PETTITKOHN
PETTIT KOHN INGRASSIA LUTZ & DOLIN

EMPLOYMENT LAW UPDATE

Relationship-Driven Results April 6, 2020

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 | Tucson

www.pettitkohn.com

LEGISLATIVE

COVID-19

Pettit Kohn Ingrassia Lutz & Dolin has published several updates regarding federal, state, and local legislation and authorities in connection with the COVID-19 pandemic. To access these publications, please click here.

California

With the new legislative session under way, there are a number of proposed bills that, if signed into law, will impact California employers and employees. These bills include:

AB 3216 (Kalra): This bill would amend the California Family Rights Act to permit employees of covered employers to take up to twelve weeks of unpaid job-protected leave: (1) to care for a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner who has been diagnosed with or quarantined because of COVID-19; or (2) for the employee's own diagnosis with or quarantine because of COVID-19 that makes the employee unable to perform the functions of the employee's position. This bill would classify employers with one or more employees as "covered employers."

AB 1844 (Chu and Gonzalez): The Healthy Workplace Healthy Family Act of 2014 permits employees to use paid sick leave for the diagnosis, care, or treatment of an existing health condition of, or preventative care for, an employee or a specified family member. This bill would extend permissible uses of paid sick leave to include "health or *behavioral health* conditions." The proposed legislative findings confirm this amendment is intended to permit the use of paid sick leave for "mental health days."

AB 1928 (Kiley): AB 1928 seeks to repeal AB 5 (California's independent contractor law) and codify the multi-factor test in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d as the test to determine whether a worker is an employee or an independent contractor. AB 1928 has been referred to the Committee on Labor & Employment.

AB 1947 (Kalra and Gonzalez): This bill extends the time in which an employee can file a retaliation complaint with the Labor Commissioner. Currently, an employee must file such a complaint within six months of the occurrence of the

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Community Association 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

violation. This bill would double that period to a full year. The bill would also permit employees who file a lawsuit asserting a whistleblower retaliation claim under Labor Code section 1102.5 to recover attorneys' fees if they prevail on that claim.

AB 1963 (Chu): This bill amends Penal Code section 11165.7, which identifies all categories of individuals who are designated as "mandated reporters" of child abuse or neglect. Existing law requires certain people, such as teachers, camp administrators, law enforcement personnel, daycare employees, etc., who have knowledge of or observe a child whom they know or reasonably suspect has been a victim of child abuse or neglect, to report such information to the appropriate authorities. This bill would designate the following as mandated reporters: (1) all human resources employees of businesses that employ minors; and (2) any persons whose duties require direct contact with and supervision of minors in the performance of the minors' duties in the workplace. The failure to report constitutes a misdemeanor punishable by up to six months in jail, a fine of $1,000, or both.

AB 2143 (Stone): Effective January 1, 2020, employers cannot include provisions in any settlement agreements that restrict the employee claimant's ability to work for the employer in the future. That is, "no rehire" provisions in settlement agreements are not permissible—unless the employer determined that the employee engaged in sexual harassment or sexual assault. This bill provides that no rehire provisions may *also* be used if the employer determined that the employee engaged in criminal conduct. However, any determination about sexual harassment, sexual assault, or criminal conduct must have been made *prior to* the employee filing their claim. Finally, the bill requires that the employee's complaint must have been filed in good faith in order for the no rehire prohibition to apply. In other words, if the employee's complaint was not brought in good faith, the employer may include a no rehire provision in the settlement agreement.

AB 2999 (Low): This bill would require all California employers to provide 10 days of unpaid bereavement leave to employees who have completed at least 60 days of employment prior to the commencement of the leave. The bill would permit the employee to take the leave nonconsecutively over a period of three months following the death, but only upon the death of a spouse, child, parent, sibling, grandparent, grandchild, or domestic partner. The employee can also be required to provide documentation of death, either by death certificate, published obituary, or written verification of death, burial, or memorial services. However, an employee discharged or disciplined due to their exercise of rights under this statute may file a complaint with the Labor Commissioner or pursue civil litigation. If the employee prevails, they will be able to obtain reinstatement and recover actual damages and attorneys' fees.

