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Relationship-Driven Results *December 2017*

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Federal

Ninth Circuit Clarifies Minimum Wage Calculation Standard

In *Douglas v. Xerox Business Services,* the Ninth Circuit Court of Appeals ("Ninth Circuit") clarified that the Fair Labor Standards Act ("FLSA") permits minimum wage compliance to be measured by weekly per-hour averages.

Krysty Douglas and Tysheka Richard (collectively, "Plaintiffs") were employed by Xerox Business Services ("Xerox") as call center customer service representatives. Plaintiffs were primarily tasked with handling incoming calls, but also performed some outgoing calls as well as follow-up and administrative tasks.

In a system that the Ninth Circuit referred to as "mind-numbingly complex," Plaintiffs earned a wide range of rates of pay depending on the particular task being performed at a given time. For example, rates earned by Plaintiffs for received calls varied between $0.15 and $0.25 per minute ($9.00 and $15.00 per hour) depending on a number of factors such as customer satisfaction and call length. As a result of this system, Plaintiffs often earned several different rates of pay over the course of each work day.

At the end of each workweek, Xerox tabulated all of the various rates (and corresponding amounts of time) earned by Plaintiffs throughout the week and divided that total by the number of hours worked during the week. If the rate was above minimum wage, the employee received the calculated wage. If the rate was below minimum wage, the employee's pay was increased to ensure that minimum wage was earned for that workweek.

Plaintiffs filed a class action suit against Xerox on behalf of themselves and other similarly situated employees, claiming that Xerox's complicated payment system violated the FLSA minimum wage and overtime provisions. Specifically, Plaintiffs argued that compliance with FLSA wage and hour requirements was necessary on an hour by hour basis and that averaging over a longer period of time to ensure compliance is improper.

Xerox's motion for summary judgment, which argued the acceptability of computing an average rate of pay on a workweek basis for the purpose of satisfying minimum wage requirements, was ultimately granted by the district court. Plaintiffs appealed. In its analysis, the Ninth Circuit noted that federal law requires

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the payment of an hourly minimum wage, but is silent with regard to the period over which that rate of pay is calculated to ensure compliance. Ultimately, however, the court ruled that Xerox's policy of confirming minimum wage payment on a weekly, rather than daily, basis was acceptable.

While *Douglas* was decided in the Ninth Circuit, its decision was based on federal minimum wage law and does not particularly apply its analysis to California law. It therefore remains to be seen whether this decision will be extended to minimum wage requirements in this state. In the meantime, California employers should take this opportunity to examine their own payment practices to ensure that potential loopholes are closed, as the *Douglas* decision highlights the increased willingness of parties to litigate matters of first impression in search of additional areas of wage and hour recovery.

California

Court of Appeal Holds Allegations of Sexual Harassment by Non-Employee Can Proceed

In *M.F. v. Pacific Pearl Hotel Management LLC*, a California appellate court held that an employee stated sufficient facts to maintain a claim for sexual harassment against her employer for an incident perpetrated by a non-employee third-party.

Plaintiff M.F. ("M.F.") worked as a housekeeper for Pacific Pearl Hotel. The morning of the incident, the hotel's engineering manager saw a drunk man, who was not a guest of the hotel, walking around the hotel property with a beer in his hand (the trespasser). The engineering manager did not ask the trespasser to leave, nor report the trespasser's presence to housekeeping management or to the police department. The trespasser approached housekeepers cleaning hotel rooms three times while he walked around the hotel property.

On the first occasion, the trespasser then made sexually harassing comments to a housekeeper, showed her a handful of $5 bills, and offered the housekeeper money in exchange for sexual favors. A maintenance worker overheard the trespasser's sexually harassing comments and helped the housekeeper persuade the trespasser to leave the room.

On the second occasion, the trespasser tried to enter a hotel room on the third floor, and offered the housekeeper who was cleaning the room; money for sexual favors. The housekeeper reported the incident to housekeeping management. The housekeeping manager broadcasted the trespasser's activities and location to other housekeeping managers. The housekeeping manager then went to one of the buildings to check on the safety of the housekeepers. However, the housekeeping manager did not go to the building where the second incident occurred because M.F.'s supervisor was assigned to that building. M.F.'s supervisor checked the first floor of the building, but did not check the second floor, where M.F. was working.

