe vision impairment and often blindness. In September 2007, he was hired as a senior bookkeeper by Riviera Consulting & Management Consulting LLC. Dahmubed alleges that within one month of being hired, Riviera terminated his employment because of his vision impairment.

Dahmubed filed a complaint with the United States Equal Employment Opportunity Commission ("EEOC"), who engaged in unsuccessful conciliation efforts with Riviera. Thereafter, the EEOC sued Riviera and its associated companies, Ali Baba Corporation, Oasis Care Inc., and Sabankaya Select LLC, on behalf of Dahmubed, for disability discrimination in violation of the Americans with Disabilities Act[11] ("ADA"). Specifically, the EEOC asserted that defendants terminated Dahmubed because of his disability without engaging in any interactive process to try to find him a reasonable accommodation.

The EEOC sought to recover compensatory damages, including back pay and other monetary losses, as well punitive damages on behalf of Dahmubed. It also sought injunctive relief to prevent future discrimination.

Defendant's Case: Defendants argued that Dahmubed was terminated because he was unable to perform the essential functions of a bookkeeper, and was unable to keep-up with his duties.

Settlement: The parties settled the case by means of a three-year consent decree, whereby the defendants

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9 29 U.S.C. § 701 et seq.

10 2014 Jury Verdicts LEXIS 3183.

11 42 U.S.C. § 12101 et seq.

agreed to pay Dahmubed $100,000. In addition, defendants agreed to work with an independent equal employment opportunity consultant to modify their policies and procedures regarding disability discrimination and the evaluation of requests for reasonable accommodations. The settlement also required Defendants to provide anti-discrimination training to all employees and periodically report their compliance to the EEOC for the three-year term of the consent decree.

Turner v. Pacific Aerospace Resources & Technologies, et al., Case No. CIVVS1106246, San Bernardino Superior Court (Apr. 2, 2014) (Hon. David S. Cohn).[12]

Summary: A jury rendered a defense verdict on an avionics specialist's claim that he was racially harassed by comments from his team leader and retaliated against for complaining about such harassment when he was not selected for additional work under the labor contract.

Plaintiff's Case: Plaintiff Eric Turner was an avionics specialist working under a labor contract with Pacific Aerospace Resources & Technologies. Turner was part of a team that worked on large commercial aircrafts when, in January 2011, Mike Helm, the team leader who was also working under a labor contract, allegedly referred to Turner as a "monkey ass" when directing him to get back to work. A co-worker of Turner's filed a complaint about the incident with Pacific on Turner's behalf. Pacific conducted an investigation of the incident, which resulted in Helm's dismissal. Turner's work assignment ended shortly thereafter in March 2011. In April 2011, Turner responded to Pacific's "call for work," but Pacific did not permit Turner to return.

Turner sued Pacific and Helm, alleging that Helm's conduct constituted workplace racial harassment. He also alleged that Pacific retaliated against him for the complaint regarding Helm's actions.

During a seven day trial, Turner asserted that Helm harassed him on several occasions, which resulted in the complaint that was filed on his behalf. He further argued that Pacific retaliated against him for the complaint and ensuing investigation by not bringing him back in to work in April 2011.

Turner sought recovery of $300,000 in total compensatory damages: $150,000 for racial harassment and $150,000 for retaliation.

Defendant's Case: During a seven day trial, Helm, appearing in *pro per*, argued that he had just been joking around when making the "monkey ass" comment, but admitted that it may have been perceived as harsh or dictatorial. Helm denied that the remark was racially based, and claimed that he had apologized to Turner who, at the time, assured Helm that he was not offended.

Pacific also claimed that no harassment occurred, but that Helm's comment violated Pacific's zero tolerance policy for inappropriate conduct in the workplace and, therefore, Pacific promptly dismissed Helm for the reported comments. In support of this defense, Defendants submitted text messages between Helm and Turner from June 2011 and January 2012. In the June 2011 series of texts, Turner wished Helm a happy Father's Day, referred to the two men as friends, asked about Helm's family, and mentioned forgiveness. In the second series of texts, Turner wished Helm a happy New Year and offered him a job opportunity at Turner's then-current place of employment.

Pacific also argued that it did not retaliate against Turner by refusing his request to return to work in response to Pacific's April 2011 call for work, but that it did not require any contract avionics specialists at that time. In addition, Pacific claimed that far from retaliating against Turner because of the complaint, it complied with the law by investigating the complaint and dismissing the offending party (Helm).

Defendants also argued that Turner did not suffer any damages.

Verdict: After deliberating for only an hour, the jury rendered a defense verdict on both claims: 12-0 on racial harassment and 11-1 on retaliation.

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[12] 2014 Jury Verdicts LEXIS 3181.

CASE NOTES

AGE DISCRIMINATION

Rosenfeld v. Abraham Joshua Heschel Day School, Inc., No. B239581, 2014 Cal. App. LEXIS 465 (May 28, 2014).

On May 28, 2014, a California appellate court held that a teacher was properly precluded from pursuing a disparate impact theory of age discrimination, in addition to a disparate treatment theory at trial, because the pleadings solely alleged a theory of disparate treatment based upon intentional discrimination by a school; a brief filed shortly after the commencement of the trial did not timely advise the school of the disparate impact theory.

Ruth Rosenfeld ("Rosenfeld") was a tenured teacher with Abraham Joshua Heschel Day School, Inc. ("Heschel"). Decline in the enrollment of students at Heschel led to a decrease in the need for teachers and a reduction in the number of available teaching hours. Consequently, Rosenfeld's teaching hours were reduced. In 2007, Rosenfeld, through counsel, advised Heschel that she was forced to resign her employment because her work environment had become intolerable. The letter asserted that Rosenfeld's age of 60 was a motivating reason for her demotion and constructive discharge. Following Rosenfeld's resignation, Heschel replaced her with a new teacher, slightly younger than Rosenfeld.

Rosenfeld initially filed a charge of age discrimination with the California Department of Fair Employment and Housing alleging Heschel systematically reduced her hours in an effort to force her out because of her age. Thereafter, Rosenfeld commenced an action against Heschel in a superior court asserting causes of action, inter alia, for discrimination on the basis of age under California Fair Employment and Housing Act ("FEHA") [Gov't Code § 12940(a)].

At the commencement of trial, Rosenfeld filed a trial brief indicating that she would be proceeding on a disparate impact theory of age discrimination, in addition to a disparate treatment theory. Heschel objected. After hearing arguments on the matter, the trial court precluded Rosenfeld from pursuing a disparate impact theory at trial, finding that the disparate impact theory was not adequately disclosed to the defense for purposes of preparing a defense in the litigation. The jury returned a defense verdict finding that Rosenfeld's age was not a motivating reason for the reduction of her working hours. Rosenfeld unsuccessfully moved for a new trial.

Thereafter, Rosenfeld timely appealed in a California appellate court. The appellate court concluded that the trial court properly precluded Rosenfeld from pursuing a disparate impact theory at trial.

The appellate court held that disparate treatment and disparate impact claims are different theories of liability with different elements and must be specifically alleged. It found that Rosenfeld's pleadings solely alleged a theory of disparate treatment, based upon intentional discrimination. Rosenfeld merely pled disparate treatment, that is, Heschel intentionally discriminated against her based on her age. She did not plead disparate impact, that is, Heschel had a facially neutral employer practice or policy which bore no manifest relationship to job requirements but which, in fact, had a disproportionate adverse effect on older employees. Also, Rosenfeld failed to give timely notice to Heschel that she intended to pursue a disparate impact theory at trial. Therefore, the appellate court held that the trial court properly barred Rosenfeld from pursuing a disparate impact claim at trial.

The appellate court further noted that there was no merit to Rosenfeld's contention that the trial court prejudicially erred in admitting evidence related to her employment status. Rosenfeld's age discrimination claim was predicated on the theory that because she was a tenured teacher, Heschel could not terminate her without cause, and because Heschel lacked the ability to terminate her, it devised a plan to reduce her hours with the aim of forcing her to resign. Heschel rebutted this theory by presenting evidence that tenured status at the school was not a guarantee of permanent employment. The appellate court found no violation of the parol evidence rule because extrinsic evidence was admissible to explain or interpret ambiguous language. Therefore, it held that the trial court properly admitted defense evidence to explain the term "tenure" in order to clarify the nature of Heschel's contractual obligations to Rosenfeld. In any event, the appellate court noted that whether Rosenfeld's status was tenured or at-will was irrelevant

to her discrimination claim under § 12940(a). Rosenfeld did not sue Heschel for breach of employment contract but for age discrimination in violation of FEHA. Rosenfeld's status as a "tenured" teacher had no bearing on her right to be free of age discrimination.

