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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *April 2015*

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I.

AGENCY UPDATE

Department of Labor Issues Final Rule Revising Definition of "Spouse" Under FMLA

The Department of Labor has issued a final rule revising the definition of "spouse" under the Family and Medical Leave Act ("FMLA"). Previously, the FMLA determined spousal status based on the employee's place of residence, which effectively deprived same-sex employees from qualifying as a spouse if they lived in a jurisdiction where same-sex marriages were not recognized. Under the new rule, eligible employees in legal same-sex marriages will be able to take FMLA leave to care for their spouse, regardless of where they live. Employers must provide FMLA leave for eligible employees in marriages that were valid in the jurisdiction in which they were entered into, whether those marriages are same-sex, opposite-sex, or common law. The new rule went into effect on March 27, 2015.

II.

JUDICIAL UPDATE

Federal

Ninth Circuit Finds Self-Serving Declarations Sufficient to Overcome Summary Judgment

In *Nigro v. Sears, Roebuck & Co.*, the Court of Appeals for the Ninth Circuit ("Ninth Circuit") reversed a trial court's decision to dismiss a disability discrimination case on summary judgment, holding that the plaintiff's self-serving declaration was sufficient to create a triable issue of material fact.

Anthony Nigro ("Nigro") was employed by Sears, Roebuck and Co. ("Sears") and claimed that he requested accommodations for his ulcerative colitis. After his discharge, Nigro filed suit against Sears, claiming that Sears discriminated against him based on his disability, failed to properly engage in the interactive

process, failed to provide him reasonable accommodations, and wrongfully discharged him.

Sears filed a motion for summary judgment. The trial court granted the motion, holding that Nigro did not prove that he was subjected to an adverse employment action because of his disability. According to the trial court, Nigro's only evidence supporting causation was his own "uncorroborated and self-serving" declaration. Nigro appealed.

On appeal, the Ninth Circuit emphasized that any facts asserted by a party opposing the summary judgment motion are assumed to be true if they are supported by affidavits or other evidentiary material. In his declaration, Nigro claimed that during a telephone conversation, his store manager said, "you're not getting paid and you're not going to be accommodated." The Ninth Circuit reasoned that although Nigro's declaration and deposition testimony were uncorroborated and self-serving, the evidence was sufficient to establish a genuine dispute of material fact with respect to the issues of discriminatory animus and causation. The Ninth Circuit explained that a plaintiff's self-serving declaration is admissible. While the declaration may have limited weight without corroboration, the magnitude of that weight is a question for the trier of fact. Accordingly, the trial court erred in disregarding Nigro's declaration. Notably, the Ninth Circuit stressed that it is relatively easy for a plaintiff in a discrimination case to defeat a summary judgment motion because "the ultimate question is one that can only be resolved through a searching inquiry-one that is most appropriately conducted by a fact-finder, upon a full record."

This case illuminates one of the many difficulties that employers face in discrimination lawsuits. Because the likelihood of attaining an order of summary judgment is low and the costs and risks associated with trial are high, many employers are forced to settle unmeritorious claims.

California

Court of Appeal Affirms Summary Judgment in Favor of Employer in Disability Accommodation Case

In *Nealy v. City of Santa Monica*, a California Court of Appeal affirmed the trial court's grant of summary judgment for an employer in a case involving claims for disability discrimination, failure to provide reasonable accommodation, failure to engage in the interactive process, and retaliation.

Tony Nealy ("Nealy") worked for the City of Santa Monica ("City") as a solid waste equipment operator. After injuring his knee at work, Nealy took multiple leaves of absence. The City reassigned Nealy to a groundskeeper position. After a second injury, Nealy returned to light duty work with restrictions. Nealy requested that he be placed in an equipment operator position. The City conducted several meetings with Nealy and his attorney and hired a disability consultant to determine whether Nealy could perform the essential functions of the equipment operator job. The City concluded that Nealy's restrictions inhibited him from performing the job. The City contemplated reassigning Nealy to a vacant position. However, Nealy was not selected for reassignment because he did not possess the

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minimum qualifications for the job. After exploring these options, the City concluded that it could not accommodate Nealy. The City thereafter extended Nealy's leave of absence while it applied for disability retirement for him, effectively ending his employment.