On the third occasion, the intoxicated trespasser went to the hotel room M.F. was cleaning. The trespasser shut M.F. in the hotel room and proceeded to

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knock her unconscious, assault, and rape her. Approximately two hours after the trespasser started assaulting M.F., a housekeeping employee knocked on the hotel room door to deliver a crib. The trespasser answered the door and told the employee to leave the crib outside the room. The employee left the crib and did not inquire as to M.F.'s whereabouts even though her housekeeping cart was in the hallway. A short time later, the trespasser left the room, and M.F. contacted the police. M.F. was hospitalized for weeks as a result of the incident.

M.F. sued Pacific Pearl Hotel for hostile work environment sexual harassment and for failure to prevent sexual harassment. She alleged that Pacific Pearl Hotel violated the FEHA by allowing the trespasser to sexually harass M.F. and by failing to take reasonable steps to prevent the sexual harassment from occurring. The trial court dismissed the complaint, and M.F. appealed.

The appellate court held that Plaintiff had stated sufficient facts to state a cause of action for sexual harassment and failure to prevent sexual harassment. The appellate court found that the employer may have been put on notice that sexual harassment may occur after it became aware that the trespasser was aggressively propositioning housekeeping employees for sexual favors. Once an employer is informed of the sexual harassment, the employer must take adequate remedial measures. The employer's obligation to take prompt corrective action requires (1) that temporary steps be taken to deal with the situation while the employer determines whether the complaint is justified, and (2) that permanent remedial steps be implemented by the employer to prevent future harassment. The appellate court also found the fact that the trespasser's initial harassment was not directed at M.F. does not preclude Pacific Pearl Hotel from having responsibilities under the FEHA toward her. The court reasoned that if an employer knows a particular person's abusive conduct places employees at unreasonable risk of sexual harassment, the employer cannot escape responsibility to protect a likely future employee victim merely because the person has not previously abused that particular employee. The more egregious the abuse and the more serious the threat of which the employer has notice, the more the employer will be required under a standard of reasonable care to take steps for the protection of likely future victims.

This case is a reminder for employers to be proactive about threats of sexual harassment from non-employees. If an employer is on notice that a third party is sexually harassing an employee, the employer has a duty to reasonably act to prevent sexual harassment. Employers should ensure that their sexual harassment prevention policies and training discuss sexual harassment perpetrated by non-employees.

Court of Appeal Holds Mandatory Arbitration Agreement Unenforceable Due to Unfairness in Employer's Internal Dispute Resolution Program

In *Baxter v. Genworth North America Corporation*, a California Court of Appeal invalidated an employer's mandatory arbitration agreement, finding that certain restrictions contained therein created both procedural and substantive unconscionability.

Maya Baxter ("Baxter") began working for AssetMark Investment Services, Inc. ("AssetMark") in 2001. In 2006, Genworth North America

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Corporation ("Genworth") acquired AssetMark. To remain employed, Baxter was required to agree to Genworth's internal dispute resolution program in conjunction with Genworth's Arbitration Agreement ("the Agreement"). This program had four mandatory steps: (1) a report to an immediate supervisor and the human resources department; (2) a report to a higher-level manager and human resources; (3) mediation; and then (4) arbitration.

In 2013, Genworth advised Baxter that it was eliminating her position and terminating her employment. In response, Baxter filed a lawsuit alleging that her discharge constituted discrimination and retaliation because she had complained of illegal conduct and taken a leave of absence protected under the California Family Rights Act. Genworth filed a motion to compel arbitration pursuant to the agreement Baxter had previously signed. However, the trial judge denied the motion, finding Genworth's Agreement procedurally and substantively unconscionable. Genworth appealed that ruling.

The Court of Appeal affirmed the trial judge's ruling, finding that the Agreement was unenforceable. In doing so, the court focused on a set of restrictions imposed by Genworth that it deemed unfair. The court concluded that the Agreement was procedurally unconscionable because it was required for employment with Genworth. On the more complex issue of substantive unconscionability, the court found that the constraints Genworth placed on employees were too onerous to be upheld. For example, Genworth's Agreement set limits on the discovery the parties could undertake and precluded employees from contacting Genworth personnel (though Genworth still could). Moreover, the progressive steps in Genworth's Agreement shortened the time within which employees could bring their claims to (i.e., shortened the statute of limitations), and interfered with employees' ability to pursue their rights with the Department of Fair Employment & Housing.

This case highlights the need for employers to carefully analyze any restrictions on employees' rights when drafting their arbitration agreements. Protocols that impede an employee's ability to litigate or investigate his or her case may make the agreement substantively unconscionable and unenforceable. A thorough assessment of an arbitration agreement's fairness is therefore essential, and employers are advised to have their arbitration agreements reviewed by an attorney.