The appellate court also concluded that the trial court properly allowed Heschel to present evidence that Rosenfeld failed to pursue Heschel's internal grievance procedure before filing suit because the evidence was relevant to mitigation of damages under the avoidable consequences doctrine. The appellate court further observed that the jury did not reach the issue of damages; consequently, any error with respect to the admission of evidence relating to Rosenfeld's failure to mitigate her damages was harmless.

The judgment of the trial court was affirmed.

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

ARBITRATION

Tiri v. Lucky Chances, Inc., No. A136675, 2014 Cal. App. LEXIS 423 (May 15, 2014).

On May 15, 2014, a California appellate court held that clear delegation clauses in employment arbitration agreements are substantively unconscionable only if they impose unfair or one-sided burdens that are different from the clauses' inherent features and consequences.

Lourdes Tiri ("Tiri") was hired as a cook by Lucky Chances, Inc. ("Lucky"). After more than three years, she signed an agreement with Lucky, requiring disputes between them to be resolved by arbitration. In one of the provisions, the parties agreed to delegate questions about the enforceability of the agreement to the arbitrator, instead of a court. Five years later, Tiri was fired, allegedly while on medical leave after undergoing heart surgery.

Subsequently, Tiri filed a complaint with a superior court alleging wrongful discharge. Lucky petitioned to compel arbitration arguing that the enforceability of the arbitration agreement was a question for the arbitrator, not a court, under the express terms of the delegation clause of the arbitration agreement. The trial court denied Lucky's petition to compel arbitration on the basis that the arbitration agreement was both substantively and procedurally unconscionable and therefore unenforceable.

Lucky timely appealed in a California appellate court. The question that arose before the appellate court was whether the trial court properly denied Lucky's petition to compel arbitration in light of the delegation clause that gave the arbitrator the authority to decide whether the arbitration agreement was enforceable. The answer turned on whether the delegation clause was valid under state-law unconscionability principles.

The appellate court concluded that although the trial court's implied finding that the delegation clause was procedurally unconscionable was correct, its implied finding that the delegation clause was substantively unconscionable was incorrect. It found that the delegation clause was clear and it was valid under state-law unconscionability principles, and therefore, the appellate court left the question whether the arbitration agreement as a whole, or any of its other severable provisions was unconscionable, to the arbitrator.

The parties disputed the applicability of the Federal Arbitration Act ("FAA"), which governs only arbitration agreements that are part of written contracts affecting interstate commerce. Because section 1281 of the California Arbitration Act ("CAA") and section 2 of the FAA are interpreted the same under controlling precedent, the appellate court observed that it made no difference to the outcome of the instant case if one but not the other applied. Therefore, the court concluded that the FAA's applicability was immaterial because the decision in the instant case would be the same under either the FAA or the CAA. As a result, the court declined to resolve the parties' dispute whether the agreement sufficiently affected interstate commerce to support the application of the FAA.

The appellate court noted that the first prerequisite for a delegation clause to be effective is that the language of the clause must be clear and unmistakable. The appellate court found that Lucky had demonstrated that the delegation clause was clear and unmistakable. The language of the delegation clause indicated an intent to delegate all issues to an arbitrator, including issues of enforceability.

The second requirement for a delegation clause to be effective is that the delegation must not be revocable on state contract defenses such as fraud, duress, or unconscionability. The appellate court found that the delegation clause was part of a contract of adhesion because the delegation clause was drafted by Lucky, it was presented to Tiri along with the rest of the agreement on a take-it-or-leave-it basis, and Tiri was never told that the agreement was actually negotiable. For the same reasons that the appellate court concluded the delegation clause was part of a contract of adhesion, it agreed with the trial court's implied finding that the delegation clause was procedurally unconscionable. The arcane nature of the clause, Tiri's lack of sophistication, and the failure of Lucky to provide adequate

time to Tiri to review the agreement, all added to the oppression and surprise of the delegation clause in the instant case.

Nonetheless, the appellate court concluded that the delegation clause was valid because it was not substantively unconscionable. It found that the delegation clause was not overly harsh, and did not sanction one-sided results; it did not lack mutuality because Tiri and Lucky were bound by it equally. The agreement required arbitration for any and all differences and/or legal disputes whether by or against the employee or employer. This mutuality was nearly unqualified.

The appellate court held that clear delegation clauses in employment arbitration agreements are substantively unconscionable only if they impose unfair or one-sided burdens that are different from the clauses' inherent features and consequences. In the instant case, the court found that Tiri failed to demonstrate that the delegation clause imposed any such burdens.

The appellate court concluded that the trial court lacked the authority to rule on the enforceability of the agreement because the parties' delegation of this authority to the arbitrator was clear and was not revocable under state unconscionability principles. Therefore, the trial court's order denying Lucky's petition to compel arbitration was reversed.

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

CLASS CERTIFICATION

Hall v. Rite Aid Corp., No. D062909, 2014 Cal. App. LEXIS 426 (May 2, 2014).

On May 2, 2014, a California appellate court held that the trial court's decertification order was erroneous because it based its ruling on the merits of the employee's theory of recovery rather than on whether the theory itself would be amenable to common evidentiary proof.

Kristin Hall ("Hall") filed an action, on behalf of herself and similarly situated persons in a superior court to recover penalties pursuant to Lab. Code § 2699(f) based on an allegation that her employer, Rite Aid Corporation ("Rite Aid"), did not provide seats to employees while the employees were operating cash registers at Rite Aid checkout counters in violation of Lab. Code § 1198 and Cal. Code Regs. tit. 8, § 11070(14)(A).

Hall moved for class certification. Rite Aid opposed the motion arguing that individual issues would predominate. The trial court initially granted Hall's motion for class certification. Rite Aid subsequently moved for class decertification. After hearing the parties, the trial court, however, granted Rite Aid's motion to decertify the class. The trial court concluded that individualized issues predominate as to whether the "nature of the work" of a cashier/clerk reasonably permitted the use of a suitable seat, and explained that it agreed with the analysis that obligations under § 11070(14) could only be assessed by examining "the job as a whole." The trial court also denied Hall's cross-motion to permit the action to proceed as a representative non-class action under Lab. Code § 2698 et seq.

Hall timely appealed before an appellate court in California. The appellate court concluded that under the analytic framework promulgated by *Brinker Restaurant Corp. v. Superior Court*,[1] the trial court erred when it decertified the class action because its decertification order was based on an assessment of the merits of Hall's theory of recovery, rather than on whether the theory was amenable to class treatment.

The appellate court noted that the starting point for purposes of class certification commenced with Hall's theory of liability because for purposes of certification the proper inquiry is whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment. In the instant case, the appellate court found that Hall alleged that Rite Aid had a uniform policy and it did not allow its cashier/clerks to sit, and therefore, provided no suitable seats to them while they performed checkout functions at the register. Hall's theory of liability was that this uniform policy was unlawful because § 11070(14) mandated the provision of suitable seats when the nature of the work reasonably permitted the use of seats, and the nature of the work involved in performing checkout functions in the instant case reasonably permitted the use of seats. The appellate court observed that the trial court's decertification order was based on its conclusion that Hall's theory of liability was unmeritorious. The appellate court held that the trial court's decertification order was based on improper criteria and/or erroneous legal assumptions because it based its ruling on the merits of Hall's theory, rather than on whether the theory itself would be amenable to common evidentiary proof.

[1] 53 Cal.4th 1004, 139 Cal. Rptr. 3d 315, 273 P.3d 513 (2012).

The appellate court read *Brinker* to hold that at the class certification stage, as long as the plaintiff's posited theory of liability is amenable to resolution on a class-wide basis, the court should certify the action for class treatment even if the plaintiff's theory is ultimately incorrect at its substantive level, because such an approach relieves the defendant of the jeopardy of serial class actions, and once the defendant demonstrates the posited theory is substantively flawed, the defendant obtains the preclusive benefits of such victories against an entire class and not just a named plaintiff. For these reasons, the appellate court explained that *Brinker* has concluded that it is far better from a fairness perspective to determine class certification independent of threshold questions disposing of the merits, because defendants who prevail on those merits, equally with those who lose on the merits have the benefits of their substantive legal victory applied to the class as a whole.