The appellate court found that the City lawfully terminated Nealy's employment. Notably, the court rejected Nealy's argument that the City could have restructured his former position so that he would not have to kneel or lift heavy objects. The court concluded that such a modification was not "reasonable" because kneeling and lifting heavy objects were essential functions of the job, and employers need not eliminate essential functions in considering accommodations. The court additionally rejected the proposition that the City could have reassigned Nealy because he was not qualified for any vacant positions available at the time of his request for accommodation. The court confirmed that the law does not require employers to provide an indefinite leave of absence so as to allow for possible future vacancies.

This case serves as an important reminder that when a disabled employee requests a reasonable accommodation, the employer should thoroughly evaluate the essential functions of the employee's job and regularly communicate with the employee throughout the interactive process. Employment separation should be the last resort, and an option only contemplated after all accommodation and reassignment possibilities have been exhausted.

Court of Appeal Upholds Class Action Waiver, Invalidates PAGA Waiver

In *Franco v. Arakelian Enterprises, Inc.*, a California Court of Appeal upheld an employment arbitration agreement's class action waiver, but ruled that the agreement's waiver of claims under the Private Attorneys General Act ("PAGA") was unenforceable. The employee ("Franco") filed a class action wage and hour lawsuit against his employer ("Arakelian"). Franco's complaint also included a PAGA claim, brought on behalf of himself and similarly aggrieved employees.

Arakelian moved to compel Franco's individual claims to arbitration and dismiss the class and PAGA claims. The trial court denied the motion finding that Franco would be unable to enforce his statutory rights if the class action waiver was upheld because few plaintiffs' attorneys would be willing to take on such a small value case. The court of appeal disagreed, holding that U.S. and California Supreme Court precedent mandates that class action waivers be enforced. The appellate court noted that in *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court held that class proceedings interfere with the fundamental attributes of arbitration and thus are inconsistent with and preempted by the Federal Arbitration Act ("FAA"). Meanwhile, the California Supreme Court held in *Iskanian v. CLS Transportation* that the FAA preempted a state law rule categorically barring class action waivers. Therefore, the class action waiver was enforceable and Franco was precluded from pursuing his class claims in any forum.

On the other hand, the appellate court followed *Iskanian* in holding that Franco's right to bring a representative PAGA claim could not be waived. The court determined that the rights conferred by the PAGA are "intended primarily to

advance the public's interest in deterring employers from violating labor laws established for public benefit," and thus, enforcing a private agreement preventing an employee from enforcing the state's interest would violate public policy. The court of appeal reasoned that this holding was not preempted by the FAA because the FAA aims to ensure enforcement of *private* agreements to arbitrate. According to the court, a PAGA action is a *public* dispute between the employer and the state agency on whose behalf the employee acts. The appellate court therefore instructed the trial court to enforce the class action waiver except as to Franco's PAGA claim.

The decision in *Franco* solidifies the California Supreme Court's ruling in *Iskanian*. Employers should be cognizant of the fact that state courts will likely continue to strike down PAGA waivers unless and until *Iskanian* is nullified by legislation or the U.S. Supreme Court.

Court of Appeal Holds "Non-Mandatory" PAGA Waiver Unenforceable

In *Securitas Security Services USA, Inc. v. Superior Court*, a California Court of Appeal held that all waivers of Private Attorneys General Act ("PAGA") claims are unenforceable, even if they are voluntary and not required as a condition of employment.

In June 2011, Denise Edwards ("Edwards"), an employee of Securitas Security Services USA, Inc. ("Securitas"), signed an acknowledgment of receipt of Securitas' dispute resolution agreement (the "Agreement"). The Agreement, which required Edwards to arbitrate all claims arising from her employment, included a waiver of class and representative claims. Although Securitas provided all employees thirty days in which to opt out of the agreement, Edwards did not do so. In 2013, Edwards brought a class action lawsuit against Securitas in state court, alleging various wage and hour violations. She also alleged a representative claim under the PAGA.

