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Court of Appeal Affirms Order Denying Employer's Motion to Compel Arbitration

In *Pinela v. Neiman Marcus Group, Inc.*, a California Court of Appeal upheld the trial court's order denying a motion to compel arbitration. Neiman Marcus Group argued that an arbitrator, not a court, must determine questions of arbitration agreement enforceability, and that the subject agreement was enforceable. The trial court held that the arbitration agreement at issue, including the clause delegating authority to the arbitrator to determine the agreement's enforceability, was unenforceable because it was unconscionable.

On appeal, the appellate court confirmed that the agreement was a contract of adhesion because it was presented on a take-it-or-leave-it basis, and Pinela's consent thereto was a condition of her employment. The court also found that the agreement was substantively unconscionable due to the inclusion of three provisions: (1) a complicated choice-of-law provision that restricted Pinela's ability to make certain legal arguments; (2) a provision shortening the statute of limitations on Pinela's claims; and (3) a provision allowing the arbitrator to order Pinela to pay certain fees and costs.

The court agreed with Pinela's argument that the Texas choice-of-law provision limited Pinela's ability to attack the agreement as a whole as unconscionable, and disabled California substantive law, which would undermine Pinela's wage and hour claims. Additionally, the provision shortening the statute of limitations was contrary to California law. Finally, the fee and cost provision unfairly burdened Pinela's exercise of her statutory rights.

The court concluded that both the delegation clause and the agreement as a whole were unconscionable and therefore unenforceable.

Pinela is yet another California decision that muddies the waters surrounding arbitration agreements. Employers are advised to consult with legal counsel to increase the likelihood that their arbitration agreements will be enforced should an employee bring a claim.

Unpublished Opinion Demonstrates Viability of Discrimination and Harassment Claims Brought by Non-Minorities

In *Duffy v. City of Los Angeles*, a California Court of Appeal upheld a sizeable jury verdict in favor of a Caucasian male who brought harassment and discrimination claims against his former employer.

James Duffy (“Duffy”), a white male, was hired as a part-time gardener by the City of Los Angeles (“the City”) in 1991. In 1995 he was promoted to a full-time position, which he held until his retirement in 2010. Between 2001 and 2006, Duffy worked under the direction of senior parks maintenance supervisor Abel Perez (“Perez”), who is Mexican American. Throughout the years leading up to Duffy’s retirement, Perez subjected Duffy to repeated and ongoing harassment and discrimination based on Duffy’s race.

The history of Perez’s harassing and discriminating conduct is both lengthy and undisputed. Perez regularly referred to Duffy using derogatory names, and noted to Duffy and others that he hated “all white people.” Perez consistently assigned Duffy to sub-optimal job placements, often without necessary assistance, and subjected Duffy to discipline for unknown or improper reasons. Following a workplace injury in 2004 which significantly affected Duffy’s mental cognition, Perez began harassing Duffy based on his disability.

Even after Perez’s transfer to another position, Perez’s harassment and discrimination of Duffy continued. The improper conduct did not cease until Duffy accepted an early retirement package from the City which granted him, in exchange for a release of claims arising from the retirement agreement, a \$15,000 separation payment and an enhanced lifetime monthly retirement allowance.

In February 2011, Duffy filed suit against the City, alleging harassment, discrimination, and retaliation based on his race and disability. The City filed a motion for summary judgment, arguing primarily that Duffy’s claims were barred as a matter of law by his separation agreement. The motion was denied and the matter was permitted to proceed to trial. Given the tremendous evidence in support of Duffy’s claims, a jury returned a verdict in favor of Duffy, awarding him nearly \$3.3 million in damages, plus attorneys’ fees. The City appealed, arguing that the trial court should have granted its motion for summary judgment.

The City relied on the language of the early retirement agreement, arguing that the release of “claims resulting in any way from the City’s offering and [Duffy’s] acceptance” of the early retirement package should be broadly construed to amount to a general release of all claims. The appellate court instead sided with the trial court, holding that the release was limited to matters arising specifically from the early retirement agreement. Claims for discrimination, harassment, and retaliation were therefore not included.

The City must now decide whether to accept the verdict (and pay the award) or seek review by the California Supreme Court.

To date, the opinion in *Duffy* has not been published and therefore has no precedential value. Nonetheless, the case demonstrates the viability of

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discrimination and harassment claims brought by Caucasian individuals. The *Duffy* ruling also serves as a reminder to California employers that release language in separation agreements will be closely scrutinized. Unless the language in such release makes it abundantly clear that the parties intend to release *all* potential future claims by an employee, an employer may still be subject to future litigation over claims not covered by the agreement.

Court of Appeal Allows Tolling of Statute of Limitations for Class Claims

In *Falk v. Children’s Hospital Los Angeles*, a California appellate court held that, under certain circumstances, the filing of a class action tolls the statute of limitations for claims subsequently brought by other class members.

Michelle Falk (“Falk”) worked as a licensed vocational nurse at Children’s Hospital Los Angeles (“Children’s Hospital”) from March 2006 to August 2006.

During May 2007, a class action complaint was filed by Thomas Palazzolo on behalf of “all non-exempt or hourly paid persons.” The *Palazzolo* action alleged, among other things, that Children’s Hospital failed to pay overtime, denied employees meal and rest breaks, failed to reimburse for business expenses, and failed to provide proper wage statements. During December 2012, Falk filed another class action alleging claims for failure to reimburse for business expenses, failure to pay all wages earned, failure to provide proper wage statements, failure to provide meal and rest breaks, and waiting time penalties.

In the *Falk* action, the trial court granted summary judgment in favor of Children’s Hospital on the ground that Falk’s claims were time-barred. Falk appealed, arguing that the statute of limitations for her claims was tolled when the *Palazzolo* class action was filed pursuant to the California Supreme Court’s previous holding in *American Pipe*: under limited circumstances, if class certification is denied, the statute of limitations is tolled from the time of commencement of the suit to the time of denial of certification for all purported members of the class who either make timely motions to intervene in the surviving individual action, or who timely file individual actions.

Here, however, the *Palazzolo* case ended because Palazzolo failed to state viable causes of action; the court made no determination as to the propriety of class certification. Falk contended that where putative class members are, through no fault of their own, left without an action to pursue their claims, and certification was not denied based on a reason that would be applicable to a subsequent action, *American Pipe* tolling should apply.

The appellate court agreed, emphasizing, however, that tolling does not apply unless two underlying policy considerations are met: (1) protection of efficiency and economy in litigation as promoted by the class action device; and (2) effectuation of the purpose of the statute of limitations to protect a defendant from unfair claims. Crucial to the second consideration is that the initial class action must have provided the defendant with sufficient notice of the substantive claims brought against it, as well as the number and identities of potential plaintiffs.

The appellate court held that while the *Palazzolo* action was generically pled, it gave sufficient notice to Children's Hospital regarding the wage claims at issue as well as the potential plaintiffs. Although the allegations in the *Falk* action were more specific, the claims raised were substantially similar to those alleged in *Palazzolo*. Applying *American Pipe* tolling, the appellate court found that Falk's claims were tolled from the date the *Palazzolo* action commenced until the date the appellate court remanded the case to the trial court. As a result, Falk's claims with a one-year statute of limitations were time-barred, but Falk's claims with three- and four-year statutes of limitations were still viable.

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Thursday, November 5, 2015

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More details to come, visit our website for updated information.

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, 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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