The appellate court held that to the extent the propriety of certification does not depend on determining threshold legal matters, such determinations should be deferred. In the instant case, the court found that the propriety of certification did not depend on whether Hall's interpretation of § 11070(14) was correct because, assuming for purposes of the certification motion Hall's claims had merit, the certification question must focus on whether common questions relevant to proving Hall's theory would predominate over individual issues. Certainly whether Rite Aid had a policy requiring cashier/clerks to stand while working at the register was subject to common proof. Moreover, the other factual question central to Hall's theory of recovery—whether the nature of the work involved in performing checkout functions would reasonably permit the use of seats—appeared equally amenable to common proof.

Thus, the appellate court held that regardless of whether Hall's or Rite Aid's interpretation of mandate under § 11070(14) was correct, class certification for Hall's claim was proper and resolution of disputes over the merits of Hall's theory of recovery had to be deferred until after the class certification had been decided.

The appellate court, thus, reversed the trial court's order granting Rite Aid's motion for class decertification, and remanded the matter for further proceedings.

References. See, e.g., Wilcox, *California Employment Law*, § 9.11, *Initiating the Certification Decision* (Matthew Bender).

EMPLOYER'S LIABILITY FOR INJURIES CAUSED TO THIRD PARTIES

Kesner v. Superior Court, Nos. A136378, A136416, 2014 Cal. App. LEXIS 424 (May 15, 2014).

On May 15, 2014, a California appellate court held that, in a case involving a claim of secondary, para-occupational, or take-home exposure to a harmful substance, the employer's duty of care does not extend to every person who comes into contact with its employee, but it extends at least to members of the employee's household who are likely to be affected by toxic materials brought home on the employee's clothing.

Johnny Blaine Kesner, Jr. ("Kesner") was diagnosed with perotineal mesothelioma. He brought an action against Pneumo Abex, LLC ("Abex") and other defendants in a superior court to recover damages for his injuries alleging that mesothelioma he contracted was allegedly due to his exposure to friable asbestos that his uncle, an employee of Abex brought home from work on his clothing. His complaint alleged negligence and other causes of action arising from his contact with asbestos manufactured or supplied to him as a worker or end user.

At the beginning of trial, Abex moved for a non-suit arguing that it had no legal duty to prevent asbestos exposure to Kesner. The superior court granted Abex's motion for non-suit and entered a final judgment in its favor, holding that Abex owed Kesner no duty for his exposure to asbestos resulting from Kesner's contact with its employee, none of which exposures took place at or inside Abex's plant. Kesner appealed.

The appellate court held that the duty of care undoubtedly does not extend to every person who comes into contact with an employer's workers, but the duty runs at least to members of an employee's household who are likely to be affected by toxic materials brought home on the worker's clothing.

In order to examine whether to impose a duty of care in a secondary exposure case, the appellate court considered the factors specified in *Rowland v. Christian*.[2] The appellate court observed that the norm in considering negligence claims is the general duty to use reasonable care to avoid injuring others. When considering the scope of an employer's obligations under the concept of respondeat superior for harm to others caused by an employee, the focus is on

[2] 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968).

whether the employee's act was an outgrowth of his employment, inherent in the working environment, typical of or broadly incidental to the employer's business, or, in a general way, foreseeable from his duties. The court noted that the same questions are pertinent to the scope of an employer's duty of care to others injured by interaction with the employer's workers.

The appellate court noted that, as a general matter, harm to others resulting from secondary exposure to asbestos dust is not unpredictable. The harm to third parties that could arise from lack of precautions to control friable asbestos that may accumulate on employees' work clothing is generally foreseeable. There often is no doubt that a plaintiff, like Kesner, suffering from malignant mesothelioma, has suffered injury due to exposure to friable asbestos. Whether exposure from any particular source was a substantial factor in causing such injury may often be questionable, but that uncertainty existed with respect to many exposure claims, whether direct or secondary.

The appellate court further held that a rule of law that holds an employer responsible to avoid injury to non employees who may foreseeably be harmed by exposure to toxins disseminated in its manufacturing process can be expected to prevent harm to others in the future. In weighing the competing considerations, the appellate court found that the balance fell far short of terminating liability at the door of the employer's premises. It observed that there is a high degree of foreseeability of harm from secondary, or take-home, exposure to those whose contact with an employer's workers is not merely incidental, such as members of their household or long-term occupants of the residence. The weight of this factor is strengthened by consideration of the moral blame attributable to disregarding a known risk to others and the important public policy of preventing future harm. On the other hand, extending the employer's duty of care to such persons does not threaten employers with potential liability for an intangible injury that can be claimed by an unlimited number of persons. Nor is there reason to believe that manufacturers cannot obtain insurance coverage to protect against their liability, while individuals cannot purchase insurance covering loss of income or their own pain and suffering resulting from a toxic-induced illness such as mesothelioma.

Therefore, the appellate court found that the *Rowland* factors supported extension of the employer's duty beyond its employees. The court noted that while Kesner was not a member of his uncle's household in the normal sense, he was a frequent visitor, spending several nights a week in the home, and therefore it concluded that the likelihood of causing harm to Kesner with such recurring and non-incidental contact with Abex's employee, i.e. Kesner's uncle, was sufficient to bring Kesner within the scope of those to whom Abex owed the duty to take reasonable measures to avoid causing harm.

While holding that a duty existed in the instant case, the appellate court emphasized that the existence of the duty is not the same as a finding of negligence. The judgment of the trial court was, thus, reversed.

References. See, e.g., Wilcox, *California Employment Law*, § 21.02[2][a], *Occupational Carcinogens Control Act of 1976* (Matthew Bender).

OVERTIME COMPENSATION

Jong v. Kaiser Foundation Health Plan, Inc., No. A138725, 2014 Cal. App. LEXIS 436 (May 20, 2014).

On May 20, 2014, a California appellate court concluded that none of the evidence, considered independently or collectively, submitted by an employee was sufficient to support a finding that the employer had actual or constructive knowledge of the employee's unreported overtime hours.

Henry Jong ("Jong") was employed by Kaiser Foundation Health Plan, Inc. and Kaiser Foundation Hospitals (collectively "Kaiser") as Outpatient Pharmacy Manager ("OPM") at different Kaiser pharmacies in California. Prior to November 2009, Jong and all OPMs were classified as salaried employees, exempt from various wage and hour requirements. However, as a consequence of the settlement of a class action, OPMs were reclassified as non-exempt hourly employees entitled to overtime premium compensation.

Subsequently, Jong along with two other OPMs complained in a superior court alleging numerous wage and hour violations, including, a cause of action for the alleged failure to pay overtime compensation for hours worked off the clock. Kaiser moved for summary judgment on the ground that Jong lacked evidence that Kaiser failed to pay overtime wages for hours he worked that Kaiser knew or should have known he worked.

The trial court granted Kaiser's motion as to Jong but denied the motion as to the other two OPMs, ruling that much of Jong's evidence was inadmissible and that his evidence failed to show that he – as distinguished from some OPMs in general – was working off the clock.

Jong timely appealed before a California appellate court and challenged the trial court's ruling with

respect to his claim for unpaid overtime compensation. The appellate court concluded that none of Jong's evidence, considered independently or collectively, was sufficient to support a finding that Kaiser was aware of his unreported overtime hours.

The appellate court noted that to prevail on his off-the-clock claim, Jong must prove that Kaiser had actual or constructive knowledge of his alleged off-the-clock work. It found that the evidence on which Jong principally relied to establish Kaiser's actual or constructive knowledge that he was working more than the hours reported was the deposition testimony that other OPMs gave in the previous class litigation. Jong argued that the deposition testimony should have been considered by the trial court not for the truth of the testimony, but to show that Kaiser was put on notice of the claim that more than 40 hours a week is required for the OPMs to fulfill their job responsibilities.