Securitas asked the trial court to: 1) compel Edwards to arbitrate her individual claims; 2) dismiss and/or sever and stay her class claims; and 3) dismiss and/or stay her PAGA claim. The trial court granted Securitas' motion to compel arbitration. However, it ruled that Edwards' PAGA claim could not be waived, and that because the Agreement's class action waiver provision illegally sought to eliminate or abridge Edwards' right to litigate her PAGA claim, that entire provision was invalid. Accordingly, the trial court ordered the parties to proceed with arbitration as to Edwards' entire complaint, including her class and PAGA claims.

Securitas appealed, arguing that the California Supreme Court's decision in *Iskanian v. CLS Transportation* only invalidates PAGA waivers within mandatory arbitration agreements. Securitas maintained that because Edwards had the express right to opt out of the Agreement and declined to do so, she voluntarily consented to the PAGA waiver. The appellate court disagreed, finding that *Iskanian*'s holding required it to conclude that the PAGA waiver was unenforceable.

The appellate court then analyzed the entire Agreement and determined that the provision waiving class and representative claims could not be severed from the remainder of the document (per the mutual intent of the parties). As such, the

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Agreement was unenforceable in its entirety. The appellate court therefore directed the trial court to vacate its order and enter a new order denying Securitas' motion to compel arbitration.

Court of Appeal Holds that Arbitrator, Not Trial Court, May Decide Arbitrability of Employee Claims

While the arbitrability of claims is a decision typically left to the courts, parties are permitted to agree to an alternate arrangement. In *Universal Protection Service, LP v. Superior Court*, a California Court of Appeal proved its willingness to enforce this tenet of contract law by denying an employer's petition to require the trial court, not an arbitrator, to decide the arbitrability of an employee's claims.

In 2008, Floridalmo Franco ("Franco") signed an arbitration agreement with her employer, Universal Protection Service ("Universal"). The agreement stated that "any and all disputes or claims" related to Franco's employment would be conducted "in accordance with the National Rules for the Resolution of Employment Disputes set forth by the American Arbitration Association" ("AAA"). In March 2014, Franco filed an arbitration claim with the AAA on behalf of herself and other similarly situated employees. Her claim included eleven causes of action primarily focused on alleged violations of the California Labor Code. It also included a prayer for recovery of civil penalties under the Private Attorneys General Act.

Universal filed a motion in state court seeking judicial declarations that: 1) the trial court, not an arbitrator, should decide whether a class, collective, or representative action was available under the arbitration agreement; and 2) the arbitration agreement limited Franco to the prosecution of claims on an individual basis. Franco responded by moving to compel arbitration, arguing that the AAA rules incorporated by reference in the arbitration agreement made it clear that the arbitrator, not the court, was responsible for determining gateway issues regarding the arbitrability of claims.

The trial court noted that while the court typically determines issues of arbitrability, this general rule can be superseded by clear evidence of the parties' desire for the arbitrator to rule on such issues. Here, while the arbitration agreement did not *expressly* address the issue, its adoption of the AAA rules was sufficient and controlling. Those rules, in conjunction with the AAA Supplemental Rules for Class Arbitrations, provide that an arbitrator is responsible for application and interpretation of the scope of an arbitration agreement. In light of this fact, the trial court denied Universal's motion. The court of appeal agreed with the lower court's ruling. Applying general tenets of contract law, the appellate court held that the parties' clear intention was to incorporate the provisions of the AAA rules.

Universal serves as yet another reminder to California employers to be wary of the potential effects of arbitration agreements. Here, despite an agreement's silence on the particular issue of arbitrability, a reference to an external set of rules resulted in an unintended consequence. Employers should review their arbitration agreements to ensure that all of the provisions contained therein, both explicit and implicit, are desirable and appropriate.

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Court of Appeal Holds Liability for Failure to Prevent Harassment Requires a Finding of Actionable Harassment

In *Dickson v. Burke Williams, Inc*., a California Court of Appeal held that an employer cannot be held liable for failing to prevent harassment and discrimination under the Fair Employment and Housing Act ("FEHA") when an employee cannot establish that illegal harassment or discrimination occurred.

Domaniqueca Dickson ("Dickson") filed a lawsuit against her former employer, Burke Williams, Inc. ("Burke Williams"), alleging a series of claims under the FEHA arising out of her work as a massage therapist. Dickson specifically alleged that she was subjected to sexual harassment and discrimination by customers, and that Burke Williams failed to take adequate steps to prevent that conduct.

