PETTITKOHN
PETTIT KOHN INGRASSIA LUTZ & DOLIN

EMPLOYMENT LAW UPDATE

Relationship-Driven Results *July 2019*

LEGISLATIVE

Governor Signs Bills Prohibiting Discrimination on the Basis of Hairstyles

Governor Newsom has signed into law SB 188 (Mitchell), which prohibits employers from discriminating against employees on the basis of their hairstyle. Under the Fair Employment and Housing Act, it is unlawful for employers to engage in specified discriminatory employment practices, including hiring, promotion, and termination based on certain protected characteristics, including race, unless based on a bona fide occupational qualification or applicable security regulations. This new law provides that the definition of "race" includes traits historically associated with race, including, but not limited to, hair texture and protective hairstyles, and defines protective hairstyles to include "braids, locks, and twists." SB 188 amends section 12926 of the Government Code and section 212.1 of the Education Code. It takes effect on January 1, 2020.

JUDICIAL

California

Safeway Defeats Claim for Unfair Competition

In *Enrique Esparza v. Safeway, Inc.*, a California Court of Appeal affirmed an order granting Safeway's motion for summary adjudication in connection with Safeway's alleged failure to pay premium wages prior to June 17, 2007.

Plaintiffs Enrique Esparza, Cathy Burns, Levon Thaxton II, and Sylvia Vezaldenos (collectively, "Plaintiffs"), filed suit in 2007 alleging (among other claims) that Safeway failed to provide meal periods to its retail employees throughout California and failed to pay missed meal period premiums to those employees when due. Prior to June 17, 2007, Safeway paid no premium wages for missed meal periods, without regard to whether an employee had been impeded or discouraged from taking a meal break. Plaintiffs successfully sought class certification of their unfair competition law claim ("UCL"), whereby they alleged that Safeway had gained an unfair competitive advantage by neglecting to pay the missed break premiums. Following the court's certification decision, Safeway moved for summary adjudication of the UCL claim, arguing that Plaintiffs had shown no viable theory upon which the class could obtain restitution. The trial court agreed and granted Safeway's motion.

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.

The California Court of Appeal affirmed, holding that while the practice of not paying premium wages can violate the UCL, Safeway properly identified that the only remedies available under the UCL are restitution[1] and injunctive relief, as opposed to damages. Unsurprisingly, Plaintiffs attempted to expand the remedies under the UCL to include a "market value" theory of damages, as opposed to restitution. Safeway argued that Plaintiffs' theories did not identify "money or property" that could be the subject of restitution, and that Plaintiffs' "market value" argument[2] described a novel concept of damages, rather than restitution.

On a different note, the appellate court also made it clear that a claim under the Private Attorneys General Act ("PAGA") will fail if the plaintiff does not send a compliant pre-filing notice to the Labor and Workforce Development Agency ("LWDA") prior to the lapse of the one-year statute of limitations period. As Safeway's allegedly unlawful practice ended on June 17, 2007, the one-year statute of limitations for the PAGA claim expired on June 17, 2008. Accordingly, Plaintiffs' LWDA notice, which was sent on July 7, 2008, was untimely. The trial court rejected Plaintiffs' argument that their amended complaint, which was filed in 2009 and included the PAGA claim, "related back" to their original complaint, which was filed in 2007.

While Safeway was ultimately successful on its motion for summary adjudication, this win likely came at a steep cost. In an effort to avoid expensive, time-consuming litigation, employers are advised to audit their wage and hour practices to ensure their compliance with California and federal law.

California Appellate Court Clarifies Definition of "Physical Disability" Under the FEHA

In *Ross v. County of Riverside*, a California appellate court reversed summary judgment granted in favor of the County of Riverside ("Employer") on Christopher Ross' ("Plaintiff") claims for violation of Labor Code section 1102.5 ("section 1102.5") and the Fair Employment and Housing Act ("FEHA"). The opinion clarifies the meaning of "protected activity" under section 1102.5 and "physical disability" pursuant to the FEHA.

Plaintiff worked for the Employer as a deputy district attorney. On at least one occasion, Plaintiff recommended to his supervisor that one of his cases be dismissed because he believed the criminal defendant's confession had been coerced, there was DNA evidence exculpating the defendant, and the defendant's roommate had admitted in recorded phone calls to being the murderer. Plaintiff believed that continued prosecution would violate the defendant's due process rights and the prosecutor's ethical obligations under state law.

---

[1] UCL restitution "operates only to return to a person those measurable amounts which are wrongfully taken by means of an unfair business practice." (*Day v. AT & T Corp*. (1998) 63 Cal.App.4th 325, 339.)

[2] Plaintiffs proposed to identify all short, missed, and late meal periods before June 17, 2007, regardless of the reason each period was short, missed, or late, and to multiply the number of those meal periods by the corresponding class members' hourly rate. The court rejected this theory because it sought to recover an economic sum to which the class members had no vested right. Under the California Supreme Court's previous ruling in the *Brinker* case, an employer is not "automatically" liable for each and every short, late or missed meal period. Rather, an employee must demonstrate that he or she was not afforded the *opportunity* to take a timely, uninterrupted break, and that he/she is therefore entitled to a premium payment.

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 | Tucson

www.pettitkohn.com

The appellate court held that section 1102.5 did not require that Plaintiff expressly state in his disclosures that he believed the Employer was violating a specific state or federal law. It was sufficient that Plaintiff had revealed information he reasonably believed disclosed unlawful activity. Therefore, the appellate court found that Plaintiff had raised a triable issue of fact as to whether he had engaged in protected activity.

Additionally, during his employment, Plaintiff began to exhibit neurological symptoms that required extensive medical testing to diagnose. Plaintiff underwent medical tests at an out-of-state clinic over several months, which required him to take time off from work to travel. To accommodate the testing, Plaintiff requested to be assigned to another unit and not to receive any new cases. Plaintiff arranged with opposing counsel to stay the work on his cases for several months until he had completed his medical testing.

The appellate court held that there was a triable issue of material fact with regard to whether Plaintiff was physically disabled within the meaning of FEHA. The court noted that although Plaintiff's travel requirements were temporary for the purpose of diagnosing his neurological condition, the condition nevertheless limited the major life activity of working because the medical appointments required Plaintiff to be absent from work periodically over several months.

This case serves as a reminder to employers that even temporary or short-term physical impairments may qualify as disabilities pursuant to the FEHA. Employers should review their disability accommodation and interactive process protocols to ensure that they are legally compliant.

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