PETTITKOHN
PETTIT KOHN INGRASSIA & LUTZ

EMPLOYMENT LAW UPDATE

Relationship-Driven Results *June 2012*

Congratulations to our Pettit Kohn Employment Team

Jennifer Lutz
selected for inclusion in
San Diego Super Lawyers
(2011-2012)

Tom Ingrassia
selected for inclusion in
San Diego Super Lawyers
(2008-2012)

Eric De Wames
selected for inclusion in
Southern California Rising Stars
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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

California

Assembly Passes Bill Prohibiting Discrimination Against Unemployed Job Applicants

On May 30, 2012, the California Assembly passed AB 1450 (Allen), a bill which would prevent employers, employment agencies, and individuals who operate Internet sites for posting jobs from, among other things, refusing to hire a person because of that person's employment status. The bill would also prohibit publishing a job opening that includes provisions pertaining to an individual's current employment status. Those who violate the bill would be subject to civil penalties that increase (from $1,000 to $10,000) as the number of violations increases. The bill now moves on to the Senate for consideration.

Assembly Passes Bill Proposing Expansion of California Family Rights Act

On May 30, 2012, the California Assembly passed AB 2039 (Swanson), a bill which would expand the circumstances under which an employee is entitled to protected leave pursuant to the California Family Rights Act ("CFRA") by (1) eliminating the age and dependency elements from the definition of "child," thereby permitting an employee to take protected leave to care for his or her independent adult child; (2) expanding the definition of "parent" to include an employee's parent-in-law; and (3) permitting an employee to take leave to care for a seriously ill grandparent, sibling, grandchild, or domestic partner, as defined.

Under existing law, "child" means a biological, adopted, foster, or stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under 18 years of age or an adult dependent child. The CFRA defines "parent" as the employee's biological, foster, or adoptive parent, stepparent, legal guardian, or other person who stood *in loco parentis* to the employee when the employee was a child.

The bill now moves to the Senate for consideration.

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II.

JUDICIAL UPDATE

Federal

Ninth Circuit Holds Employees Can Use Statistical Evidence to Prove Age Discrimination

In *Schechner v. KPIX-TV et al.*, the Ninth Circuit Court of Appeals held that the plaintiff employees could establish a prima facie case of age discrimination using statistical evidence, even where that evidence did not account for the defendant employer's legitimate, non-discriminatory reason for the discharge decisions.

William Schechner and John Lobertini (collectively, "Plaintiffs") were television news reporters at KPIX-TV ("KPIX"), one of the two San Francisco affiliates of CBS Broadcasting, Inc. They were laid off after CBS issued a directive requiring each of its affiliates to reduce its annual budget by ten percent. Plaintiffs were sixty-six and forty-seven years old, respectively, when they lost their jobs. They brought suit alleging that KPIX discriminated against them on the basis of age and gender, in violation of California law. KPIX offered legitimate, non-discriminatory reasons for its layoff decision: that it laid off general assignment reporters based on date of contract expiration. However, Plaintiffs submitted reports by an expert statistician which compared the on-air talent who were laid off with the entire pool of on-air talent in the KPIX news department. The report concluded that "those individuals laid off, as a group, are older than the group of those not laid off, and the disparity between the two groups is statistically significant." The expert found statistically significant age disparities using three different statistical methods and using a number of different groups of KPIX's on-air talent. Based on his statistical analyses, the expert opined that the age of KPIX's on-air talent "correlates closely" with those selected for layoff. KPIX's statistical expert opined that the Plaintiffs' expert's report failed to account for obvious, valid and important factors because it failed to account for the decision-making process that KPIX said it followed.

The district court granted KPIX's motion for summary judgment, finding that Plaintiffs failed to make out a prima facie case of age discrimination. Specifically, the district court concluded that where a plaintiff's statistical analysis fails to preemptively account for a defendant's legitimate non-discriminatory reason for discharge, the statistical results cannot show a stark pattern of discrimination. The appellate court ultimately affirmed summary judgment, but clarified that a plaintiff who relies on statistical evidence to establish a prima facie case of discrimination bears a relatively low burden of proof.

