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PETTIT KOHN INGRASSIA & LUTZ

EMPLOYMENT LAW UPDATE

Relationship-Driven Results *May 2013*

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11622 El Camino Real, Suite 300
San Diego, CA 92130
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Los Angeles, CA 90045
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I.

LEGISLATIVE/ADMINISTRATIVE

Federal

Legislature Considers Bill Expanding Protections for Victims of Domestic Violence, Sexual Assault and Stalking

The California Legislature is currently considering SB 400 (Jackson), a bill that would expand the protections afforded to victims of domestic violence, sexual assault and stalking.

Existing law prohibits employers from taking an adverse employment action against victims of domestic violence and sexual assault who take time off from work to attend to issues arising from domestic violence or sexual assault, as long as the employee complies with certain conditions.

This bill would extend these protections to victims of stalking, and would also prohibit an employer from discriminating, retaliating against or discharging an employee due to the employee's known status as a victim of domestic violence, sexual assault or stalking. The bill would further require the employer to provide reasonable accommodations for such victims, and create a private right of action for an aggrieved employee to seek enforcement of the above-referenced provisions.

The bill is currently pending before the Senate Appropriations Committee.

Legislature Considers Bill Preventing Discrimination Against Recipients of Disability Insurance Benefits

California's existing family temporary disability insurance program provides up to six weeks of wage replacement benefits to workers who take time off to care for a seriously ill child, spouse, parent, or domestic partner, or to bond with a minor child.

SB 761 (DeSaulnier) would make it unlawful for an employer to discriminate, retaliate against or discharge an individual because he or she has applied for, used, or

indicated an intent to apply for or use, family temporary disability insurance benefits. An employer that violates these provisions would be liable for actual damages and appropriate equitable relief, including reinstatement. The bill also provides for an award of reasonable attorneys' fees and costs to employees who successfully obtain such remedies.

The bill is currently pending before the Senate Judiciary Committee.

II.

JUDICIAL

California

Court of Appeal Offers Clarity on the Admissibility of "Me Too" Evidence

In *Hatai v. Department of Transportation*, a California Court of Appeal clarified the parameters of the admissibility of "me too" evidence. The court held that a plaintiff in a discrimination case may not improperly broaden the scope of his or her allegations in order to permit the admission of testimony from individuals whose allegations against a particular defendant lack sufficient similarity to those made by the plaintiff.

Kenneth Hatai ("Hatai") was employed as a senior traffic engineer at the California Department of Transportation ("Caltrans") and worked under the supervision of Sameer Haddadeen ("Haddadeen"). Hatai is of Asian ancestry while Haddadeen is of Arab descent.

Throughout his employment, Hatai expressed displeasure with Haddadeen's management style. Haddadeen made comments to Hatai and other employees suggesting both an anti-Asian and a pro-Arab bias. Hatai filed a complaint alleging that he had been discriminated against on the basis of his race. Notably, Hatai's complaint *only* alleged anti-Asian discrimination and was silent with regard to any pro-Arab allegations.

In preparation for trial, Caltrans' attorney filed a motion to exclude evidence that Haddadeen had discriminated against non-Asians. Caltrans argued that permitting testimony from *all* non-Asians that alleged discrimination by Haddadeen would exceed the bounds of permissible "me too" evidence. As Haddadeen's attorney pointed out, Hatai's pleadings merely alleged that Haddadeen was anti-Asian, not that he was pro-Arab. Therefore, the only admissible "me too" evidence would be that of Asians alleging discrimination by Haddadeen.

The trial court was unmoved by Hatai's argument that Haddadeen's alleged pro-Arab bias was central to Hatai's case. The appellate court affirmed, holding that since the pleadings, discovery, and investigation had all focused on a claim of anti-Asian discrimination, testimony of non-Asians for the purpose of demonstrating a pro-Arab bias would amount to improper "me too" evidence. Accordingly, the trial court correctly permitted *only* evidence of anti-Asian bias while excluding all proposed pro-Arab testimony.

While arguably a victory for California employers, the aftermath of *Hatai* may serve to change the landscape of California discrimination cases. Plaintiffs may allege that a supervisor has demonstrated bias in favor of one racial group rather than (or in addition to) disdain for another. This case also highlights the importance of educating managers and serves as a reminder that a manager's treatment of one employee may find its way into the discrimination case of another.

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Court of Appeal Ruling Highlights Potential Unintended Consequences of Choice-of-Law Provision in Arbitration Agreement

In *Harris v. Bingham McCutchen*, a California Court of Appeal affirmed a trial court decision refusing to enforce an arbitration clause rendered invalid by Massachusetts law.