The appellate court observed that, assuming that the deposition testimony was offered for both a permissible and an impermissible purpose, the latter does not preclude consideration for the permissible purpose. In the instant case, it was not necessary to rely on the depositions for evidence that Jong worked more than 40 hours per week; Jong's testimony was sufficient to create a triable issue of that fact. But to the extent the deposition testimony was offered to prove notice, the appellate court found that the excerpts were properly excluded by the trial court. It observed that the depositions in the previous class action may have provided notice that when OPMs were exempt salaried employees, many worked more than 40 hours a week. But that testimony hardly put Kaiser on notice that when their classification was changed and they were directed not to work overtime without prior approval and to report any overtime that they did work, OPMs in general, and Jong in particular, failed to comply with those directives.

Further, the appellate court found that while Jong submitted evidence that he was criticized for working overtime, he proffered no evidence that his supervisors told him he could or should work off-the-clock or that he advised the supervisors that he would discontinue reporting his overtime hours rather than limiting the time he spent on the job.

Further the appellate court noted Jong acknowledged that he knew of Kaiser's written policy that OPMs should be clocked in whenever they were working, that he was always paid for time he recorded on Kaiser's recording system, including overtime hours, that he was instructed he was eligible to work and be paid for overtime hours, that there was never an occasion when he requested approval to work overtime that was denied and there were occasions when he worked and was paid overtime even though he did not seek pre-approval, that he was not told by any of his managers or supervisors or any other Kaiser management personnel that he should perform work before he clocked in or after he clocked out or otherwise work off-the-clock. Under these admitted circumstances, evidence that Kaiser was aware that many OPMs worked more than 40 hours a week before being reclassified would not support a finding that after the reclassification Kaiser knew or should have known that Jong was not correctly reporting his hours.

Jong relied on two email messages of Kaiser's officials regarding reports of potential violations of the prohibition of working off-the-clock. However, the appellate court agreed with the trial court's reasoning for rejecting the sufficiency of this evidence. It noted that the emails arose in the context of warnings that prohibit the practice and measures to impress that policy upon all non-exempt employees; and it fell short of evidence that Kaiser knew Jong was working off the clock at his pharmacy - especially where Jong basically admitted that he took steps to prevent Kaiser from discovering that he was working off-the-clock.

Further Jong submitted alarm code data from his pharmacy cross-referenced to his time records, which indicated he disarmed the alarm prior to the time he reported beginning his work. The appellate court again found the trial court's reason for rejecting this evidence to be persuasive that the alarm data did not show what Jong was doing during the time between disarming the alarm and clocking in, or between checking out and arming the alarm. While the summary judgment papers may have contained evidence that Jong was working whenever the alarm was off, that information was not before Kaiser when paying Jong and Kaiser could reasonably believe that he did not begin or end work except as he reported.

Consequently, the appellate court held that Jong failed to create a triable issue of material fact essential to his claim, and Kaiser's motion for summary judgment, therefore, was properly granted.The trial court's judgment was affirmed.

References. See, e.g., Wilcox, *California Employment Law*, § 3.11[1][b], *General Overtime Compensation Requirements* (Matthew Bender).

RAILWAY LABOR ACT

United Transp. Union v. Foxx, No. 11-73258, 2014 U.S. App. LEXIS 8660 (May 8, 2014)

On May 8, 2014, the U.S. Court of Appeals for the Ninth Circuit held that interpretation of a collective bargaining agreement between the railroad company and its employees' union was beyond the Federal Railroad Administration's adjudicatory powers; such a contractual dispute has to be governed by the resolution procedures authorized in the Railway Labor Act.

The Union Pacific Railroad Company ("Railroad") submitted notice to the United Transportation Union ("the Union") that the Railroad was planning to establish a new rail service between Big Rock/Wash and Sun Valley, California. The notice to the Union quoted a relevant portion of the Collective Bargaining Agreement ("CBA") that provided for negotiations. The Union took the position that the designated terminal could be established only by agreement between labor and management. The Union was concerned that the proposed terminal was located in a remote location without food or lodging. Subsequently, it asked the Federal Railroad Administration ("FRA") Administrator to issue an order to prevent the Railroad from taking allegedly illegal unilateral action to create a terminal at Big Rock/Wash.

The FRA then contacted the Railroad for its position, and the Railroad responded that the terms of the CBA stated that if negotiations failed, the Railroad could begin service on the new line. The FRA concluded, however, that resolution of the dispute required interpretation of the CBA, which the FRA lacked the authority to do. It concluded that such a dispute over interpretation had to be governed by the resolution procedures authorized in the Railway Labor Act ("RLA") under 45 U.S.C. § 151 et seq.

Consequently, the Union petitioned for review of the decision of the FRA in the U.S. Court of Appeals for the Ninth Circuit. The question before the Ninth Circuit was whether the FRA was correct that the underlying issue was one of interpretation of the CBA. The Ninth Circuit concluded that the FRA correctly determined that this was fundamentally an issue of contract interpretation beyond its adjudicatory powers.

The Ninth Circuit found that there was no serious disagreement that, under the statutory provisions of the Hour Service Laws ("HSL") and the provisions of the CBA, the parties were expected to designate the terminals through collective bargaining negotiations. The Union and the Railroad did meet, but were unable to come to an agreement as to the terminals. If they had agreed on terminals, the FRA would have been in a position to review the CBA to determine whether the hour laws were being complied with. However, since the parties did not agree on any designated terminals, the Union did not ask the FRA simply to "review" the CBA to see what terminals were negotiated; rather, it asked the FRA, in effect, to declare that absent any agreement as to the Big Rock/Wash terminal, it could not be treated as a designated terminal. If it was not treated as a designated terminal, then all crew time at Big Rock/Wash was on-duty time. The Ninth Circuit, therefore, observed that the underlying issue was what the CBA required in the absence of an agreement by the parties as to the designated terminal.

The Ninth Circuit observed that the Congress has clarified that the designation of terminals is to be determined by CBAs [*See* 49 U.S.C. § 21101(1)], and this intent has been incorporated in the FRA Agency policy [*See* 49 C.F.R. § 228, Appx. A (2012)]. It found that the record reflected that the FRA had consistently taken the position that its duty was to enforce the HSL and not to interpret CBAs to determine whether the agreements have been violated. It observed that the position of the Union in the instant case was fundamentally that the Railroad violated the CBA in unilaterally establishing a designated terminal and the position of the Railroad was that it had not violated the CBA. Given the positions of the parties, the court held that the Union could prevail in the dispute only if the Railroad's interpretation of the CBA was rejected.

The Ninth Circuit, therefore, held that the underlying dispute was a contractual dispute outside the purview of the FRA's authority. It held that the FRA can review an agreement to determine what the designated terminals are, but it cannot interpret the agreement to decide how the terminals shall be designated. Disputes over how an agreement should be interpreted are governed by a different statute. Because the dispute in the instant case was regarding interpretation of the CBA, the Ninth Circuit concluded that it was governed by the procedures of the RLA for disputes requiring interpretation or application of agreements covering rates of pay, rules, or working conditions [*See* 45 U.S.C. § 151a].

Accordingly, the petition for review was denied.

References. See, e.g., Wilcox, *California Employment Law*, § 60.03[3][e][xi], *Railway Labor Act* (Matthew Bender).

SEVERANCE AGREEMENT AND FUNDS FOR PROJECTS

NRG Energy, Inc. v. Fuchs, No. 11-56828, 2014 U.S. App. LEXIS 8998 (May 14, 2014).

On May 14, 2014, the U.S. Court of Appeals for the Ninth Circuit held that a former employee breached a severance agreement when he failed to reimburse a portion of the severance payment after resigning from a new employer before working for one year because the employer had accepted and relied on the employee's resignation for convenience, thus, making it irrevocable.

NRG Energy, Inc. ("NRG") and Jerry Fuchs ("Fuchs") entered into a separation, severance, and general release agreement ("Severance Agreement"), and that NRG performed under the Severance Agreement when it paid Fuchs the required amount. Subsequently, Fuchs and Enel North America, Inc. ("ENA") entered into a valid employment agreement. Though Fuchs resigned from ENA after two weeks, he failed to pay NRG the portion of the amount that the Severance Agreement required him to repay if he left ENA before working for one year. Consequently, NRG filed a suit against Fuchs for breach of contract, unjust enrichment, and money had and received claims. Simultaneously, Fuchs filed a third-party complaint against ENA for breach of employment agreement. The district court granted partial summary judgment in favor of NRG as well as ENA.

