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EMPLOYMENT LAW UPDATE

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JUDICIAL

California

Sleeping on Sexual Harassment Claims Becomes Nightmare for Autozone

A recent decision handed down by a California Court of Appeal emphasizes why it is important for employers to have policies and procedures that immediately address sexual harassment complaints.

In *Meeks v. Autozone*, the plaintiff complained in October 2009 to her supervisor at Autozone that one of her coworkers was sending her inappropriate text messages, commenting about her body and clothes, and suggesting that they should have sex. According to the plaintiff, her supervisor told her to not take the complaint any higher or cooperate with any human resources investigation into the allegations. The plaintiff also alleged that the human resources office did not contact her about her allegations until August 2010, when the harasser was the subject of a separate sexual misconduct claim.

The plaintiff subsequently sued, lost at trial, and appealed certain evidentiary rulings made by the trial court. Especially relevant to California employers was the appellate court's decision that the plaintiff should have been allowed to introduce evidence about her coworker's harassing conduct toward four other female Autozone workers. The *Meeks* court ruled that the exclusion of this and other evidence prejudiced the plaintiff and ordered a new trial on her claims.

This case has several important lessons for employers. First, employers should ensure that they are in compliance with California's regulations regarding the reporting of sexual harassment. Employers should ensure that there are multiple ways for employees to report such harassment and implement a mechanism employees can use if they feel their complaint is not being taken seriously.

Second, this case emphasizes the importance of training supervisors and managers about the importance of taking all sexual harassment claims seriously. Simply stated, no employee should ever be told that he or she should not pursue a sexual harassment claim or not cooperate with an investigation into any such claim.

Third, this case is a reminder that employers must immediately investigate all complaints of sexual harassment. Here, it took Autozone almost a year to contact the plaintiff about her sexual harassment complaint. During this delay, the

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purported harasser turned his attention to other victims while the plaintiff was forced to continue working with her alleged harasser.

Finally, this case illustrates the time and expense associated with employment litigation. The *Meeks* case has been pending since 2013, and will continue unless the parties settle before the new trial ordered by the appellate court. Although nothing can prevent motivated plaintiffs and their attorneys from filing a lawsuit, solid policies and procedures related to how sexual harassment complaints are handled will help minimize the risk associated with such a lawsuit.

Employer With a "Fair and Neutral" Rounding Policy Prevails on Summary Judgment

In *AHMC Healthcare, Inc. v. Superior Court*, a California Court of Appeal reversed an order denying AHMC's motion for summary judgment in connection with its policy of rounding employees' time clock swipes up or down to the nearest quarter hour.

Emilio Letona and Jacquelyn Abeyta (collectively, "Plaintiffs"), acting on behalf of themselves and others similarly situated, brought suit against AHMC for failure to pay wages, failure to provide meal periods, failure to provide rest periods, failure to furnish timely and accurate wage statements, failure to pay wages to discharged employees, and unfair business practices. Plaintiffs contended that AHMC's method of calculating employee hours violated the Labor Code because the system rounded employees' hours up or down to the nearest quarter hour prior to calculating wages and issuing paychecks, rather than using the employees' exact clock-in and clock-out times. For example, if employees clocked in between 6:53 and 7:07, they were paid as if they had clocked in at 7:00. If employees clocked in between 7:23 and 7:37, they were paid as if they had clocked in at 7:30.

The time records from AHMC's Anaheim and San Gabriel locations were examined by an economic and statistics expert. At San Gabriel, AHMC's rounding procedure added time (9,476 hours) to the pay of 49.3% of the workforce (709 employees) and left 1.2% of the workforce (17 employees) unaffected; 49.5% of the workforce (713 employees) lost time (a total of 8,097 hours). At Anaheim, the rounding procedure added time (17,464 hours) to the pay of 47.1% of the workforce (861 employees), and had no effect on 0.8% of the workforce (14 employees); 52.1% of the workforce (953 employees) lost time (a total of 13,588 hours). Over the nearly four-year period examined, Letona lost 3.7 hours, an average of .86 of a minute per shift, for a total dollar loss of $118.41. Abeyta, who worked at San Gabriel for only nine months during the examined period, lost 1.6 hours, an average of 1.85 minutes per shift, for a total dollar loss of $63.70.