AB 3313 (Bonta): Currently, the California Community Care Facilities Act (the "Act") requires the California Department of Social Services to license, inspect, and regulate "community care facilities," which include facilities providing nonmedical residential care, day treatment, adult daycare, or foster family agency services for children and/or adults. The Act requires licensees and employees of licensees to complete certain education and training about various topics, such as the laws and regulations governing the facility, management and supervision of

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 | Tucson

www.pettitkohn.com

staff, community and support services, and intervention and reporting requirements. This bill would require such training to also include information about minimum wage, overtime, hours worked, deduction of sleep time and other off-duty periods, off-duty and on-duty meal and rest periods, crediting of meals and lodging against the minimum wage, sick leave, employee classifications, paystub requirements, recordkeeping and retention, where to file claims, whistleblower protections, workers' compensation insurance requirements, and workplace safety. The bill specifies the required training hours for initial trainings (to be completed prior to contact with the facility's clients) as well as for continuing education.

SB 1129 (Dodd): If this bill is signed into law, employers will have additional time to cure certain wage statement violations prior to an employee filing suit. Labor Code section 226(a) requires the following information to appear on employees' wage statements: (1) gross wages earned; (2) total hours worked; (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis; (4) all deductions; (5) net wages earned; (6) the inclusive dates of the pay period; (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number; (8) the name and address of the legal entity that is the employer; and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate. Pursuant to this bill, if an employee wants to sue for violations of Labor Code section 226(a)(6), (7), or (8), either directly or through a Private Attorneys General Act ("PAGA") claim, the employee must first provide written notice to the employer of the alleged violation. The employer then has 65 days to "cure" the alleged violation by providing compliant paystubs to affected employees for the one-year period prior to the date of the written notice. If the employer cures the violation, the employee cannot recover any damages, statutory penalties, injunctive relief, or civil (e.g., PAGA) penalties based on the alleged violation. Notably, the bill also proposes that any PAGA claim based upon paystub violations in which employees suffer no economic or physical harm are capped at a maximum of $5,000 in penalties.

JUDICIAL

California

California Supreme Court Rules That Individual Settlements Do Not Bar Subsequent PAGA Actions

In *Kim v. Reins International California, Inc.* the California Supreme Court ruled that employees do not lose standing to pursue a claim under the Labor Code Private Attorneys General Act of 2004 ("PAGA") if they settle and dismiss their individual claims for Labor Code violations. In other words, settlement of individual claims does not strip an "aggrieved employee" of standing to pursue PAGA remedies.

In the instant case, Justin Kim ("Kim") brought a lawsuit against his former employer, Reins International California, Inc. ("Reins"), alleging a series of Labor Code violations both on an individual basis and representative basis pursuant to PAGA. Since Kim signed an arbitration agreement when he was hired, Reins

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Community Association 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

moved to compel arbitration as to Kim's individual claims. Kim resolved his individual claims by settlement and release, leaving only his PAGA claim. Reins then moved for summary adjudication on the grounds that Kim lacked standing because his rights had been redressed by the settlement and dismissal, thus he was no longer an "aggrieved employee" with PAGA standing. Judgment was entered for Reins and affirmed on appeal. Kim appealed to the California Supreme Court as to the issue of whether Kim's individual settlement extinguished his PAGA standing.

In evaluating this issue on appeal, the Supreme Court observed that the plain language of the Labor Code reveals there are only two requirements to establish PAGA standing—the plaintiff must be an (1) aggrieved (2) employee. That is, someone "who was employed by the alleged violator" and "against whom one or more of the alleged violations was committed" has standing to assert a PAGA claim. Further, the Supreme Court concluded that the Legislature defined PAGA standing in terms of violations, not in terms of injury. It further held that Kim became an aggrieved employee when one or more Labor Code violations were committed against him, and that settlement did not nullify the violations because the remedy is distinct from the fact of the violation itself. Moreover, the Court cited to recent decisions holding that a plaintiff's inability to obtain individual relief is not necessarily fatal to the maintenance of a PAGA claim. The Court reiterated that an act may be wrongful and subject to civil penalties even if it does not result in an injury for which individual damages are available.

The Court additionally highlighted that civil penalties recovered on the state's behalf are intended to "remediate present violations and deter future ones," and that a PAGA claim is not simply a collection of individual claims for relief. In contrast, in a class action, "the representative plaintiff still possesses only a single claim for relief—the plaintiff's own." Moreover, the Court ruled that the availability of civil penalties for statutes that provide no individual relief highlighted the flaw in Rein's conception of PAGA standing. Finally, it rejected Reins' argument for claim preclusion stating that "we are aware of [no authority], holding that the resolution of some claims can bar the litigation of other claims that were asserted in the *same* lawsuit."

This case reiterates the challenges for employers facing and potentially resolving PAGA claims. Employers should take caution when settling individual claims that may later implicate PAGA, as an individual release no longer provides the protection it did prior to this decision. Accordingly, constant attention to wage and hour practices and Labor Code compliance is essential to limiting risk and avoiding serious liability.

