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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *February 2015*

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JUDICIAL

Federal

First Circuit Court of Appeals Protects Employer in ADA Claim Where Employee Fails to Engage in Interactive Process

The Americans with Disabilities Act ("ADA") mandates that employers engage in the interactive process to make reasonable accommodations for disabled employees. When they fail to do so, employers are frequently faced with adverse judgments in court. In *EEOC v. Kohl's Department Stores*, however, the employer received a rare summary judgment victory when the First Circuit Court of Appeals found that the employee failed to engage in a good faith interactive process.

Kohl's Department Store ("Kohl's") is a nationwide retail chain. Pamela Manning ("Manning") was a full-time sales associate, working approximately forty hours per week. While her shifts always occurred during normal store hours, the timing of the shifts varied. Manning was occasionally scheduled to work "swing shifts," which required her to work a night shift one day followed by a morning shift the next day.

Manning suffers from type 1 diabetes. In March 2010, she informed her supervisor that her erratic schedule was negatively affecting her health. Manning provided a doctor's note requesting that she be scheduled for "predictable" day shifts. Kohl's responded that although it could not give her a steady schedule, it would refrain from scheduling her for swing shifts. Unsatisfied with Kohl's response, and despite her manager's suggestion to consider alternate options, Manning quit.

A few days later, Manning's manager called her in a second attempt to discuss alternatives. Manning declined. Manning filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), alleging disability discrimination in violation of the ADA and constructive discharge. The EEOC brought the instant lawsuit on Manning's behalf.

Kohl's filed a motion for summary judgment, arguing that Manning's claims should be dismissed. The trial court agreed, holding that, despite attempts by Kohl's to discuss the requested accommodations, Manning had failed to engage in the interactive process in good faith, and a reasonable person in Manning's position would not have felt compelled to resign. The appellate court affirmed the ruling.

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In light of *Kohl's*, employers are reminded of their duty to engage in the interactive process in good faith. Courts will closely scrutinize the employer's attempts to communicate with the employee about reasonable accommodations, and a different court may have reached a different conclusion.

California

California Supreme Court Holds Security Guards Must Be Compensated For On-Call Time

In *Mendiola v. CPS Security Solutions, Inc*., the California Supreme Court held that security guards must be compensated for time they spend on-call. The plaintiffs, security guards at a construction site, filed a class action lawsuit alleging that they were entitled to compensation for on-call time. The guards worked a sixteen-hour shift on weekdays, comprised of an eight-hour work day followed by eight hours of on-call duty. Their weekend shifts were twenty-four hours, comprised of an eight-hour work day followed by sixteen-hours on-call. The on-call hours were unpaid, except in those instances in which guards were required to conduct an investigation or wait for relief to arrive.

The California Supreme Court determined that this on-call time constituted hours worked and was therefore compensable. In making its decision, the Court noted that the guards were under the employer's control, and that the on-call time was spent primarily for the employer's benefit. The Court further relied on the fact that the guards were required to reside in worksite trailers during their on-call time, and were expected to respond to calls immediately and in uniform. Although the guards could engage in limited personal activities during their on-call shifts, they could not leave the worksite or entertain nonemployee visitors, have pets, or consume alcohol inside the trailers. The Court also found it significant that the employer would have been in breach of its service agreement with the construction company had a guard not been at the worksite during specific hours, which demonstrated that the presence of the guards was integral and a benefit to the employer's business.

Notably, the Court declined to apply federal law, which permits agreements to exclude sleep time from hours worked, and disapproved a California Court of Appeal decision that applied the federal rule in a similar context.

Because the facts of each situation will differ, and this decision applies only with respect to employees covered by Industrial Welfare Commission Wage Order 4, the case has limited applicability. Employers who utilize on-call workers should consult with legal counsel to ensure that such employees are properly compensated.

Court of Appeal Clarifies Procedure for Authenticating Electronic Signature on Arbitration Agreement

In *Ruiz v. Moss Bros. Auto Group, Inc.*, Moss Bros. ("Moss") petitioned the trial court to compel arbitration of Ernesto Ruiz's ("Ruiz") claims. Moss based its petition on an arbitration agreement Ruiz allegedly signed electronically. The trial court denied Moss' petition on the ground that Moss failed to establish that an agreement to arbitrate existed. The court of appeal affirmed.