Thereafter, Fuchs filed an appeal challenging the district court's order granting summary judgment in favor of NRG and ENA before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit concluded that summary judgment in favor of NRG on its breach of contract claim was proper because Fuchs failed to raise any triable issues of fact regarding his breach of the Severance Agreement. NRG presented evidence that Fuchs resigned from ENA for convenience after two weeks. Fuchs did not cite a material breach by ENA when he resigned and the record showed that ENA accepted and relied on Fuchs's resignation for convenience, thus making it irrevocable.

The Ninth Circuit found that though the employment agreement with ENA required that any notice, communication or request provided for in the employment agreement had to be in writing and personally delivered, ENA's acceptance of Fuchs's notice of resignation through the email was not a notice "provided for" in the employment agreement. Therefore, ENA's email was valid acceptance of his resignation and hence, the court concluded that Fuchs breached the Severance Agreement when he failed to comply with its reimbursement provision.

The Ninth Circuit also observed that Fuchs failed to make any arguments regarding NRG's unjust enrichment and money had and received claims in his opening brief. Accordingly, the court considered those issues to be waived. Even if he had not waived those arguments, the court found no merit in them.

Further, the Ninth Circuit held that the district court properly entered summary judgment in favor of ENA on Fuchs's breach of contract claim, as Fuchs failed to present any evidence that ENA breached the employment agreement. Fuchs contended that ENA breached the employment agreement by failing to adequately fund certain projects. However, the Ninth Circuit noted that ENA was given discretion to determine the amount of funding for the projects under the employment agreement.

Also, Fuchs presented no evidence that ENA's representation regarding its funding of the projects was false as well as he failed to provide any evidence for his damages. Therefore, the Ninth Circuit found the summary judgment in favor of ENA on Fuchs's fraud and negligent misrepresentation claims to be appropriate.

The Ninth Circuit affirmed the judgment of the trial court.

References. See e.g., Wilcox, *California Employment Law*, § 80.37[2], *Payments by Employer to Supplement Unemployment Compensation; Severance or Dismissal Pay* (Matthew Bender).

VOLUNTARY DISMISSAL OF CLAIMS

deSaulles v. Community Hospital of the Monterey Peninsula, No. H038184, 2014 Cal. App. LEXIS 399 (May 2, 2014)

On May 2, 2014, a California appellate court held that when costs are sought under Civ. Proc. Code § 1032(a)(4), a trial court must determine whether an award is mandatory based on one and only one party "prevailing" under its statutory definition.

Maureen deSaulles ("deSaulles") was employed by Community Hospital of the Monterey Peninsula ("Monterey Peninsula") as a part-time patient business services registrar. deSaulles began complaining about her work shift assignments to the emergency room in June 2005. Monterey Peninsula placed her on a leave of absence in January 2006 and subsequently terminated her employment.

In July 2007, deSaulles brought an action in a superior court against Monterey Peninsula alleging failure to accommodate her physical disability or medical condition, among other claims. Monterey Peninsula filed alternative motions for summary judgment or summary adjudication. The trial court denied summary judgment, but granted Monterey Peninsula's motion for summary adjudication on failure to accommodate. At the conclusion of the ruling, the parties agreed to come to a settlement wherein Monterey Peninsula agreed to pay deSaulles $23,500 for dismissal with prejudice of two claims of breach of contract and breach of covenant.

In 2008, pursuant to the settlement, deSaulles filed a request for dismissal with prejudice of the two claims. In 2009, the trial court entered an amended judgment stating that deSaulles shall recover nothing from Monterey Peninsula. deSaulles filed an appeal from the amended judgment before a California appellate court. The appellate court affirmed the amended judgment in an unpublished opinion in 2011.

After the appellate court issued a remittitur, Monterey Peninsula filed a memorandum in the trial court seeking costs of $11,918.87 and deSaulles filed a memorandum seeking costs of $14,839.71. Both the parties asserted that the other party was not the prevailing party. Finding that Monterey Peninsula was the prevailing party, the trial court awarded costs of $12,731.92 to Monterey Peninsula, in the exercise of its discretion, as it was not mandatory costs. Therefore, the trial court denied deSaulles's request for costs and consequently, deSaulles appealed.

On appeal, the question before the appellate court was determining whether either party was entitled to mandatory costs. The appellate court held that since the parties' settlement was silent regarding the costs, Monterey Peninsula's payment of $23,500 triggered mandatory costs as a "net monetary recovery" under the plain language of the Civ. Proc. Code § 1032(a)(4).

The appellate court held that nothing in § 1032 indicated that there can be no prevailing party when an action has been dismissed or a judgment entered based on full or partial settlement. There is no provision in § 1032 like that in Civ. Code § 1717(b)(2), concerning an award of attorney fees provided for by contract: Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of § 1717(b)(2). The appellate court held that § 1032(c) authorizes parties to make their own agreements regarding the responsibility for costs. By negative implication, when there is no agreement on this topic, the other provisions of § 1032 for a costs award apply.

When the parties agreed on the day of trial to settle two causes of action and stipulated to settlement orally before the court (*see* Civ. Proc. Code § 664.6), the appellate court regarded the settlement as accomplished through legal process. In the instant case, the appellate court regarded the Monterey Peninsula's settlement payment as deSaulles's net monetary recovery. The court held that nothing in § 1032 requires a trial court to disregard a settlement payment as a net monetary recovery.

The appellate court held that when costs are sought under § 1032(a)(4), a trial court must determine whether one and only one party fits a statutory definition of prevailing party. It found that, from deSaulles's perspective, though one of her seven causes of action succumbed to a partial summary judgment and four more causes of action were eliminated by motions in limine, she was ultimately paid $23,500 to dismiss her remaining two causes of action on the eve of trial. Although Monterey Peninsula obtained a dismissal for its payment, the appellate court found no reason why this settlement payment did not fall within "net monetary recovery." Accordingly, it held that the trial court should have recognized deSaulles as entitled to mandatory costs under the statutory definition of "prevailing party."

Further, the appellate court observed that Monterey Peninsula did not obtain a favorable dismissal. The sustaining of in limine motions did not end the action in Monterey Peninsula's favor, as two causes of action remained for trial. deSaulles voluntarily dismissed two causes of action and a judgment was entered on the remaining causes. Monterey Peninsula obtained at most a partial voluntary dismissal, which the appellate court concluded, did not, without more, trigger a mandatory costs award to Monterey Peninsula.

The appellate court held that Monterey Peninsula did not qualify as a "prevailing party." Had Monterey Peninsula qualified as a "prevailing party," the instant case could have been among the "situations other than as specified" for purposes of awarding mandatory costs. However, since Monterey Peninsula was not a prevailing party under the statute, the case did not present the trial court with occasion to exercise discretion to determine which party prevailed based on the merits of the case. When only one party fits a "prevailing party" definition, § 1032 operates mechanically to mandate costs and does not afford the trial court discretion to decide the issue in light of the circumstances, such as by discounting a nuisance settlement.

The order awarding costs to Monterey Peninsula and denying costs to deSaulles was therefore reversed.

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 CLASS ACTION

Duran v. U.S. Bank National Assn., S200923, 2014 Cal. LEXIS 3758 (May 29, 2014).

On May 29, 2014, the Supreme Court of California held that a class action trial management plan must permit the litigation of relevant affirmative defenses, even when these defenses turn on individual questions; statistical sampling may provide an appropriate means of proving liability and damages in some wage and hour class actions, but a trial plan that relies on statistical sampling must be developed with expert input and must afford the defendant an opportunity to impeach the model or otherwise show its liability is reduced.

U.S. Bank National Association ("USB") is a nationwide financial services provider. USB employees, who worked as business banking officers ("BBOs"), sold bank products, including loans and lines of credit, to small business customers. During all relevant times, USB had classified the BBO position as exempt from overtime compensation, primarily based on the outside salesperson exemption in Lab. Code § 1171.

Subsequently, a group of BBOs brought a putative class action complaint filed in a superior court complaining that USB had improperly classified BBOs as exempt, denying them overtime pay in violation of Lab. Code § 1194. The BBOs moved to certify the case as a class action. The trial court certified the class, which composed of 260 BBOs. Meanwhile, USB moved to decertify class action, which was denied by the trial court.

