PETTITKOHN
PETTIT KOHN INGRASSIA LUTZ & DOLIN

EMPLOYMENT LAW UPDATE

Relationship-Driven Results *April 2018*

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.

San Diego | Los Angeles | Phoenix

www.pettitkohn.com

JUDICIAL

Federal

Federal Courts Provide Clarity On Indefinite Leaves of Absence

It is a familiar pattern to many employers: an employee takes a medical leave of absence that is subsequently extended for an indefinite period of time. Does the law require an employer to accommodate this indefinite leave of absence? Two recent federal cases provide much needed (employer-friendly) guidance.

In *Markowitz v. UPS*, the Ninth Circuit Court of Appeals ("Ninth Circuit") affirmed the trial court's grant of summary judgment in favor of the employer where the employee essentially requested an indefinite leave of absence. The plaintiff, a part-time UPS employee, took a leave of absence under the Family and Medical Leave Act ("FMLA") for mental health issues. The employee briefly returned to work after exhausting her FMLA leave, and then took a "personal" leave of absence. The employee's physician eventually extended this leave so that the personal leave lasted over a year. During this leave, at least two physicians concluded that the employee was totally disabled and unable to work.

UPS discharged the employee after she had been on leave for approximately one year. The employee then sued UPS under the Fair Employment and Housing Act ("FEHA") for disability discrimination, failure to accommodate, failure to engage in the interactive process, and wrongful termination.

In affirming the trial court's grant of summary judgment in favor of UPS, the Ninth Circuit ruled that UPS did not violate the law because the employee could not perform her job even with reasonable accommodations. That is, the employee was not a "qualified individual with a disability" entitled to leave protection because there was no accommodation that would allow her to perform her job. The *Markowitz* court also noted that the FEHA does not require employers to provide employees with an indefinite leave of absence. Stated differently, an indefinite leave of absence is not a "reasonable accommodation" under the FEHA. The court also noted that UPS had engaged in the interactive process with the employee by granting multiple extensions of her personal leave of absence. The court ruled that UPS had no further obligation to provide a reasonable accommodation until the employee indicated that she would be able to return 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

The facts in *Ruiz v. Paradigmworks Group, Inc.*, a federal district court case from the Southern District of California, were similar. In that case, the employee became unable to perform her essential job duties following an accident. As an accommodation, the employer provided her three consecutive leaves of absence that totaled fourteen weeks. After the employee requested an additional six weeks of leave without any assurance of her return-to-work date, the employer discharged her. The employee then sued for disability discrimination and related claims under state and federal law.

The *Ruiz* court ruled in favor of the employer. The court noted that there was "no dispute" that the employee was totally disabled and that "no accommodation would have allowed her to perform her job." The court held that the law did not require the employer to extend the employee's medical leave indefinitely, and that the termination of her employment was therefore an appropriate and legitimate business decision.

Despite these favorable cases, employers should keep in mind that the law provides a great deal of protection for employees with disabilities and other medical issues. These laws are complex, and disability-related claims are often costly and time-consuming to litigate. Accordingly, employers should assess each employee disability and/or leave of absence situation on a case-by-case basis, and consult with experienced employment counsel as needed.

California

Court of Appeal Grants Summary Judgment in Favor of Temporary Staffing Agency in Connection with Meal Break Claim

In *Serrano v. Aerotek, Inc.*, a California Court of Appeal affirmed an order granting summary judgment in favor of the temporary staffing agency. Plaintiff Norma Serrano ("Serrano") sued her former employer Aerotek, Inc. ("Aerotek"), alleging it had failed to provide her meal breaks. Aerotek is a staffing agency that places temporary employees. Aerotek placed Serrano with its client, Bay Bread, LLC ("Bay Bread"), which operates a food production facility in San Francisco.

Aerotek maintained compliant meal and rest period policies. As part of the agreement between Aerotek and Bay Bread, Bay Bread was responsible for controlling, managing, and supervising the work of the employees provided by Aerotek. The agreement also contained a clause under which Bay Bread agreed to comply with federal, state, and local laws. Bay Bread set and enforced the schedules of Aerotek's temporary employees. Although Aerotek reviewed employee time punches, it admittedly did not monitor those time punches for meal break violations. The time punches demonstrated that Serrano took non-compliant meal breaks during more than half of the shifts worked.

Aerotek moved for summary judgment, which the trial court granted. The decision was then affirmed on appeal.

In affirming the trial court's ruling, the appellate court found that: 1) the agreement between Aerotek and Bay Bread required Bay Bread to comply with laws, and 2) Aerotek both provided and trained its temporary employees on its

meal period policy. The policy required temporary employees to notify Aerotek if they believed they were being prevented from taking meal breaks. Serrano reported no problems in connection with her meal breaks. The court concluded that nothing more was required of a staffing agency.

Relying heavily on *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1041 ("*Brinker*"), the appellate court found that Aerotek had no obligation to investigate potential violations as revealed in Serrano's time records. The court specifically rejected Serrano's contention that time records showing late and missed meal periods created a presumption of violations. Indeed, it found such a position at odds with *Brinker*, stating an employer is not required to "police" the taking of meal breaks, and the employer's mere knowledge that breaks were not being taken does not establish liability.

The court's analysis of *Brinker* reinforces that employers need not force their employees to take breaks. It also demonstrates that a company is not automatically liable if it does not investigate potential documented violations. Although the law does not require such action, it may be beneficial to institute disciplinary policies that encourage employees to take compliant breaks.

This is Pettit Kohn Ingrassia Lutz & Dolin 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, Jennifer Suberlak, Shannon Finley, Cameron Flynn, Cameron Davila, or Erik Johnson at (858) 755-8500; or Grant Waterkotte, Jennifer Weidinger, Andrew Chung, or Tristan Mullis at (310) 649-5772.