Hartwell Harris ("Harris") was employed as an associate attorney at Bingham McCutchen ("Bingham"). Harris alleged that despite positive reviews throughout her tenure at Bingham, her employment was terminated after she made a request for reasonable accommodations necessitated by her disabling sleep disorder. Harris sued Bingham in California state court for discrimination and wrongful discharge. Bingham moved to compel arbitration pursuant to an arbitration clause in the employment agreement ("Agreement") that Harris had signed.

The Agreement included a choice-of-law provision which specified that Massachusetts state law would apply to any dispute pertaining to the employment relationship. While neither side challenged the validity of the choice-of-law provision, Harris argued that the arbitration clause was unenforceable in light of a Massachusetts law requiring that parties seeking to arbitrate statutory discrimination claims clearly and specifically state that such claims are covered by the contract's arbitration clause. Harris argued that the arbitration clause was invalid because the Agreement did not contain such language. The trial court agreed and refused to compel arbitration.

In affirming the trial court's ruling, the appellate court held that, based on the choice-of-law provision in the Agreement (which Bingham drafted), Massachusetts law controlled. Moreover, because the arbitration clause did not "clearly and unmistakably" apply to statutory claims (as opposed to common law claims) - and because Harris' common law claims were integrated with his statutory claims - no claims could be arbitrated.

The appellate court also rejected Bingham's argument that the Federal Arbitration Act and the seminal United States Supreme Court decision in *AT&T Mobility v. Concepcion* preempt Massachusetts Law,[1] explaining that *Concepcion* does not infringe on states' ability to address concerns surrounding contracts of "adhesion" (*i.e.*, where one party has unequal bargaining power or there is some other unfairness in the negotiation).

In light of *Harris*, employers should review their employment agreements and be cognizant of the implications of any choice-of-law provisions contained therein.

Court of Appeal Holds that Employers Cannot Use Averaging Methods to Determine Compliance with Minimum Wage Obligations

In *Gonzalez v. Downtown LA Motors, LP*, a California appellate court held that employers must pay non-exempt employees who work on a piece rate basis a separate hourly minimum wage for the time they spend waiting to work.

Defendant Downtown LA Motors ("DTLA"), an automobile dealership that sells and services Mercedes-Benz automobiles, compensated its service technicians on a piece rate basis for completed repair tasks. Under DTLA's piece rate system, technicians were paid a flat rate ranging from $17 to $32 for each "flag hour" accrued. Flag hours were assigned to every task that technicians performed on an automobile, and were intended to

[1] *Concepcion* held that the Federal Arbitration Act preempts state laws and state court decisions that are "hostile" to arbitration provisions and that arbitration agreements should be enforced according to their terms.

correspond to the actual amount of time the technician needed to perform the task. DTLA calculated its technicians' pay for an 80-hour pay period by multiplying flag hours accrued during that pay period by each technician's applicable flat rate. For example, a technician with a flat rate of $26 who accrued 150 flag hours in a pay period would earn 150 x $26, or $3,900.

DTLA also kept track of the time a technician spent at the worksite, regardless of whether the technician was working on a repair. At the end of each pay period, DTLA calculated how much each technician would earn if paid an amount equal to his total recorded hours "on the clock," multiplied by the applicable minimum wage. DTLA referred to this amount as the "minimum wage floor." If a technician's flat rate/flag hour pay fell short of the minimum wage floor, DTLA would supplement the technician's pay in the amount of the shortfall.

A group of 108 automotive service technicians brought a class action lawsuit, alleging that although DTLA compensated its technicians on a piece rate basis, it was also obligated to pay them a separate hourly minimum wage for the time they spent during their shifts waiting to repair vehicles or performing other non-repair tasks directed by DTLA. DTLA maintained that it was not required to pay the technicians a separate hourly minimum wage for the time they spent waiting to work because it ensured that their total compensation for each pay period never fell below the "minimum wage floor."

The trial court found, and the appellate court affirmed, that class members were entitled to separate hourly compensation for time they spent waiting for repair work or performing other non-repair tasks directed by DTLA. The appellate court specifically held that DTLA's method of compensation violated the minimum wage law because California does not permit employers to avoid paying its employees for all hours worked by averaging total compensation over total hours worked in a given pay period. Rather, California law requires that employees receive at least the minimum wage *for each hour worked*.

This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Jenna Leyton-Jones, Christine Mueller, Hazel Ocampo, Heather Stone or Ryan Nell at (858) 755-8500; or Andrew L. Smith or Jennifer Weidinger at (310) 649-5772.

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