After certifying the class, the trial court devised a plan to determine the extent of USB's liability to all class members by extrapolating from a random sample. In the first phase of trial, the court heard testimony about the work habits of 21 BBOs. USB was not permitted to introduce evidence about the work habits of any BBO outside this sample. Nevertheless, based on testimony from the small sample group, the trial court found that the entire class had been misclassified.

USB moved again to decertify the class arguing that trial evidence revealed wide variations among class members and therefore, individual issues predominated as to both liability and restitution. The motion was again denied by the trial court. After the second phase of trial, which focused on testimony from statisticians, the trial court extrapolated the average amount of overtime reported by the sample group to the class as a whole, resulting in a verdict of approximately $15 million and an average recovery of over $57,000 per person.

Consequently, USB filed an appeal in a California appellate court. The appellate court unanimously reversed the trial court's judgment. It held that the trial plan's reliance on representative sampling to determine liability denied USB its due process right to litigate affirmative defenses. The appellate court concluded that the trial court abused its discretion in denying USB's second motion to decertify the class. It noted that even if the certification had once appeared appropriate, it should have been apparent after phase one that individual issues predominated to such an extent that they rendered class treatment impossible. The appellate court also ordered the class decertified.

A review petition was filed before the Supreme Court of California, which was subsequently granted. After reviewing the requirements of the outside salesperson exemption, the Supreme Court discussed the trial court's obligation to consider the manageability of individual issues in certifying a class action. In particular, it held that a class action trial management plan must permit the litigation of relevant affirmative defenses, even when these defenses turn on individual questions. The Supreme Court concluded that the trial court ignored individual issues in the instant case, hamstringing USB's ability to defend itself. It also found flaws in the trial plan's implementation of statistical sampling as proof of USB's liability to the class.

The Supreme Court held that, given California's uniquely quantitative approach to outside salespeople exemption, some proof about how individual employees use their time will often be necessary to accurately determine an employer's overtime liability. Depending on the nature of the claimed exemption and the facts of a particular case, a misclassification claim has the potential to raise numerous individual questions that may be difficult, or even impossible, to litigate on a classwide basis. Class certification is appropriate only if these individual questions can be managed with an appropriate trial plan.

The Supreme Court further held that the granting of class certification requires a determination that group, rather than individual, issues predominate. Such a finding, however, does not preclude the consideration of individual issues at trial when those issues legitimately touch upon relevant aspects of the case being litigated. In considering whether a class action is a superior device for resolving a controversy, the manageability of individual issues is just as important as the existence of common questions uniting the

proposed class. If the court makes a reasoned, informed decision about manageability at the certification stage, the litigants can plan accordingly and the court will have less need to intervene later to control the proceedings. Trial courts also have the obligation to decertify a class action if individual issues prove unmanageable.

The Supreme Court also observed that misclassification class actions can pose difficult manageability challenges. It held that if statistical evidence will comprise part of the proof on class action claims, the court should consider at the certification stage whether a trial plan has been developed to address its use. A trial plan describing the statistical proof a party anticipates will weigh in favor of granting class certification if it shows how individual issues can be managed at trial. Rather than accepting assurances that a statistical plan will eventually be developed, trial courts would be well advised to obtain such a plan before deciding to certify a class action. In any event, decertification must be ordered whenever a trial plan proves unworkable.

The Supreme Court found that USB's exemption defense raised a host of individual issues. It noted that the certification order, in the instant case, was necessarily provisional as it was subject to development of a trial plan that would manage the individual issues surrounding the outside salesperson exemption.

The Supreme Court concluded that the trial plan in the instant case was seriously flawed. First, without following a valid statistical model developed by experts, the trial court improperly extrapolated liability findings from a small, skewed sample group to the entire class. Second, in pursuing this extrapolation, the trial court adamantly refused to admit relevant evidence relating to BBOs outside the sample group. The Supreme Court noted that these rulings significantly impaired USB's ability to present a defense. In rigidly adhering to its flawed trial plan and excluding relevant evidence central to the defense, the Supreme Court concluded that the trial court in the instant case did not manage individual issues; it ignored them.

The Supreme Court held that, while class action defendants may not have an unfettered right to present individualized evidence in support of a defense, a class action trial management plan may not foreclose the litigation of relevant affirmative defenses, even when these defenses turn on individual questions. It held that the trial court could not abridge USB's presentation of an exemption defense simply because that defense was cumbersome to litigate in a class action. While representative testimony and sampling may sometimes be appropriate tools for managing individual issues in a class action, these statistical methods cannot so completely undermine a defendant's right to present relevant evidence.

The Supreme Court further held that if liability is to be established on a classwide basis, defendants must have an opportunity to present proof of their affirmative defenses within whatever method the court and the parties fashion to try these issues. If trial proceeds with a statistical model of proof, a defendant accused of misclassification must be given a chance to impeach that model or otherwise show that its liability is reduced because some plaintiffs were properly classified as exempt.

As regards the use of sampling to prove misclassification liability, the Supreme Court noted that any class action trial plan, including those involving statistical methods of proof, must allow the defendant to litigate its affirmative defenses. If a defense depends upon questions individual to each class member, the statistical model must be designed to accommodate these case-specific deviations. If statistical methods are ultimately incompatible with the nature of the plaintiffs' claims or the defendant's defenses, resorting to statistical proof may not be appropriate. Procedural innovation must conform to the substantive rights of the parties.

Further, with regard to the use of sampling to prove misclassification damages, the Supreme Court noted that any compensation awarded to the class must be based solely on overtime hours worked by nonexempt employees. Overtime hours worked by exempt employees are irrelevant. If a sampling plan used to calculate damages cannot distinguish exempt from nonexempt employees, it may be difficult to obtain an accurate estimate of overtime owed to the class.

Even when statistical methods such as sampling are appropriate, due concern for the parties' rights requires that they be employed with caution. In the instant case, the Supreme Court found that the sample size was too small, sample was not random but appeared to be biased in BBOs' favor, and intolerably large margin of error were resulted. The Supreme Court noted that the trial court ignored the margin of error entirely when it ruled that USB was liable to all class members, even though a number of class members admitted facts establishing they had been properly classified. Therefore, the Supreme Court concluded that the liability estimate could not be trusted because it resulted from an unfair trial.

The Supreme Court held that in a wage and hour class action, the sample relied upon must be representative and the results obtained must be sufficiently reliable to satisfy concerns of fundamental fairness. But these conditions were not satisfied here. Further, it was held

that the trial court's exclusion of all evidence about the work habits of BBOs outside the sample group and its implementation of a biased sampling plan were manifestly an abuse of the court's discretion.

The Supreme Court affirmed the judgment of appellate court in its entirety.

Concurring in the judgment, Judge Liu agreed that the case should be remanded. However, he did not show confidence to join majority's conclusion that the employee had non-exempt status, stating that the issue should be resolved on remand.

References. See e.g., Wilcox, *California Employment Law*, § 9.11, *Initiating the Certification Decision* (Matthew Bender).

WORKERS' COMPENSATION BENEFITS

Lantz v. Workers' Comp. Appeals Bd., No. F065934, 2014 Cal. App. LEXIS 431 (May 19, 2014).

On May 19, 2014, a California appellate court held that when the Workers' Compensation Appeals Board determined that a lieutenant acting as a watch commander was not extraordinary in relation to his routine duties, it was a factual finding and thus had to be upheld under Cal. Lab. Code §§ 5952, 5953 because it was based on reasonable choices among conflicting inferences drawn from uncontroverted evidence.

In October 2010, Lieutenant Seth Patrick Lantz ("Lantz"), a correctional officer at the Department of Corrections-Pleasant Valley State Prison in Coalinga, California, was killed in an automobile accident while driving home from work. Before his normal commute home, Lantz was held over from his scheduled shift and required to work the next shift as the prison's watch commander. Later in 2011, Lantz's widow, on behalf of herself and four children (collectively "the dependants"), applied for workers' compensation benefits, contending that Lantz sustained the fatal injury during the course of his employment.

