

EMPLOYMENT LAW UPDATE

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January 2015

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JUDICIAL

Federal

U.S. Supreme Court Holds Employees Need Not be Compensated for Time Spent Waiting for Security Screenings

In *Integrity Staffing Solutions, Inc. v. Busk*, the United States Supreme Court issued a rare, unanimous opinion in favor of employer Integrity Staffing Solutions, Inc. (“the Corporation”). The Supreme Court held that the time employees wait to go through a required security screening after their shift is not compensable under the Fair Labor Standards Act (“FLSA”) or the Portal-to-Portal Act.

The Corporation employs individuals to retrieve warehoused products and package them for delivery to Amazon customers. After each shift, employees are required to complete security screenings, whereby they must remove their wallets, keys, and belts, and walk through a metal detector. Employees wait approximately twenty-five minutes each day to go through this security screening, which is minimally staffed. A group of employees filed a class action against the Corporation, alleging violations of the FLSA and Nevada’s state labor laws. They argued that they should be compensated for time spent waiting to be screened because the screening process is intended to prevent theft and, therefore, occurs solely for the benefit of the employer.

The U.S. Supreme Court held that such time is noncompensable because the screenings are “postliminary activities.” According to the Court, security screenings are not integral or indispensable to the principal activity of assembling and packaging orders in the warehouse. If the Corporation stopped conducting security screenings, it would have had no impact on an employee’s ability to fulfill his or her duties. Therefore, the employees need not be paid for this time.

This case clarifies which types of employee activities require compensation under federal law. However, it is important to note that California courts have consistently held that hours for which an employee has been hired to do nothing or merely wait for something to happen are hours subject to the control of the employer, and constitute “hours worked.” Accordingly, a California employer would likely be required to compensate its employees for the type of screening activities (and waiting time) discussed in this case.

Ninth Circuit Affirms Summary Judgment in Favor of Employer in ADA Case

In *Curley v. City of North Las Vegas*, the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) affirmed the trial court’s decision to grant summary

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judgment in an action alleging employment discrimination and retaliation in violation of the Americans with Disabilities Act (“ADA”).

Plaintiff Michael Curley (“Curley”) was an employee of the City of North Las Vegas (“the City”) from 1996 until 2009. Throughout his employment, Curley received many oral and written reprimands for a number of issues, including verbal altercations with coworkers, damaging City property, making several threats of violence against coworkers, and making constant complaints and negative remarks about his managers and the City. In December 2008, Curley filed a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”) alleging that the City had denied his request for accommodation. In January 2009, Curley made a second request for an accommodation. Shortly after the second request, Curley was involved in another incident with a coworker, which prompted the City to place Curley on administrative leave and investigate his behavior.

As part of the investigation, the human resources department interviewed City employees about their interactions with Curley. The interviews revealed that Curley had repeatedly threatened his coworkers and their families, and that he regularly conducted personal business while at work, sometimes spending up to three hours a day on his cell phone. The City scheduled Curley for a fitness-for-duty evaluation, which assessed whether Curley could return to work and whether he was a danger to himself or others. His doctor determined that Curley was fit for duty.

At the conclusion of the investigation, the City conducted a hearing, during which the City decided to discharge Curley for: (a) nonperformance of duties due to excessive phone calls; (b) intimidation of coworkers by threats of violence; (c) conducting and soliciting personal business on work time; and (d) making disparaging remarks about his supervisors and the City. Shortly after his discharge, Curley filed a suit alleging discrimination and retaliation under the ADA. The City brought a motion for summary judgment, which the trial court granted.

In reviewing the trial court’s decision, the Ninth Circuit determined that Curley failed to raise a genuine issue of material fact as to whether the City’s reasons for discharging him were pretextual. Curley attempted to show pretext by pointing to the results of his fitness-for-duty evaluation, arguing that it created a dispute as to the credibility of the City’s stated reasons for firing him. The Ninth Circuit disagreed with Curley’s position for two reasons. First, the City explained that it fired Curley because of the threats he had made in the past, not any danger of future violence. Second, the City had put forth several other reasons for terminating his employment, which Curley did not refute.