Employees Must Be Paid for Time Spent Undergoing Exit Searches

In *Frlekin v. Apple Inc.*, the California Supreme Court held that employees must be compensated for time spent waiting for their bags and personal belongings to be screened at the end of their shifts.

At issue was an Apple policy requiring workers in several of its California retail stores to submit to mandatory exit searches to ensure that merchandise was not stolen. The Apple employees were required to clock out before undergoing the searches, which lasted anywhere from a few minutes to 45 minutes. In 2013, several employees sued Apple alleging that the company's policy of not paying retail workers for such time was illegal.

The California Supreme Court concluded that the following factors should be considered to determine whether an onsite, employer-controlled activity is compensable as "hours worked": (1) the mandatory nature of the activity; (2) the location of the activity; (3) the degree of the employer's control; (4) whether the activity primarily benefits the employee or the employer; and (5) whether the activity is enforced through disciplinary measures.

When the state high court applied these factors in *Frlekin*, it determined that the exit searches were required, occurred at the workplace, involved a significant degree of control, were imposed primarily for Apple's benefit, and were enforced through threat of discipline. Thus, the Court held that the employees "must be paid." The Court rejected Apple's argument that the time should not be compensable because workers could choose not to bring a bag to work to avoid being subjected to a search.

In *Frlekin*, the Court unsurprisingly follows California's trend of interpreting the wage orders in favor of employees and with the intent to make more time compensable rather than less. Following the *Frlekin* ruling, employers should be wary of any time that employees are spending onsite while not clocked in, even if the employees are not performing their normal duties.

Harassment and Discrimination Claims Dismissed Where the Plaintiffs Failed to Name a Key Defendant in Their Administrative Complaints

In *Judy Alexander et al., v. Community Hospital of Long Beach et al.*, a California court of appeal reversed a jury verdict against the employer of the alleged harasser, upholding the requirement that employees must identify the relevant perpetrators of unlawful conduct in their administrative complaints and thereby properly exhaust their administrative remedies prior to filing suit.

The plaintiffs ("Plaintiffs") worked as nurses in the Behavioral Health Unit at the Community Hospital of Long Beach ("Hospital"). The Hospital contracted with Memorial Psychiatric Health Services ("MPHS") to operate the unit and with Memorial Counseling Associates Medical Group ("MCA") to supply physicians for patients in the unit. Pursuant to the contract, MPHS provided administrative services for the unit and employed and managed its director, Keith Kohl ("Kohl").

Kohl purportedly discriminated in favor of male staff with respect to schedules, assignments, and promotions, and also used sexually explicit language that favored homosexuality and denigrated heterosexuality. During her employment, one of the Plaintiffs ("Alexander") complained to a colleague that she felt demeaned and humiliated by Kohl and was fearful of his reprisals. Alexander subsequently complained to the Hospital's human resources director that Kohl had berated her, but was told that the last person who had complained about Kohl was no longer employed by the Hospital. The human resources director asked if Alexander "really wanted to make that complaint." Alexander declined to make a formal complaint.

Following an allegation of patient mistreatment, Plaintiffs were fired. A few weeks later, hospital staff complained to MPHS that Kohl had created a hostile work environment by favoring male employees. Approximately one year later, another employee made a similar complaint about Kohl to MPHS, but no investigation was conducted. Kohl was issued a verbal warning only after the MPHS' human resources manager received a third complaint about him. More than one year after Plaintiffs were discharged, the Hospital demanded that MPHS remove Kohl as director for "having created a hostile work environment."

Plaintiffs filed suit against the Hospital, MCA, and MPHS for sexual harassment, sexual orientation discrimination, failure to prevent harassment and discrimination, retaliation, wrongful termination, and various tort and common law claims. At trial, the jury found against the Hospital and MPHS, but in favor of MCA.

On appeal, MPHS successfully argued that Plaintiffs had failed to exhaust their administrative remedies with respect to that entity. Though Plaintiffs had named Kohl, the Hospital, and MCA as respondents in their administrative complaints to the Department of Fair Employment & Housing ("DFEH"), MPHS was never mentioned. Moreover, though MCA was served with the DFEH complaints through MPHS' human resources director, who also functioned as the human resources director for MCA, this was insufficient to establish actual notice of the complaint to MPHS to provide an opportunity to participate in the administrative process. Thus, the appellate court agreed that Plaintiffs did not exhaust their administrative remedies with respect to MPHS, and the verdict as to MPHS was overturned.