According to the Uniform Electronic Transactions Act, an electronic signature has the same legal effect as a handwritten signature. However, all writings must be

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authenticated in order to be received into evidence. Thus, where a party seeks consideration by a court of an electronically signed document, the party must show that the electronic signature was the act of the alleged signer.

Moss failed to show that the electronic signature was an act attributable to Ruiz even though the arbitration agreement contained the typewritten name "Ernesto Zamora Ruiz," next to which was typed a date ("9/21/2011") and a time ("11:47:27 AM"). Moss relied on the declaration of its business manager, who merely asserted that Ruiz signed the arbitration agreement electronically, that the same arbitration agreement is presented to all employees, and that each employee is required to log into the employer's computer system using a unique identification and password to review and sign the form.

The business manager did not explain how the typed signature, or the date and time next to it, came to be placed on the arbitration agreement, or how she inferred that the typewritten name, date, and time were the acts of Ruiz. According to the court, Moss should also have explained: (1) that the electronic signature of "Ernesto Zamora Ruiz" could only have been placed on the document by a person using Ruiz's unique ID and password; (2) that "9/21/2011" and "11:47:27 AM" indicated the time and date the signature was made; (3) that all employees were required to use their unique ID and passwords to log into Moss' system and sign electronic forms; and that, (4) the signature was made by Ruiz at the date and time specified. In the absence of such evidence, the business manager's declaration was insufficient to support a finding that the electronic signature belonged to Ruiz.

Employers should consider the *Ruiz* case when deciding whether to require or permit employees to electronically sign documents. While it is possible to authenticate an employee's electronic signature, doing so requires additional steps that are generally unnecessary with a written signature. Though the benefits of maintaining an electronic signature mechanism may ultimately justify its use, employers should be prepared to properly authenticate such signatures whenever an electronically signed document is submitted to a court.

Court of Appeal Holds Employer Waived its Right to Compel Arbitration

In *Bower v. Inter-Con Security Systems, Inc.*, a California Court of Appeal held that the employer waived its right to compel arbitration by engaging in litigation conduct inconsistent with that right.

Brian Bower ("Bower") was hired to work as an armed security guard by Inter-Con Security Systems, Inc. ("Inter-Con"). Bower signed an arbitration agreement at the commencement of his employment, and a second arbitration agreement (which superseded the first) one year later. The second agreement contained a clause in which Bower agreed not to assert class claims in arbitration.

After Bower was discharged he filed a class action complaint alleging Labor Code violations. However, instead of filing a petition to compel arbitration, Inter-Con filed an answer to the complaint. The parties also exchanged and responded to written discovery requests. Inter-Con subsequently filed a petition to compel arbitration pursuant to the second arbitration agreement. The trial court denied Inter-Con's petition, noting that Inter-Con had propounded and responded to substantial discovery related to the class claims, which was inconsistent with Inter-Con's position that Bower's individual claims should be arbitrated and the class claims dismissed.

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In affirming the trial court's order, the appellate court held that a party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration. According to the appellate court, the evidence demonstrated that Inter-Con had knowledge of its right to arbitrate when it listed the arbitration agreement as an affirmative defense in its answer. Inter-Con further engaged in discovery and settlement negotiations related to the class claims, which was inconsistent with its petition for arbitration and class waiver argument. Additionally, Bower was prejudiced when he incurred litigation costs and was required to respond to discovery that would have been unavailable in arbitration.

This case confirms that employers should typically assert their right to arbitration at the outset of a case in order to avoid unintentional waiver. It is always a good idea for employers to have their arbitration agreements, including class and/or representative action waivers, reviewed by counsel to maximize their enforceability.

Court of Appeal Follows *Iskanian* and Holds PAGA Waiver is Unenforceable

In *Montano v. The Wet Seal Retail, Inc.*, a California Court of Appeal held that a mutual waiver of a claim under the Private Attorneys General Act ("PAGA") was unenforceable in light of the California Supreme Court's previous ruling in *Iskanian v. CLS Transportation.*

Elizabeth Montano ("Montano"), an employee of The Wet Seal Retail, Inc. ("Wet Seal"), filed a wage and hour class action against her employer in October 2011. Montano alleged that Wet Seal failed to provide meal and rest breaks, pay all regular and overtime wages, and provide accurate wage statements. The complaint also included a representative PAGA claim.