As the court explained, "the requisite degree of proof necessary to establish a prima facie case [under the *McDonnell Douglas* burden shifting framework]…on summary judgment is minimal and does not even rise to the level of a preponderance of evidence." Thus, a plaintiff who submits statistical evidence that shows a stark pattern of discrimination establishes a prima facie case at step one of the *McDonnell Douglas* framework. "Statistical evidence does not necessarily fail to establish a prima facie case because it does not address the employer's proffered non-discriminatory reasons for the discharge." In this case, Plaintiffs submitted analyses showing stark age disparities between the on-air talent who were retained and those who were laid off. The court held that this evidence was sufficient to establish a prima facie case of

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discrimination. However, KPIX met its burden under step two of the framework by offering a legitimate, non-discriminatory reason for its layoffs, and Plaintiffs failed to demonstrate that the proffered reason was mere pretext for discrimination. Accordingly, summary judgment was appropriate.

California

California Court Holds Prevailing Parties Cannot Recover Attorneys' Fees for Meal and/or Rest Break Violations

In a seminal decision, *Kirby v. Immoos Fire Protection, Inc.*, the California Supreme Court ruled that the California Labor Code does not permit an attorneys' fee award to a prevailing party on claims for meal and/or rest break violations. This ruling comes on the heels of the Court's decision in *Brinker*,confirming that employers need only ensure that employees are provided an opportunity to take meal periods, not *ensure* that such breaks are actually taken.

The plaintiffs ("Plaintiffs") sued Immoos Fire Protection ("IFP") and several other defendants for violating various labor laws, including a claim that IFP failed to provide its employees rest breaks. Plaintiffs ultimately dismissed this claim, and IFP requested that it be awarded its attorneys' fees under Labor Code 218.5. The trial court awarded fees and the court of appeal affirmed.

The California Supreme Court reversed, however, holding that in light of the relevant statutory language and legislative history, neither Labor Code section 1194[1] nor section 218.5[2] authorizes an award of attorneys' fees to a party that prevails on a section 226.7 claim.

The court held that an action under section 226.7 does not constitute an "action brought for the nonpayment of wages" within the meaning of section 218.5. "Instead, the statute is primarily concerned with ensuring the health and welfare of employees by requiring that employers provide meal and/or rest periods as mandated by the [Industrial Welfare Commission]. When an employee sues for a violation of section 226.7, he or she is suing because an employer has allegedly 'require[d] [the] employee to work during [a] meal or rest period mandated by an applicable order of the Industrial Welfare Commission.' In other words, a section 226.7 action is brought for the nonprovision of meal and/or rest periods, not for the 'nonpayment of wages.'"

Kirby is a positive ruling for California's employers and may reduce the number of class action lawsuits brought for alleged violations of meal and/or rest break laws.

[1] Section 1194 allows successful *plaintiffs* to recover attorneys' fees in actions for unpaid minimum wages or overtime pay.

[2] Section 218.5 allows for two-way attorney fee-shifting (in favor of the employer or the employee), awarding attorneys' fees to a prevailing party in any action "brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions." However, this section does not apply to actions under Section 1194, which provides for the awarding of attorneys' fees only to employees who prevail in an action for unpaid minimum wages or overtime pay.

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California Court Holds that Arbitration Agreement is Unconscionable and Therefore Unenforceable

In *Samaniego v. Empire Today, LLC*, the California Court of Appeal held that an arbitration provision in an employment agreement was unconscionable and therefore unenforceable.

The plaintiffs, Salome Samaniego and Juventino Garcia (collectively, "Plaintiffs"), worked as carpet installers for Flooring Install, Inc., an alleged subsidiary or affiliate of Empire Today, LLC ("Empire"). When they were initially hired, and again later during their employment, Plaintiffs were given form contracts and told to sign them if they wanted to work for Empire. The second contract ("the Agreement") was captioned "Flooring Install, Inc. Subcontractor Installer Agreement." Both contracts were presented only in English, although the Plaintiffs could not read English fluently. The contracts were offered on a non-negotiable, take-it-or-leave-it basis, with little or no time for review.

The Agreement itself consisted of eleven single-spaced pages of small-font print riddled with complex legal terminology. It provided, among other things, that "[b]oth Empire and the Subcontractor are hereby agreeing to choose arbitration, rather than litigation or some other means of dispute resolution, to address their grievances or alleged grievances with the expectation that this resolution process may be more cost-effective and expedient for the parties than litigation." The Agreement also included a shortened six-month statute of limitations for the Subcontractors to sue and a unilateral fee-shifting provision that required Plaintiffs to pay any attorneys' fees Empire might incur "to enforce any of its rights hereunder or to collect any amounts due." Although the Agreement directed that arbitration would be governed by the commercial rules of the American Arbitration Association, those rules were not attached or otherwise provided to Plaintiffs.