Court of Appeal Explains the Difference Between Unenforceable Pre-Dispute Waivers of PAGA Claims and Enforceable Post-Dispute Waivers

In *Julian v. Glenair, Inc.*, the defendant employer ("Glenair") sought to enforce an arbitration agreement distributed to employees after the filing of a class action lawsuit that also asserted a claim under the Private Attorneys General Act ("PAGA"). Due to unique procedural circumstances and a strict reading of the California Supreme Court's opinion in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, the Court of Appeal refused to enforce the agreement.

In February 2014, an employee named Roxane Rojas filed a class action and PAGA lawsuit against Glenair ("the *Rojas* action"). A few months later, in

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July 2014, Glenair distributed an arbitration agreement to its hourly employees, which stated that, if the employees did not opt out of the arbitration agreement within 30 days, their continued employment with Glenair manifested their consent to arbitration of employment claims. The arbitration agreement also contained a description of the *Rojas* action, including the PAGA claim, and explained that failure to opt out would preclude the employee from participating in that lawsuit. The Julian sisters ("Plaintiffs") were given a copy of the arbitration agreement and failed to opt out.

Several months later, the plaintiff in the *Rojas* action dropped her PAGA claim. Soon after, Plaintiffs filed their own lawsuit asserting only a PAGA claim, after having notified the Labor and Workforce Development Agency ("LWDA") of the alleged Labor Code violations. Glenair moved to compel arbitration of Plaintiffs' claim on the ground that they had signed a voluntary post-dispute arbitration agreement. The trial court denied the motion, and the appellate court affirmed.

In *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, the California Supreme Court held that pre-dispute waivers of PAGA claims are unenforceable because they "disable one of the primary mechanisms for enforcing the Labor Code." According to the Supreme Court, "employees are free to choose whether or not to bring PAGA actions when they are aware of Labor Code violations. But it is contrary to public policy for an employment agreement to eliminate this choice altogether by requiring employees to waive the right to bring a PAGA action before any dispute arises." (*Iskanian*, 59 Cal.4th at 383.) In *Julian*, the Court of Appeal analyzed the boundary between an unenforceable pre-dispute waiver and an enforceable post-dispute waiver. Per the Court of Appeal, the following factors are relevant to determining whether the pre-dispute/post-dispute boundary has been crossed: (1) the employee's capacity to make a knowing and voluntary choice of forum based on adequate awareness of the Labor Code violations supporting a PAGA claim; and (2) the absence of public policy considerations attendant to the loss of the judicial forum.

The appellate court concluded that the boundary is crossed only when the employee is authorized to commence a PAGA action as an agent of the state—that is, only after the statutory requirements for commencing a PAGA action have been satisfied by the employee at issue. Before that point, the employee has submitted to allegations of Labor Code violations to the state (or has done so, but is still waiting to hear whether the state will resolve the matter itself); thus, before exhausting the statutory requirements, an employee does not *know* which violations he or she is authorized to assert. Accordingly, enforcing a waiver secured at that time would "effectively dictate a choice of forum the employee did not knowingly make."

The appellate court also explained that enforcing a waiver obtained before the employee had satisfied the PAGA pre-filing requirements would also impair PAGA's enforcement mechanism. According to the court, the state retains control of the right underlying the employee's PAGA claim until the statutory requirements are exhausted. Allowing an employee to waive the judicial forum before the state has given up its right to pursue the PAGA claim itself would contravene the state's control over this right.

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In this case, Glenair distributed the arbitration agreement to Plaintiffs in July 2014, long before Plaintiffs submitted notice of the alleged Labor Code violations to the LWDA in April 2015. Thus, the arbitration agreement constituted an unenforceable pre-dispute waiver.

The *Julian* decision severely limits what constitutes a valid post-dispute PAGA waiver. Given that an employee likely has already retained counsel by the time he or she submits the statutorily-required notice to the LWDA of his or her intention to pursue PAGA penalties, it is highly unlikely that the employee's attorney will permit the employee to agree to the arbitral forum.

To Recover PAGA Penalties for the Violation of Labor Code Section 226, Employees Need Not Prove They Suffered "Injury" from a "Knowing and Intentional" Violation

A California Court of Appeal recently made it even easier for an employee to recover penalties under the Private Attorneys General Act ("PAGA") for paystub violations. In *Lopez v. Friant & Associates, LLC*, plaintiff Eduardo Lopez ("Lopez") filed a complaint against his employer ("Friant") asserting a single cause of action for civil penalties under PAGA. Lopez's lawsuit centered on Friant's alleged failure to comply with Labor Code section 226, subdivision (a), which mandates the inclusion of certain information on each and every itemized wage statement provided to the employee. Specifically, Lopez claimed that that his paystubs violated subdivision (a)(7) of Section 226, which requires employers to include the last four digits of the employee's social security number or an employee identification number on the paystub.