Wet Seal filed a motion to compel arbitration pursuant to an arbitration agreement that included both a class action waiver and a PAGA waiver. The arbitration agreement also contained a non-severability clause, which rendered the agreement null and void if the waivers were deemed to be unenforceable. The trial court denied Wet Seal's motion to compel, finding that the entire arbitration agreement was void because the PAGA waiver was unenforceable.

Wet Seal appealed, arguing that a rule prohibiting PAGA waivers - as espoused in *Iskanian* - is preempted by the Federal Arbitration Act ("FAA").[1] The appellate court followed *Iskanian* and held that PAGA waivers are invalid under California law. Moreover, since the arbitration agreement contained a non-severability clause, the entire arbitration agreement was null and void.

The enforceability of PAGA waivers and the extent to which the *Iskanian* decision is preempted by the FAA remain unsettled legal issues. Unless and until the United States Supreme Court rules on these issues, employers should be wary of including PAGA waivers in their arbitration agreements. If an employer chooses to include such a waiver, it should consider removing any non-severability language so as to avoid nullifying the entire agreement should the PAGA waiver be held unenforceable.

[1] In *Iskanian,* the California Supreme Court held that class action waivers in employment arbitration agreements are enforceable but PAGA waivers are not.

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Court of Appeal Denies Class Certification Under *Brinker* Standard

Since the California Supreme Court issued its landmark 2012 decision in *Brinker Restaurant Corp. v. Superior Court*, California's appellate courts have issued a series of rulings analyzing class certification standards. In *Koval v. Pacific Bell Telephone Co.*, a court of appeal extended the *Brinker* line of cases, holding that class certification was inappropriate where certain corporate policies, albeit sufficiently uniform, were not applied consistently.

Plaintiff Frank Koval ("Koval") brought a wage and hour class action on behalf of himself and a class of non-exempt field service technicians against Pacific Bell Telephone Company ("Pacific Bell"). Among other things, the plaintiffs alleged that Pacific Bell failed to relieve the class members from their work responsibilities during meal and rest periods. The parties agreed that Pacific Bell maintained facially compliant meal and rest break policies. However, Pacific Bell also utilized hundreds of guidelines outlining best practices for field technicians. Seven of these guidelines allegedly placed restrictions on field technicians during their meal and rest periods. Critically, the supervisors verbally provided these guidelines to the field technicians.

At the class certification hearing, the trial court ruled that because the policies were provided verbally - and inconsistently - there was no common set of facts applicable to the class. Accordingly, certification was denied. Citing *Brinker*, the trial court concluded that the relevant inquiry for commonality as to a disputed workplace policy was whether it was both uniform and consistently applied. The court found that while the guidelines at issue were sufficiently uniform, the variations in how they were disclosed and utilized precluded class certification. Koval appealed the ruling.

The court of appeal affirmed, holding that the trial court had correctly examined the case under *Brinker*. The appellate court noted that while *Brinker* held that "a uniform policy consistently applied" can support certification, it is not required. Rather, the trial court retains discretion to determine whether Koval's theory of liability was amenable to class treatment. Here, the inconsistent application of the protocols by different supervisors was a sufficient basis for the trial court to deny certification.

This decision signals a minor break in the post-*Brinker* line of cases supporting class certification based on employers' written policies. Although the impact of this case may be limited based on its facts, the decision suggests that appellate courts may show increased deference to trial courts in examining the manageability of putative class actions. Employers should review their wage and hour policies to confirm that they are legally compliant, and should further ensure that such policies are enforced consistently.

Court of Appeal Discusses Employer's Duty to Provide Reasonable Accommodation and Engage in the Interactive Process

In *Swanson v. Morongo Unified School District*, a California Court of Appeal held that the trial court erred in granting the employer's summary judgment motion, finding that the plaintiff had sufficiently raised triable issues of material fact with respect to her claims for disability discrimination, failure to provide reasonable accommodation, and failure to engage in the interactive process.

Lauralyn Swanson ("Swanson") was an elementary school teacher with over thirty years of teaching experience. In August 2006, Morongo Unified School District ("the District") hired Swanson as a technology/reading specialist and computer laboratory teacher. She received excellent performance evaluations. The school's new principal ("Principal Lowe") changed Swanson's teaching assignment for the 2007/2008 school year.