Plaintiffs filed a putative class action lawsuit, challenging Empire's allegedly unlawful misclassification of its carpet installers as independent contractors. Empire moved to stay the action and compel arbitration pursuant to the Agreement. The trial court found that the Agreement was "highly unconscionable from a procedural standpoint" and demonstrated "strong indicia of substantive unconscionability," and therefore denied Empire's motion to compel. Empire appealed.

In affirming the trial court's ruling, the court of appeal found that the Agreement was both procedurally and substantively unconscionable. Procedural unconscionability arose from the fact that the Agreement was offered on a take-it-or-leave-it basis in a language that Plaintiffs were not able to sufficiently read. Although Plaintiffs asked for a Spanish translation of the Agreement, the request was denied. Moreover, Plaintiffs were not provided a copy of the Agreement or a copy of the relevant arbitration rules. Procedural unconscionability was also inherent in the presentation of the Agreement—eleven pages of densely worded, single-spaced text which required no separate acknowledgement by Plaintiffs.

Substantive unconscionability arose from the fact that the Agreement unilaterally shortened the limitations period to six months, required Plaintiffs to pay any attorneys' fees incurred by Empire, but imposed no reciprocal obligation on Empire, and exempted from arbitration requirement claims typically brought by employers—namely, those seeking declaratory and preliminary injunctive relief to

protect Empire's proprietary information and noncompetition/nonsolicitation provisions—while restricting to arbitration any and all claims Plaintiffs might bring.

Finally, the Court held that the unconscionable provisions of the Agreement were not severable because the Agreement was "permeated" by unconscionability.

Like many recent cases with similar holdings, this case serves as a reminder to employers to review their arbitration agreements and eliminate provisions which may be considered to be unconscionable.

<u>California Court Holds Business Partner Has Standing to Bring FEHA-Based Retaliation Claim Against Partnership</u>

In *Fitzsimons v. California Emergency Physicians Medical Group*, the California Court of Appeal held that the Fair Employment and Housing Act ("FEHA") supports a claim for retaliation by a partner against her partnership for opposing sexual harassment of an employee.

Mary Fitzsimons ("Plaintiff") was a partner with the California Emergency Physicians Medical Group ("CEP")—a general partnership with approximately 700 partners working in hospital emergency rooms throughout California. After Plaintiff's position as a regional director was terminated, she filed a complaint against CEP, and its President and its Chief Operating Officer alleging, among other things, a cause of action for retaliation in violation of the FEHA. Plaintiff asserted that CEP removed Plaintiff from her position as regional director and otherwise created a hostile working environment in retaliation for reports she made to her supervisors that "certain officers and agents of CEP" had sexually harassed female employees of CEP's management and billing subsidiaries.

Prior to trial, the trial court ruled that if Plaintiff was a bona fide partner in CEP, she did not have standing to assert a cause of action for retaliation against CEP under the FEHA because CEP was not an "employer" of its partners. The jury found that Plaintiff was a partner, and judgment was entered in favor of CEP. Plaintiff appealed, and the appellate court reversed.

In holding that Plaintiff *did* have standing to assert a cause of action for retaliation under the FEHA, the court of appeal noted that, although CEP was not Plaintiff's employer, it employed the alleged victims of the harassment she reported. If proven, such harassment would be an unlawful practice for which CEP could be held liable under the FEHA. Likewise, the FEHA proscribes retaliation against any person who opposes any unlawful practice, such as harassment. Interpreting the word "person" to include partners, such as Plaintiff, "gives the word its normal meaning," the court stated. Essentially, the court found that because the FEHA protects "any person" from retaliation, Plaintiff could assert a claim for retaliation, even though, as a partner, she could not sue the practice for employment discrimination or harassment.

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, Vanessa Maync, Christine Mueller, Hazel Ocampo or Heather Stone at (858) 755-8500; Eric De Wames, Mark Bloom, Jennifer Weidinger or Edgar Martirosyan at (310) 649-5772.

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