Curley also argued that his discharge was retaliatory because the City tolerated his bad behavior for years before his recent protected activity (filing an EEOC claim and making an accommodation request). On the contrary, it appeared that the City was not aware of the full extent of Curley’s misconduct until the investigation, which revealed several additional, independently sufficient bases for Curley’s discharge (which he did not contest). Finally, Curley argued that the fact that the City fired him within two months of his protected activity was itself evidence of pretext. While close temporal proximity between a protected activity and an adverse employment action can be sufficient evidence of a causal link, the information revealed by the City’s investigation defeated any causal inference. Because Curley failed to refute the City’s legitimate explanations for the adverse employment action, summary judgment was appropriate.

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Ninth Circuit Upholds \$300,000 Punitive Damages Award in Title VII Case

In *State of Arizona v. ASARCO LLC*, the Ninth Circuit Court of Appeals (“Ninth Circuit”) reviewed a substantial award of punitive damages to a prevailing employee who was awarded nominal damages of only \$1. The plaintiff sued her employer for sexual harassment, retaliation, and constructive discharge under Title VII. The jury found the employer liable only for sexual harassment, and awarded the plaintiff \$1 in nominal damages. However, the jury also awarded her \$868,750 in punitive damages. The trial court reduced the punitive damages award to \$300,000, the statutory maximum allowed under the relevant portion of Title VII. The Ninth Circuit affirmed the trial court’s award of \$300,000, explaining that the award satisfied due process.

The Ninth Circuit noted that the U.S. Supreme Court set forth three guideposts for reviewing the constitutionality of common law punitive damages awards in *BMW of North America, Inc. v. Gore*. According to *Gore*, in assessing whether a punitive damages award comports with due process, courts must analyze: (1) the reprehensibility of the defendant’s misconduct; (2) the ratio between the actual harm suffered by the plaintiff and the punitive damages award; and (3) any civil or criminal penalties that could be imposed for comparable misconduct. The Ninth Circuit noted that these guideposts are less relevant where a statutory scheme dictates the standard for awarding punitive damages.

Awards made pursuant to Title VII’s equal protection clause comport with due process because the statute (1) sets forth the type of conduct, and the mindset, a defendant must have to be found liable for punitive damages; and (2) Title VII sets a cap on compensatory and punitive damages. These features of the statute address *Gore*’s concern that a defendant be given fair notice of the conduct that might subject it to liability, and the extent to which it may be held liable. Further, the likelihood of a plaintiff receiving an arbitrary or random award is reduced because Title VII articulates the exact degree of culpability required, and limits awards of punitive damages to between \$0 and \$300,000. The constitutional principles underlying *Gore* are therefore sufficiently addressed by Title VII and the three guideposts need not be rigidly applied. The Ninth Circuit held that the trial court did not err in awarding \$300,000 in punitive damages. It should be noted that California’s employment statute contains no such cap on damages.

California

Court of Appeal Expands “Whistleblower” Protection to Employee Mistakenly Believed to Have Reported Illegal Activity

California law prohibits employers from discharging an employee in retaliation for reporting illegal conduct. In *Diego v. Pilgrim United Church of Christ*, a California appellate court expanded that principle, ruling that the employer was liable for wrongful termination when it discharged an employee because of a mistaken belief that the employee reported illegal conduct.