In 2012, a trial was held before the Workers' Compensation Administrative Law Judge ("WCJ"). The WCJ found that Lantz sustained an injury arising out of and in the course of his employment, resulting in his death because the going and coming rule did not apply to Lantz, given that his commute was not local and was outside the fixed time of his usual shift. The WCJ's findings of fact were rescinded by the Workers' Compensation Appeals Board ("WCAB") and it concluded that the going and coming rule would control the outcome unless the "special mission" exception applied.[3] WCAB denied the application for benefits, determining that the hold-over shift as watch commander was not extraordinary because, among other things, it was assigned in accordance with procedures agreed upon by the prison administration and the officers' union and did not dramatically change his activities.

Subsequently, the dependants filed a petition for a writ of review with an appellate court in California, requesting that the WCAB's decision be annulled and the decision of the WCJ be reinstated, contending that the mandatory hold-over shift as watch commander was a special mission that included the travel home. In June 2013, the appellate court issued the writ of review.

The issue presented before the appellate court was whether, at the time of the accident, Lantz was acting within the course of his employment for purposes of Cal. Lab. Code § 3600(a)(2). The appellate court concluded that substantial evidence supported the finding that Lantz was not acting within the course of his employment at the time of the accident.

As the parties disagreed about the appropriate standard of review, the appellate court examined the constitutional and statutory provisions that defined the judicial review of decisions by the WCAB. The parties' dispute concerning the applicable standard of review was based on their disagreement over whether the WCAB decided a question of fact or a question of law when it concluded the special mission exception did not apply.

The appellate court observed that workers' compensation law follows the usual rule, not the special rule that adopted for contractual interpretation; accordingly, it is the function of the WCAB as the administrative tribunal and trier of fact to choose among the conflicting inferences that may be drawn from uncontroverted evidence. It held that an appellate court does not second guess that choice; it requires only that the inference chosen be reasonable [*See* Cal. Lab. Code § 5952(c)]. The appellate court also noted that the strong language in Cal. Lab. Code § 5953, when read

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[3] Under the "going and coming rule" and its "special mission" exception, travel to and from work ordinarily is not considered within the course of employment, but travel undertaken as part of a special mission is. The special mission exception requires three factors to be met: (1) the activity is extraordinary in relation to the employee's routine duties, (2) the activity is within the course of the employee's employment, and (3) the activity was undertaken at the express or implied request of the employer and for the employer's benefit.

in conjunction with § 5952, means that that the WCAB's findings of fact are reviewed for substantial evidence and the WCAB's resolution of a question of law is subject to independent review.

The appellate court noted the special mission exception requires that an activity be extraordinary in relation to an employee's routine duties. Whether an activity is extraordinary depends on the place, time, and nature of the additional work. In the instant case, the evidence regarding the place of the additional shift showed that Lantz served as watch commander on a hold-over shift at the place of his usual employment that is, the prison. However, the evidence regarding the length of Lantz's additional shift and how additional shifts were assigned supported conflicting inferences. The evidence regarding the nature of the work performed during the hold-over shift compared to Lantz's routine duties also showed conflicting inferences. The court observed that the inference drawn from the facts could vary depending upon how much weight was given to each.

Therefore, the appellate court observed that the WCAB had to weigh the evidence and choose from among conflicting inference when it determined whether Lantz's acting as watch commander was extraordinary in relation to his routine duties as the third watch lieutenant. The court held that these two analytical steps – deciding which inferences to draw and then deciding how much weight to give the inferred fact – are steps associated with deciding a question of fact, not resolving a question of law. In *Mercer-Fraser Co. v. Industrial Acc. Com.*,[4] the Supreme Court set forth the rule of law that resolving conflicting inferences and determining the weight of the evidence are questions of fact. Pursuant to that rule, the appellate court rejected the applicants' argument that the course of employment issue posed a question of law, but instead concluded that the WCAB decided questions of fact when it decided that the duties of watch commander were not extraordinary in comparison to Lantz's routine duties as a lieutenant.

Therefore, the court reviewed the WCAB's order for substantial evidence. While analyzing whether the WCAB's decision was supported by substantial evidence, the appellate court concluded that the testimony of other officials about the operation of the prison, the job of lieutenant, and the job of watch commander of first shift constituted substantial evidence that supported the finding of fact that serving a hold-over shift as watch commander was not an extraordinary activity for Lantz.

The appellate court affirmed the WCAB's order.

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4 40 Cal.2d 102.

References. See, e.g., Wilcox, *California Employment Law*, § 20.22[4], *Going and Coming Rule* (Matthew Bender).

WRONGFUL TERMINATION

Conchita Franco Serri v. Santa Clara Univ., No. H037534, 2014 Cal. App. LEXIS 467 (May 28, 2014).

On May 28, 2014, a California appellate court held that an employee who was terminated for failing to perform an important job function, could not avoid summary judgment by arguing, based on expert evidence acquired years after the employee's termination, that there were no adverse consequences from the employee's failure to perform; such after-acquired expert evidence did not create a triable issue of whether the employee failed to perform his or her job duties, and thus, it had limited relevance to the question of discrimination.

Conchita Franco Serri ("Serri") was working as Director of Affirmative Action Santa Clara University ("the University") since 1992. Other than her routine duties, her duty also included preparing the University's annual Affirmative Action Plan ("AAP") and providing sexual harassment training to the University staff. The University terminated Serri's employment in 2007 when she failed to produce AAP for three consecutive years and made misrepresentations about AAPs that she had failed to prepare.

Subsequently, Serri filed a complaint in a superior court against the University and others (collectively "defendants") alleging that she was wrongfully discharged from her employment based on her race and ethnic origin. Her complaint also contained causes of action, inter alia, for breach of her employment contract and retaliation and harassment in violation of the California Fair Employment and Housing Act ("FEHA"). The defendants moved for summary judgment, or in the alternative, summary adjudication of each of Serri's causes of action. The trial court granted summary judgment ruling that the University had no liability on Serri's claims.

Consequently, Serri filed a petition for writ of mandate in a California appellate court, which was denied by the appellate court. Thereafter, Serri challenged the trial court's order granting summary judgment on procedural grounds and on the merits before the appellate court.

The appellate court was asked to determine whether an employee who was terminated for failing to perform an important job function could avoid summary judgment by arguing, based on expert evidence obtained for the

purpose of opposing a motion for summary judgment or summary adjudication, years after the employee's termination, that the failure to perform did not and would not result in any adverse consequences to the employer. The appellate court held that after-acquired expert evidence that there were no adverse consequences from an employee's failure to perform did not create a triable issue of fact on the question of whether the employee failed to perform his or her job duties, and thus, had limited relevance, if any, to the question of discrimination.

The appellate court found that the trial court abused its discretion by sustaining all of the defendants' objections to Serri's evidence in a blanket ruling. The trial court observed that many of Serri's exhibits lacked foundation, were inadmissible hearsay, or were irrelevant because they were not cited in Serri's opposition. The appellate court noted that this blanket ruling was hardly a ruling, that it provided no meaningful basis for review, and that it could be treated as a failure to rule. However, the appellate court further held that the error in this regard was harmless and it did not change the outcome of the motions because handwritten notes of Serri's supervisor were properly excluded for lack of authentication under Evid. Code § 1400 when they were not signed by Serri's supervisor, and Serri's admissible evidence did not create a triable issue of material fact.

As to the discrimination claim under Gov't Code § 12940(a), the appellate court held that Serri's expert evidence that the failure of performance did not harm the University, acquired years after Serri was terminated, did not create a triable issue of material fact on the question of whether the University's stated reasons for terminating Serri were untrue or pretextual such that a reasonable trier of fact could conclude that the employer engaged in discrimination. Before she was terminated, Serri told the University that her failure to prepare AAP could have adverse consequences, including the loss of federal grants. That the University ultimately suffered no adverse consequences did not create a triable issue on the questions of whether the University had a legitimate, nondiscriminatory reason to terminate her employment or whether its reasons for doing so were untrue or pretextual.

Since the appellate court concluded that Serri could not meet her burden of showing that the stated reasons for her termination were false or pretextual, it also rejected her contention that the timing in the instant case between Serri's filings before the federal Equal Employment Opportunity Commission about discrimination claims and her termination, in itself, was sufficient to create a triable issue regarding her tortious discharge and the retaliation claims under § 12940(h). The court held that temporal proximity was not enough to prove retaliation.