Friant argued that Lopez could not prevail on his PAGA claim because he could not prove that he suffered any injury resulting from a "knowing and intentional" violation of Section 226, subdivision (a), as required by Section 226, subdivision (e). Labor Code section 226, subdivision (e) provides:

> An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000)….

The Court of Appeal determined that Lopez was not required to prove the elements of Section 226, subdivision (e) in order to recover PAGA penalties for the violation of subdivision (a). According to the appellate court, PAGA permits employees to recover "civil penalties" on behalf of the state, but does *not* authorize the recovery of damages and restitution. Section 226, subdivision (e) expressly provides for "actual damages" — not a "civil penalty." Thus, the requirement that an employee suffer injury from a knowing and intentional violation of subdivision (a) only applies to an action for statutory damages under subdivision (e), not to a

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PAGA claim for civil penalties. Therefore, to prevail on his PAGA claim, Lopez merely had to show that subdivision (a) was violated — in other words, that required information was missing from his wage statement.

Court of Appeal Holds Workers' Compensation Decision Bars Employee's FEHA Claim

In *Ly v. Fresno*, a California Court of Appeal held that an employee could not pursue a claim under the Fair Employment and Housing Act ("FEHA") in connection with work-related injuries for which he also sought a remedy under workers' compensation law.

Plaintiff Va Ly ("Ly"), a Laotian correctional officer with the County of Fresno ("County"), alleged he was subject to discrimination, harassment, and retaliation based on his national origin. He filed a workers' compensation claim with the Department of Industrial Relations, Workers' Compensation Appeals Board, claiming psychological injuries from the harassment and discrimination. He then sued the County, alleging violations of the FEHA stemming from the same allegations of harassment and discrimination.

At Ly's workers' compensation hearing, he testified that he was subjected to racial discrimination and harassment when his requests to swap shifts with other officers were denied; his assignment was changed; and a supervisor called him "the Swap King," which led to teasing by other officers. The judge found the denial of Ly's swap request "was not a discriminatory action and was made as a good faith personnel action." The judge also found the reassignments were due to business necessity and were not discriminatory actions. The judge ordered that Ly take nothing.

After the workers' compensation decision, the County moved for summary judgment in the civil case, contending that the workers' compensation findings precluded the FEHA claims. The trial court granted the motion. Ly appealed.

The Court of Appeal agreed with the trial court. It acknowledged that racial or national origin discrimination and harassment are not normal incidents of employment, so the workers' compensation exclusive remedy provisions do not apply to such claims. However, the court recognized that an injured employee may recover for psychiatric injury via a workers' compensation claim. In short, a claim may be made under the FEHA or under workers' compensation statutes.

If a person pursues the claim in both forums, a decision in one may foreclose the opportunity to purse the claim in the other. The doctrine of claim preclusion prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Under this doctrine, a valid final judgment in the defendant's favor constitutes a bar to any further suit on the same cause of action.

Ly contended claim preclusion did not apply because the two proceedings did not involve the same cause of action and arose from different "primary rights"—in the workers' compensation context, the right to prompt compensation for work-related injuries regardless of fault; and in the FEHA context, the right to

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be "free of invidious employment discrimination." However, the appellate court disagreed, finding that Plaintiff sought the vindication of a single primary right: the right to work in an environment free of discrimination, harassment, and retaliation. Therefore, once Ly elected to pursue a remedy in the workers' compensation forum, that became the exclusive forum for recovery in connection with Ly's alleged injuries.

Court of Appeal Affirms Jury Verdict on Police Officer's Retaliation Claim

In *Perez v. City of Westminster et al.*, a California Court of Appeal affirmed a jury verdict in the employees' favor on a retaliation claim.

Jose Flores, Ryan Reyes, and Brian Perez, three police officers of Latino descent (collectively, "Plaintiffs"), sued their employer and, after a nine-day jury trial, won. The officers alleged that the City of Westminster ("the City" or "the Department"), as well as current and former Westminster Police Chiefs ("the Chiefs"), discriminated and retaliated against them in violation of the California Fair Employment and Housing Act ("FEHA") and 42 U.S.C § 1981. Specifically, Plaintiffs claimed they were subjected to adverse employment actions because of their race and national origin. The jury awarded the officers a total of $3,341,000.00 in general and punitive damages, and the court awarded $3,285,673.00 in attorney's fees, $40,028.49 in expert fees, and $18,684.12 in costs. The City and the Chiefs appealed numerous aspects of the trial, judgment and the resulting award of fees and costs.