Pilgrim United Church of Christ (“Pilgrim”) hired Cecilia Diego (“Diego”) to work in a preschool Pilgrim operated. In August 2011, a coworker advised Diego in confidence that she had reported a foul odor to the state agency overseeing preschool safety and licensing (“Licensing”). Thereafter, Licensing representatives conducted an unannounced site inspection of the preschool. The identity of the caller was not disclosed to Pilgrim. Pilgrim’s director questioned Diego about the report to

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Licensing, and accused Diego of being responsible. Diego denied any involvement. Three days after this exchange, Pilgrim discharged Diego for insubordination unrelated to the Licensing complaint. Diego claimed that Pilgrim's true motive for her discharge was Pilgrim's mistaken belief that she had reported the alleged violations to Licensing.

Diego sued Pilgrim for wrongful termination in violation of public policy. The trial court granted summary judgment in favor of Pilgrim because Diego had not actually reported any misconduct, and therefore could not be considered a "whistleblower." Diego appealed the trial court's ruling.

The appellate court reversed, finding that Diego's claim was "sufficiently tethered" to the fundamental public policy of encouraging employees to report illegal activity. The appellate court noted that because the chilling effect of retaliation against employees who might report illegal activity is both severe and harmful to the public, the protection afforded to employees should be broadly construed. The fact that Diego had not actually reported illegal activity did not change the fact that her discharge, if actually retaliatory, would send an explicit warning to coworkers of how Pilgrim would respond to whistleblowers. The chilling effect was the key public policy concern. The appellate court emphasized that employers are already barred from "preemptive retaliation," where an employee who is viewed as likely to report misconduct is discharged before he or she does so. The same principle applies to retaliation against employees believed to have reported illegal activity.

This case serves as a reminder to employers to implement and enforce strict policies against retaliation in the workplace. All employees, especially supervisors, must understand that reports of suspected illegal conduct, if made in good faith, are strictly protected. Further, when reports of illegal conduct are made, the employer's actions will be closely scrutinized.

Court of Appeal Narrows Scope of Wrongful Termination Claim

California law generally prohibits employers from discharging employees for engaging in actions in furtherance of the public interest. In *Ferrick v. Santa Clara University*, a California appellate court discussed that while the scope of the term "public interest" is broad, it is not boundless.

Linda Ferrick ("Ferrick") was employed as a senior administrator in the real estate department of Santa Clara University ("SCU"). Her direct supervisor was department director Nick Travis ("Travis"). According to Ferrick, Travis routinely engaged in unprofessional behavior, including sending inappropriate emails, arriving late (or not at all) to the office, taking long lunches, and drinking alcohol at work.

In September 2011, Ferrick was involved in the purchase of a truck on behalf of SCU. In processing the transaction, Ferrick engaged in behavior which Travis believed to be fraudulent. Despite Ferrick's denial of any wrongdoing, Travis terminated Ferrick's employment for "questionable finance practices." Ferrick filed a complaint against SCU, claiming that her employment had been wrongfully terminated. She claimed that she had witnessed and reported Travis embezzling funds, engaging in kickback schemes, evading taxes, misdirecting public monies, making false representations in real estate deals, violating state realtor laws, and threatening public health and safety (by driving a SCU golf cart without a driver's license). Ferrick claimed that she had made reports of Travis' alleged wrongdoing to Travis' supervisor and, based upon these reports, her employment had been terminated.

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SCU challenged Ferrick's complaint, alleging that no public policy was implicated by her conduct. The trial court found that because SCU is a private university, Ferrick's alleged complaints did not inure to public policy, as they had no effect on the public at large. Ferrick appealed.

The appellate court confirmed that Travis' alleged embezzlement and driving of an SCU golf cart without a driver's license failed to affect the public at large. The court similarly held Travis' alleged evasion of taxes, as pled, did not implicate any statute. However, Travis' alleged engagement in a kick-back scheme could have amounted to bribery, and therefore did inure itself to public policy, as his actions potentially violated the California Penal Code. Accordingly, Ferrick could proceed with her lawsuit on that narrow basis.

This case illustrates that courts will look closely at the specific conduct alleged in claims of wrongful termination in violation of public policy to examine whether a true public interest is implicated.

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