PETTITKOHN
PETTIT KOHN INGRASSIA & LUTZ

EMPLOYMENT LAW UPDATE

Relationship-Driven Results *May 2016*

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

JUDICIAL

Federal

Ninth Circuit Declines to Expand Employer Liability Under the ADA

In *Mendoza v. The Roman Catholic Archbishop of Los Angeles*, a bookkeeper brought a disability discrimination claim under the Americans with Disabilities Act ("ADA") against her employer, a small parish. The bookkeeper alleged that her employer engaged in discrimination by failing to offer her a full-time position upon her return from a ten-month leave of absence. The church argued that its pastor performed plaintiff's duties while she was on leave and determined that the role could be fulfilled by a part-time employee. The church offered the bookkeeper a part-time role upon her return from leave, which she declined.

The trial court granted summary judgment in favor of the parish and the Ninth Circuit Court of Appeals ("Ninth Circuit") affirmed, concluding that the plaintiff failed to create a triable issue of material fact with respect to her contention that the church's legitimate reasons for denying her the full-time role were pretextual.

Importantly, the Ninth Circuit opined that the U.S. Supreme Court's decision in *EEOC v. Abercrombie & Fitch Stores, Inc*. (2015) 135 S. Ct. 2028, which was brought under Title VII of the Civil Rights Act, does not apply to ADA disparate treatment claims. In *Abercrombie*, the Supreme Court held that a plaintiff could succeed on a failure to accommodate claim under Title VII by showing that the plaintiff's need for an accommodation was a factor motivating the employer's adverse decision, even if the employer did not have knowledge of the employee's limitations. The Ninth Circuit reiterated that "knowledge" remains an element of ADA claims, and that a plaintiff suing under the ADA must still demonstrate that a discriminatory reason more likely than not motivated the employer's decision.

Mendoza does not change existing law. However, it is a favorable decision for employers since the Ninth Circuit declined to expand the reach of Title VII's broad discrimination standards to claims brought under the ADA.

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

San Diego | Los Angeles | Phoenix

www.pettitkohn.com

California

Family Matters: Court of Appeal Holds Employer Has Duty to Accommodate Employee with Disabled Son

In *Castro-Ramirez v. Dependable Highway Express, Inc*, a California appellate court held that an employer has a duty to provide reasonable accommodations to an employee with an associational disability under the Fair Employment and Housing Act ("FEHA"). Plaintiff Luis Castro-Ramirez ("Castro-Ramirez") worked as a truck driver for Defendant Dependable Highway Express, Inc. ("DHE"). Castro-Ramirez's son needed a kidney transplant and required daily home dialysis treatments, and Castro-Ramirez was the only member of his family trained to operate the dialysis machine. Castro-Ramirez informed his supervisors that he needed to end his shifts early enough to get home for his son's treatments. While the schedules for all of the drivers varied, Castro-Ramirez's supervisors, including Winston Bermudez ("Bermudez"), accommodated the request as often as they could. Castro-Ramirez typically worked from 9:00 or 10:00a.m. to 7:00 or 8:00p.m. While the time for his son's treatments differed based on his son's condition, the treatments generally needed to begin between 7:00 p.m. and 12:00a.m. Throughout his employment by DHE, Castro-Ramirez performed his duties satisfactorily.

Castro-Ramirez received a new supervisor who went by the name of Junior, who was instructed to accommodate Castro-Ramirez's schedule. When Junior did not, Castro-Ramirez complained to Bermudez that his hours were changed, and that he was unable to tend to his disabled son. Bermudez told Junior that he needed to schedule Castro-Ramirez for earlier shifts, and Junior said that he would "work on that." Castro-Ramirez was taken off of his typical shift, and when Castro-Ramirez asked why, Junior informed him that the customer did not want him to make the deliveries and did not like his work. This was not true. DHE's customer had actually sent Bermudez an email requesting their "regular driver," and this email was forwarded to Junior. DHE's customer even called Castro-Ramirez and asked him why he was no longer making its deliveries. Despite the customer's requests, Junior did not schedule Castro-Ramirez for that route. Instead, Junior scheduled Castro-Ramirez for increasingly later shifts.

When Castro-Ramirez was scheduled for a shift that did not start until 12:00p.m., he asked Junior for another route because he would not be able to administer his son's dialysis. Castro-Ramirez also requested to take the day off if another route was not possible. Junior told Castro-Ramirez that if he did not complete the assigned route, he would be discharged. Castro-Ramirez stated, he could not work that shift. Junior told Castro-Ramirez to return the next day to sign termination paperwork. Castro-Ramirez returned to work for the next three days because he wanted to work, and refused to sign the document stating that he had resigned. DHE processed the termination as a resignation because Castro-Ramirez refused his assignment.

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

Castro-Ramirez sued his former employer for wrongfully terminating him for requesting an accommodation to care for a disabled relative under the FEHA. The trial court dismissed all of his claims on summary judgment because it found that there was no evidence that the termination decision was based on Castro-Ramirez's association with his child, or in retaliation for his scheduling requests. Castro-Ramirez appealed the decision.

The Court of Appeal reversed. Although no published California case had determined whether employers have the duty under the FEHA to provide reasonable accommodations to an applicant or employee who is associated with a disabled person, the appellate court held that the FEHA creates such a duty. The court reasoned that "physical disability" is defined in the FEHA to include the person who is associated with a person who has, or is perceived to have, a physical disability. Thus, the FEHA forbids discrimination based on a disability, and also forbids discrimination based on a person's association with another who has a disability.