In the summer of 2007, Swanson was diagnosed with breast cancer and underwent a mastectomy. Swanson advised Principal Lowe of her health condition and expressed concern about lacking the necessary training to excel in her new placement. Swanson attended some training before taking a medical leave to undergo chemotherapy from October 2007 to March 2008.

For the 2008/2009 school year, Principal Lowe assigned Swanson to teach fifth grade. Swanson objected, arguing that her health condition would prevent her from doing the necessary preparation for a new assignment. Swanson requested a vacant second grade teaching position, as she previously taught that grade at another school. However, Principal Lowe assigned Swanson to teach kindergarten. Swanson expressed her concern that teaching kindergarten-age children would pose health risks because her immune system had been compromised during treatment. Principal Lowe did not change her assignment. In September 2008, Swanson was hospitalized for eight days with pancreatitis, pneumonia, and liver issues that she attributed to her kindergarten teaching assignment. She was not able to return to teaching until December 2008. Thereafter, Principal Lowe gave her a poor performance rating, and provided her the choice of resigning or participating in a remediation program. Swanson chose the latter. However, before the remediation plan was complete, the District voted not to renew Swanson's contract for the 2009/2010 school year.

Swanson filed suit, alleging that the District: (1) discriminated against her because she had breast cancer and took a medical leave of absence; (2) failed to reasonably accommodate her disability; and (3) failed to engage in the interactive process with her. The trial court granted summary judgment in favor of the District on all of Swanson's claims. Swanson appealed.

The appellate court held that the trial court erred in granting summary judgment as to Swanson's discrimination claim. Swanson argued that the District set her up for failure by giving her a difficult assignment without the resources required to succeed. The appellate court held there was sufficient evidence to create a triable issue on Swanson's theory.

As to Swanson's reasonable accommodation claim, the appellate court found that the District failed to meet its burden to show that the second grade position sought by Swanson was not available or was not a reasonable accommodation. The court of appeal also stressed that an employer has a duty to reassign a disabled employee if an already funded, vacant position at the same level exists, and that a disabled employee seeking reassignment is entitled to preferential consideration over other applicants. In this case, the District gave the vacant second grade teaching position to a non-disabled teacher when Swanson should have received preferential consideration.

The court of appeal also found that the District failed to show that it continued to engage in dialogue regarding accommodations. The appellate court emphasized that an employer has a continuous obligation to engage in the interactive process in good faith. Despite the District's past efforts to communicate with Swanson and identify

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reasonable accommodations, the District did not prove that it engaged in ongoing dialogue with Swanson regarding the second grade position.

This case serves as a reminder of employers' obligations to engage in the interactive process and provide reasonable accommodation(s) to disabled employees. Employers should have a system in place to document all reasonable accommodation requests, and should engage in an ongoing dialogue with disabled employees.

Court of Appeal Holds Exhaustion of Administrative Remedies Is Not a Prerequisite to Employee's Retaliation Claim

In *Satyadi v. West Contra Costa Healthcare District*, a California Court of Appeal confirmed that a plaintiff is not required to exhaust administrative remedies before bringing suit for retaliation in violation of Labor Code section 1102.5.

After her discharge, Carolyn Satyadi ("Satyadi") filed suit claiming she had been fired in retaliation for reporting and refusing to participate in her employer's alleged illegal activities, in violation of Labor Code section 1102.5. Satyadi's employer argued that the case should be dismissed because Satyadi failed to exhaust her administrative remedies by first filing a complaint with the Labor Commissioner. The trial court agreed and dismissed Satyadi's action. Satyadi appealed.

While her appeal was pending, the Legislature amended the Labor Code to specify that employees need not exhaust administrative remedies before filing suit for violations of the Labor Code unless the specific provision under which the suit is brought expressly requires exhaustion. On appeal, the court reviewed the pre-existing legal authority on the issue of exhaustion of administrative remedies and determined that even before the Labor Code amendment, California law did not require employees to exhaust administrative remedies before filing suit for an alleged violation of section 1102.5. Accordingly, the court reversed the trial court's judgment and remanded the matter for further proceedings.

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, Heather Stone, Ryan Nell, Lauren Bates, Jennifer Suberlak or Shannon Finley at (858) 755-8500; or Jennifer Weidinger, Tristan Mullis or Andrew Chung at (310) 649-5772.

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