Based on these facts, AHMC moved for summary judgment. The company argued that the rounding procedure was lawful, as it was facially neutral, applied fairly, and provided a net benefit to employees considered as a whole. The trial court denied AHMC's motion and AHMC appealed.

On appeal, the plaintiffs argued that the policy was unlawful because a slight majority of employees at the Anaheim location lost an average of 2.33 minutes per shift. Additionally, each of the plaintiffs individually lost hours as a

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Transportation

result of the rounding policy. The Court rejected the plaintiffs' argument, holding that "where the system is neutral on its face and overcompensates employees overall by a significant amount to the detriment of the employer, the plaintiff must do more to establish systematic under-compensation than show that a bare majority of employees lost minor amounts of time over a particular period."

The Court reiterated that to satisfy the requirements of state and federal law, a rounding system must round all employee time punches without regard to whether the employer or the employee is benefitting from the policy. The employer must adopt a system that is used in such a manner so as not to result, over a period of time, in a failure to compensate the employees properly for all time actually worked. AHMC established that the rounding policy was neutral, applied fairly, and provided a net benefit to employees when considered as a whole. Specifically, for a majority of the shifts over a 4-year time period, the rounding policy resulted in employees having gained compensable time at the Anaheim and San Gabriel locations. Thus, the Court held that AHMC's motion for summary judgment should have been granted.

This ruling serves as a reminder that any rounding policy utilized by employers must not result in employee under-compensation over time. Employers are advised to consult with experienced employment law counsel to ensure that their rounding practices are legally compliant.

Bruce Willis' Arbitration Award Dies Hard Before the Court of Appeals

A California Court of Appeal determined that an arbitrator lacked the authority to add a nonsignatory party to the arbitration in *Benaroya v. Willis*. Bruce Willis and Benroya Pictures entered into an arbitration agreement. The agreement stated that any disputes shall be resolved exclusively through arbitration pursuant to the rules and regulations of JAMS before a single arbitrator.

Willis commenced arbitration against Benaroya Pictures for allegedly violating its contract with Willis when it failed to pay him. Willis moved to add Michael Benaroya as an individual to the arbitration on the ground that he was an alter ego of Benaroya Pictures. The arbitrator granted the request, found Mr. Benaroya to be an alter ego of Benaroya Pictures, and awarded damages to Willis for which both Benaroya Pictures and Mr. Benaroya were liable.

Mr. Benaroya filed a petition to vacate the arbitrator's judgment, and Willis filed a petition to confirm the award. The trial court confirmed the award against Mr. Benaroya on the ground that the arbitrator correctly determined the alter ego issue.

On appeal, Mr. Benaroya argued that the arbitrator did not have the authority to make him a party in the arbitration because he did not sign the arbitration agreement in his individual capacity, and the award against him should be vacated as a result. The Court of Appeal agreed. The appellate court reasoned that the public policy favoring arbitration does not eliminate the need for an agreement to arbitrate and does not extend to persons who are not parties to an agreement to arbitrate. There are six theories by which a nonsignatory can be bound to arbitrate: (1) incorporation by reference, (2) assumption, (3) agency,

(4) veil-piercing or alter ego, (5) estoppel, and (6) third party beneficiary. While a nonsignatory can be compelled to arbitrate under an alter ego theory, California case law is clear that "an arbitrator has no power to determine the rights and obligations of one who is not a party to the arbitration agreement. The question of whether a nonsignatory is a party to an arbitration agreement is one for the trial court in the first instance." (*American Builder's Assn. v. Au-Yang* (1990) 226 Cal. App.3d 170, 179). The case was remanded to the trial court with directions to: (1) set aside its rulings denying Mr. Benaroya's petition to vacate the award, and (2) grant Willis' petition to confirm the award against Benaroya Pictures.

While not employment-related, this case is significant because it confirms that arbitration can only be compelled against nonsignatories to an arbitration agreement by a trial court under limited circumstances. Employers should be cognizant of the names of the signatories on arbitration agreements to ensure that they will be enforced against the proper parties.

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, Erik Johnson, or Carol Shieh at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Jennifer Weidinger, Andrew Chung, or Rachel Albert at (310) 649-5772.