This is the first California case to hold that, pursuant to the FEHA, employers have a duty to accommodate employees and applicants associated with a person with a disability. This is in stark contrast to the federal Americans with Disabilities Act ("ADA"), pursuant to which courts have consistently held that an employer has no duty to accommodate an employee who is not personally disabled. While it remains to be seen if this case will be appealed to the California Supreme Court, employers need to be keenly aware of this new affirmative duty and its implications when making hiring, scheduling, and other personnel decisions.

California Court of Appeal Strikes Down Creative Rest Period Policy

In *Rodriquez v. EME*, a California Court of Appeal ruled that an employer's provision of back-to-back rest periods was improper. Plaintiff Juan Rodriguez ("Plaintiff") filed a class action lawsuit against E.M.E., Inc. ("EME"), a metal finishing company engaged in painting and processing parts for the aerospace industry. Plaintiff's class action complaint focused primarily on a claim that EME's provision of rest periods violated California law.

Plaintiff's complaint was filed on behalf of non-exempt employees on both of EME's two shifts. The first shift lasted from 7:30a.m. until 4:00p.m., while the second shift lasted from 3:30p.m. until 11:30p.m. During the first shift, employees were provided with a twenty minute paid rest period at approximately 9:30a.m. and a thirty minute unpaid meal period at approximately 12:30p.m. During the second shift, an unpaid thirty minute meal period began at approximately 5:30p.m., while a paid twenty minute rest period commenced at 8:00p.m.

EME's meal and rest break policies were developed with both the company and its employees' interests in mind. As the process of shutting down a painter's work station was a time intensive one, EME benefitted by having its employees only take a single rest period. The employees benefitted as a longer break allowed time to cook and eat a full meal before returning to work.

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Employment & Labor

Personal Injury

Product Liability

Professional Liability

Real Estate Litigation

Restaurant & Hospitality

Retail

Transactional & Business Services

Transportation

Plaintiff argued that EME's scheduling of two consecutive ten minute rest periods violated California law. Generally, California law mandates that employees be provided with one paid ten minute rest period for every four hours worked or major fraction thereof. Based on the fact that its employees were provided with twenty minutes of paid rest time per eight hours of work, EME filed a motion for summary judgment. The trial court granted the motion, agreeing that EME had satisfied its legal obligation regarding rest breaks. Plaintiff appealed.

The California Court of Appeal focused on the decision in *Brinker Restaurant Corp. v. Superior Court* to determine whether or not summary judgment was proper. Among other factors, the court noted *Brinker's* allowance that rest breaks should fall on either side of a meal break but that "other factors that render such scheduling impracticable may alter this general rule."

In support of its position, EME provided numerous declarations noting that EME employees received a full twenty minutes of paid break time and that practical considerations both benefitted employees and rendered the provision of two separate breaks infeasible. In opposition, Plaintiff provided numerous declarations in support of an argument that the considerations argued by EME were insufficient to demonstrate the exceptional circumstances necessary to justify placement of both rest periods on the same side of a meal period.

Applying *Brinker*, the court held that EME was required to provide rest periods on either side of a meal period "insofar as practicable." As evidence provided by Plaintiff was sufficient to create a triable issue of fact as to whether the provision of separate rest breaks was practicable, summary judgment was improper. The Court of Appeal therefore overturned the trial court's decision.

In light of *Rodriquez*, California employers that utilize unique rest break schedules should take a closer look at their reasons for doing so. Unless there is a significant basis upon which to provide rest periods which are not on either side of a meal period, employers should generally err on the side of caution and follow *Rodriquez's* guidance on this issue.

Court of Appeal Clarifies When and How to Authenticate Electronic Signatures in the Context of a Petition to Compel Arbitration

In *Espejo v. Southern California Permanente Medical Group*, a California Court of Appeal determined that the employer sufficiently established the authenticity of the employee's electronic signature on an arbitration agreement, and that the declaration setting forth the facts underlying the electronic signature process was timely filed. The plaintiff, Jay Espejo ("Plaintiff"), was a doctor formerly employed by defendant Southern California Permanente Medical Group ("Defendant"). Following his discharge, Plaintiff filed a lawsuit alleging wrongful termination in violation of public policy and violation of whistleblower statutes; he claimed he was unlawfully fired for reporting inappropriate medical practices. In response, Defendant filed a petition to compel arbitration pursuant to arbitration agreements appearing in employment agreements and dispute resolution policies (collectively referred to as "the arbitration agreement") that Plaintiff had electronically signed upon his hire.

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

A few weeks after Defendant filed its moving papers, a California appellate court issued a ruling in *Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836. In *Ruiz*, the court set forth a step-by-step process for authenticating an electronic signature to prove that an electronic signature was "the act of" the person alleged to have signed the document. In response to *Ruiz*, Defendant submitted a supplemental declaration supplying additional details regarding the electronic review and signature process for the arbitration agreement. In his opposition to the petition, Plaintiff argued that Defendant failed to properly authenticate his electronic signature on the arbitration agreement and that Plaintiff did not specifically recall signing that document.

The appellate court concluded that Defendant successfully authenticated Plaintiff's electronic signature. Defendant detailed its security precautions regarding transmission and use of an applicant's unique user name and password, and the steps an applicant must take in order to place his or her name on the signature line of the arbitration agreement. The supplemental declaration explained that, according to this procedure, Plaintiff's name could only have been placed there by someone using Plaintiff's unique user name and password. The court of appeal determined that these details satisfied the requirements set forth in *Ruiz* and established that the electronic signature appearing on the arbitration agreement was "the act of" Plaintiff.

The *Espejo* opinion confirms the importance of carefully articulating how the electronic signature is attributable to the responding party—if the petitioner cannot establish this "critical factual connection," there will be no basis for concluding that an agreement to arbitrate exists.

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, 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.