As regards Serri's harassment claims under § 12940(j), the appellate court noted that, to prevail on her harassment claim, Serri was required to produce evidence that she was subjected to offensive comments or other abusive conduct that was based on a protected characteristic, her national origin, age or sex, that was sufficiently severe or pervasive as to alter the conditions of her employment. However, the appellate court found that the record was devoid of any such evidence; Serri did not identify any statements that were derogatory, offensive, or pervasive.

Serri's breach of contract and bad faith claims failed because based on all of the admissible evidence, the appellate court concluded that the University met its burden of establishing that it acted in good faith and had reasonable grounds for believing Serri engaged in gross misconduct when it decided to terminate her and that its decision was based on fair and honest reasons. The court further found that even if Serri's evidence created a triable issue on the question of whether the failure to prepare the AAPs was gross misconduct, it did not create a triable issue on the question of whether she made misrepresentations regarding the AAPs, which was sufficient ground by itself to demonstrate gross misconduct.

The appellate court concluded that the trial court properly granted summary judgment on each of Serri's causes of action, and therefore, it affirmed the trial court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 60.08, *Remedies in Wrongful Discharge Action* (Matthew Bender).

Piccinini v. California Emergency Management Agency, No. A137275, 2014 Cal. App. LEXIS 456 (May 27, 2014).

On May 27, 2014, a California appellate court held that Gov't Code § 19257 expresses a legislative policy that recognizes a cause of action in favor of someone who accepts in good faith an offer of state employment in violation of the rules and statutes that govern state hiring.

Joseph Piccinini (''Piccinini'') was offered and accepted employment as a deputy chief in the California Emergency Management Agency. Just before

he was to report for work, he was told not to come because the position for which he was hired had been eliminated. Subsequently, Piccinini filed a suit against the State in a superior court for wrongful termination, breach of contract, and promissory estoppel.

The State demurred. The trial court sustained the demurrer on the grounds that public employment is governed by statute, not contract, and hence, Piccinini could not have a cause of action for breach of contract. Alternatively, the trial court reasoned that to the extent Piccinini's claims were premised upon misrepresentation of the availability of a vacant position warranting his appointment, the State was immune from suit under Gov't Code § 818.8. Thereafter, the State applied for judgment of dismissal upon Piccinini's failure to file an amended complaint. The trial court dismissed the complaint with prejudice and entered judgment for the State.

Piccinini timely appealed before a California appellate court. The appellate court held that to the extent that Piccinini actually rendered service in good faith under his attempted appointment, he stated a claim for promissory estoppel under Gov't Code § 19257.

The appellate court observed that Piccinini alleged that after following the state application process, he was offered and accepted a position as a deputy chief with the emergency management agency. Just before he was to report for work, he was told that the hiring had been in error because his position was eliminated due to a lack of funding. Thus, the court found that Piccinini's complaint alleged good faith acceptance of employment contrary to law, and his allegations fell squarely within the scope of the cause of action circumscribed in § 19257.

The appellate court agreed that, as a general matter, estoppel will not be applied against the government if doing so would nullify a rule of policy adopted for the public benefit, or if doing so would expand the statutory or constitutional power of a government officer or employee. But the court observed that such general expressions of estoppel doctrine did not control in the instant case. It observed that § 19257 expresses a legislative policy that recognizes a cause of action in favor of someone who accepts an offer of state employment in good faith in violation of the rules and statutes that govern state hiring.

As regards the State immunity under § 818.8 against Piccinini's claim for promissory estoppels, the appellate court observed that a claim for promissory estoppel is an equitable theory rooted in contract, not tort. It noted that Gov't Code § 814 provides that the immunities, including § 818.8, of the Government Tort Liability Act do not affect liability based on contract. Moreover, a claim for promissory estoppel does not require a misrepresentation by the defendant, nor did Piccinini allege any.

The appellate court concluded that Piccinini had no claim for breach of contract, nor based on his allegations that the offer of employment was revoked solely due to a lack of funding could he possibly have a cause of action for wrongful termination. This is because public employment is not held by contract but by statute, and no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law.

Accordingly, the appellate court reversed the dismissal of the cause of action for promissory estoppels, but affirmed the dismissal of causes of action for breach of contract and wrongful termination.

References. See, e.g., Wilcox, *California Employment Law*, § 61.02, *Drafting a Complaint for Damages for Wrongful Termination or Discipline* (Matthew Bender).

CALENDAR OF EVENTS

2014

July 12	CALBAR: Workers' Compensation Section Summer Education Conference	Los Angeles Airport Marriot 5855 W. Century Blvd. Los Angeles, CA (415) 538-2256
July 16	DFEH Webinar: Sexual Harassment Prevention Training	10 AM - Noon http://dfeh.ca.gov/Webinars.htm
July 16	NELI: California Employment & Discrimination Law Briefing	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
July 17-18	NELI: Employment Discrimination Law Update	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
July 18	CALBAR: Workers' Compensation Section, Webinar: Utilization Review Post-SB863: Nuances of Sandhagen and Dubon	Noon - 1 PM Webinar (415) 538-2256
July 22	CALBAR: Litigation Law Section, Webinar: Navigating the Rough Seas: When the FAA Meets the CAA	Noon - 1 PM Webinar (415) 538-2546
July 30	DFEH Webinar: CFRA, PDL and Other Leaves	10 AM - Noon http://dfeh.ca.gov/Webinars.htm
July 30	CALBAR: Labor and Employment Law Section, Fourth Annual Advanced Wage and Hour Conference	JW Marriott Los Angeles L.A. Live 900 W Olympic Blvd, Los Angeles, CA (415) 538-2238.
July 30	CALBAR: Law Practice Management & Technology Section, Webinar: Technology Tips for Presenting Your Case at Trial	Noon – 1 PM Webinar (415) 538-2520.
Aug. 11-14	EEOC's 17th Annual EXCEL Training Conference: Examining Conflicts in Employment Laws http://www.eeotraining.eeoc.gov/EXCEL2014/	Sheraton San Diego Hotel & Marina 1380 Harbor Island Drive San Diego, California 92101 (619) 291-2900/ (800) 325-3535 https://www.starwoodmeeting.com/Book/EE0C17THANNUAL
Aug. 21-22	NELI: Public Sector EEO & Employment Law Conference	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Aug. 22	CALBAR: Workers' Compensation Section, Webinar: Affirmative Defenses and Claim Denial Issues	Noon - 1 PM Webinar (415) 538-2256

Aug. 25	NELI: California Disability Law Workshop	Parc 55 Wyndham Union Square 55 Cyril Magnin Street San Francisco, CA 94102 (415) 392-8000
Aug. 26	NELI: Americans with Disabilities Act Workshop	Parc 55 Wyndham Union Square 55 Cyril Magnin Street San Francisco, CA 94102 (415) 392-8000
Sept. 11-14	CALBAR: 87th Annual Meeting of the State Bar of California	Grand Hyatt San Diego 1 Market Place San Diego, CA (415) 538-2210
Sept. 15	NELI: California Disability Law Workshop	Omni Los Angeles Hotel 251 South Olive Street Los Angeles, CA 90012 (213) 617-3300
Sept. 16	NELI: Americans with Disabilities Act Workshop	Omni Los Angeles Hotel 251 South Olive Street Los Angeles, CA 90012 (213) 617-3300
Sept. 17	DFEH Webinar: Sexual Harassment Prevention Training	10 AM - Noon http://dfeh.ca.gov/Webinars.htm
Oct. 17	CALBAR: Workers' Compensation Section, Webinar: Tips for Taking a Doctor's Deposition	Noon - 1:30 PM (415) 538-2256
Oct. 29	NELI: Affirmative Action Workshop	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Oct. 30-31	NELI: Affirmative Action Briefing	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Nov. 12	DFEH Webinar: Sexual Harassment Prevention Training	10 AM - 12 PM http://dfeh.ca.gov/Webinars.htm
Dec. 4-5	NELI: Employment Law Conference	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000

2015

Mar. 22-25	NELI: Employment Law Briefing	Hotel Del Coronado 1500 Orange Avenue Coronado, California 92118 (619) 435-6611
Apr. 2-3	NELI: ADA & FMLA Compliance Update	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
May 7-8	NELI: Employment Law Conference - Mid Year	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000

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