At trial, the court instructed the jury that with regard to Dickson's claim for harassment, she was required to establish both that she had been harassed based on sex, and that the harassment was "severe or pervasive." However, the trial court instructed the jury that with regard to Dickson's claim for failure to prevent harassment or discrimination, Dickson's burden was simply to establish that she had been subjected to harassment or discrimination based on sex (*i.e.*, she was not required to prove that such conduct was "severe or pervasive"). The jury concluded that harassment had occurred, but was not severe or pervasive. Relying on the trial court's instructions, the jury found for Dickson on her claim for failure to prevent harassment, even though it found that no liability existed on the underlying claim for harassment. Burke Williams appealed.

The appellate court reversed the jury's conclusion, holding that liability for failure to prevent harassment cannot exist where no actionable harassment occurred. As the appellate court explained, it would be improper to provide a legal remedy for failure to prevent actions that were not unlawful. Moreover, although the approved jury instructions for the failure to prevent harassment claim did not explicitly state that the alleged harassment needed to be "severe or pervasive," they required that the jury be instructed on the elements of harassment, which included the "severe or pervasive" language. The appellate court extended the ruling to hold that an employer cannot be held liable for failing to prevent discrimination where the employee cannot establish liability on the underlying discrimination claim.

This decision is a positive development for employers, as it affirms a strong defense to a claim for failure to prevent harassment or discrimination. However, the decision also serves as a reminder that employers have an affirmative duty to prevent harassment and discrimination in the workplace. Failure to meet this duty can create an independent cause of action for employees. It is therefore imperative that employers implement and enforce zero-tolerance harassment and discrimination policies.

Court of Appeal Rules Applicant's Race Discrimination Lawsuit Not Barred by After-Acquired Evidence

In *Horne v. District Council 16 International Union of Painters and Allied Trades*, a California Court of Appeal found that summary judgment in a racial

discrimination case must be reversed where the trial court based its decision on after-acquired evidence that the applicant was not qualified for the job.

Raymond Horne ("Horne"), an African-American male, worked as a glazier and served as a member and officer of his local union for many years. Horne was also a member of a union organization ("District Council 16"). In 2009, Horne applied for an organizer position with District Council 16, without success. The position was filled by a white male. In February 2010, Horne again applied for an organizer position. Horne was not hired, and the position was again filled by a white male.

In September 2010, Horne filed a complaint of discrimination under the Fair Employment and Housing Act ("FEHA"), alleging that District Council 16's decision not to hire him as a union organizer was based on his race. During discovery, Horne admitted that he was convicted of a crime in 1997, which resulted in Horne serving time in prison and a revocation of his citizenship rights. After Horne was discharged from parole in May 2003, his citizenship rights were restored, though District Council 16 disputed this. At the time of its February 2010 decision not to hire Horne, District Council 16 did not know about Horne's conviction. After learning about the conviction through discovery, District Council 16 sought to dismiss Horne's lawsuit on the ground that he was statutorily disqualified in 2010 from the union organizer position, because Section 504(a) of the federal Labor Management Reporting and Disclosure Act prohibits anyone who does not have full citizenship rights from serving as a labor organizer. Accordingly, District Council 16 moved for, and the trial court granted, summary judgment on the ground that Horne was unable to establish that he was qualified for the job for which he applied. Horne appealed.

On appeal, Horne argued that the court should apply the California Supreme Court's decision in *Salas v. Sierra Chemical Co.*, suggesting that "the doctrines of after-acquired evidence and unclean hands are not complete defenses to a worker's claim under FEHA, although they do affect the availability of remedies." Relying on the holding in *Salas*, the appellate court reversed the trial court's order granting summary judgment. After-acquired evidence is irrelevant during all phases of the three-stage burden-shifting approach designed to establish liability, and is only relevant in the damages phase of a FEHA proceeding. Allowing after-acquired evidence to serve as a complete defense at the liability stage would eviscerate the public policies embodied in the FEHA by allowing an employer to engage in employment discrimination with total impunity.

This case serves as a reminder that although after-acquired evidence cannot be used to defeat an applicant or employee's prima facie case of discrimination, it can serve to limit the remedies available.

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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