Officer Flores was hired by the City of Westminster in 2002, after serving for ten years as a police officer with the City of South Gate. From 2004 to 2009, Officer Flores applied for, but did not receive, multiple detective positions. In addition, he was called names by other officers, including "Dirty Sanchez," "Jorge," and "Silver" or "Silverback," and he was told that the gray streak in his hair was his "INS mark." In July 2010, Officer Flores filed an administrative complaint with the California Department of Fair Employment and Housing ("DFEH") in which he alleged discrimination on the basis of national origin. After that, he did not apply for further special assignments. On December 6, 2011, eighteen months after filing his first complaint, Officer Flores filed a second complaint with the DFEH alleging retaliation.

Officer Flores cited five incidents to show he was retaliated for his discrimination complaint:

(1) In November 2010, five months after Officer Flores filed his discrimination complaint, Chief Waller removed him from the list of available Field Training Officers ("FTO") (officers chosen to perform the collateral duty of mentoring and training new recruits);

(2) In June 2011, following an internal affairs ("IA") investigation, Officer Flores and Reserve Officer Phan received a written reprimand for failing to take reasonable action while on duty. The reprimand stemmed from a domestic violence call in April 2011 to which the officers did not respond, instead returning to the station to book evidence from a different crime scene. Although Officers Flores and Phan were the closest unit to the scene

of the domestic violence incident, the dispatcher sent three other cars, and Officer Flores assumed those cars were closer than he was and that he did not need to respond. The incident resulted in serious injuries to the victim, and the perpetrator fled.

(3) In July 2011, Officer Flores received a supervisor's log entry[1] for a remark he made to a 14-year-old boy during a domestic violence call. As Officer Flores was working to deescalate the situation, he instructed the boy to go inside, whereupon the boy asked: "When did you become my dad?" Officer Flores responded: "I would not want to be your dad." The remark was deemed "mean spirited and discourteous," "not necessary," and "disrespectful."

(4) In June 2012, Officer Flores received a supervisor's log entry for his accidental discharge of a taser during testing.

(5) In late 2013 or early 2014, Officer Flores was interviewed as part of an IA investigation into the failure to report criminal and/or policy violations, and was asked whether he was surreptitiously recording co-workers or knew of anyone doing so.

Before filing his first DFEH complaint, Officer Flores had never been disciplined as a police officer or the subject of an IA investigation during his tenure with the City.

The City contended that none of its conduct with respect to Officer Flores constituted adverse employment actions. However, the court affirmed that actions that are "reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion fall within the reach of [FEHA's retaliation provisions]." Thus, at the very least, the jury could infer that Officer Flores' removal from the FTO list, written reprimand, and negative log entries would have been reviewed as part of any decision whether or not to award him special assignments or promote him, and would have harmed his prospects.

To establish a prima face case of retaliation, Officer Flores was also required to show the adverse employment actions were linked to his protected activity. It was undisputed that the City knew of Officer Flores' DFEH complaint. And the first alleged adverse action by the City occurred in November 2010, five months after the DFEH filing, when Officer Flores was removed from the FTO list. The court affirmed that a jury could conclude that the relatively short timing demonstrated the necessary causal link between Officer Flores' discrimination complaint and the subsequent adverse employment actions he suffered.

Furthermore, the evidence presented by Officer Flores permitted a finding of intentional retaliation by the City. For example, the jury heard testimony that workplace policies were inconsistently applied to Officer Flores — specifically, that Officer Flores was disciplined for his failure to respond to a domestic violence call while other officers who also failed to respond escaped discipline; and that

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1 A supervisor's log entry documents verbal counseling given to an officer by a supervisor.

Officer Flores received supervisor's log entries for discourteous language and for discharging a taser, while others did not.

This case highlights the fact that an employer must tread carefully after an employee makes a DFEH complaint, as a broad spectrum of conduct (not just termination or demotion) could be deemed to adversely affect the material terms of the employee's employment and therefore be considered "retaliatory." Also, the mere close proximity between the complaint and adverse action can demonstrate the requisite "causal connection" for a retaliation claim. Lastly, it is imperative that employers apply workplace policies consistently among employees to avoid retaliation and discrimination claims. Employers are advised to consult with legal counsel before taking any action against an employee who has filed a DFEH complaint.

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