That the legal employer of the alleged harasser was able to overcome a jury verdict supported by extensive evidence of improper behavior proves the importance of thoroughly examining a DFEH complaint to confirm the plaintiff has properly exhausted his or her administrative remedies. Employers receiving administrative complaints should carefully scrutinize such documents upon receipt to determine whether the company has been properly identified or if other grounds exist to assert a defense of failure to exhaust administrative remedies.

"Willful" Violations of the Fair Labor Standards Act May Be Imputed to the Employer Even When Committed by a Single Non-Supervisory, Non-Managerial Payroll Processor

Willful violations of the Fair Labor Standards Act ("FLSA") carry considerably adverse consequences for employers. While a standard violation of the FLSA is subject to a two-year statute of limitations, a willful violation extends the limitations period to three years. Moreover, an employer found liable for a willful violation forfeits its right to dispute an employee's request for liquidated damages (i.e., double damages) on the bases that the employer acted in good faith or had reasonable grounds to believe it was not violating the FLSA. Following a ruling from the U.S. Court of Appeal for the Ninth Circuit, even non-managerial, non-supervisory employees responsible for payroll processing can expose their employers to liability for willful violations of the FLSA and these concomitant adverse consequences.

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 | Tucson

www.pettitkohn.com

In *Eugene Scalia, Secretary of U.S. Department of Labor v. Employer Solutions Staffing Group, LLC, et al.,* the Ninth Circuit affirmed a district court's granting of summary judgment in favor of the U.S. Secretary of Labor ("Plaintiff"), who had sued four staffing companies (collectively, "Defendants") for one payroll processing employee's "willful" failure to pay overtime to employees who worked more than 40 hours in a workweek. The order included an award of liquidated damages against the direct employer of the subject employee.

Defendant Employer Solutions Staffing Companies ("ESSC") provided administrative services, such as processing payroll and recruiting employees, to various companies. Defendant Sync Staffing ("Sync") placed the recruited employees at various jobsites, including Defendant TBG Logistics' ("TBG") facilities. TBG maintained a practice of recording employees' hours worked on a spreadsheet.

In November 2012, TBG began sending its timekeeping spreadsheets to Sync, which forwarded them to ESSC. In turn, an EESC employee named Michaela Haluptzok ("Haluptzok") processed TBG's payroll using the spreadsheets. Haluptzok did not possess managerial or supervisory authority in her position with ESSC. However, ESSC did train Haluptzok on the FLSA's overtime requirements and informed her that the payroll system would generate "error messages" if any qualifying employees were not being paid overtime. The first time Haluptzok received a TBG spreadsheet and prepared payroll, she created and sent to Sync a report showing that employees who had worked more than 40 hours per week would receive overtime pay. But when a Sync employee called Haluptzok and instructed her to pay all hours as "regular" hours instead of overtime (without explaining why this action would be appropriate), Haluptzok complied. Over the next 1.5 years, more than 1,000 FLSA violations resulted.

Plaintiff filed suit in August 2016, more than two years after the final overtime violation occurred in July 2014. Typically, such a claim would be barred by the two-year statute of limitations. However, because Haluptzok admitted she was aware TBG employees were not being paid earned overtime, and that she had dismissed repeated "error messages" for over a year, the Ninth Circuit found this conduct qualified as a "willful violation" such that the three-years statute of limitations applied. The court of appeal further found Haluptzok to constitute an agent of ESSC, such that ESSC was liable for her actions, reasoning that ESSC "cannot disavow her actions merely because she lacked a specific job title or a certain level of seniority in the company." According to the court, allowing ESSG to evade liability simply because none of its "supervisors" or "managers" processed the payroll would create a loophole in the FLSA and run counter to the statute's purpose of protecting all covered workers from substandard wages and oppressive working hours. Therefore, Plaintiff's suit was deemed timely and ESSC was ordered to pay $78,500 in unpaid overtime wages, plus an equal amount in liquidated damages.

Following *Scalia*, employers should take care to properly train and oversee payroll processing employees to ensure compliance with wage and hour laws, lest the unlawful actions of non-supervisory, non-managerial employees give rise to increased liability for "willful" violations.

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Community Association 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

Court Permits Employee to File Identical Class Action Lawsuit Against a Joint Employer, Despite Having Settled with the Primary Employer

In *Grande v. Eisenhower Medical Center, et al.*, a California appellate court found that a plaintiff's wage and hour settlement with a staffing agency did not preclude her from bringing the same claims against the company that the agency assigned her to work for.

Plaintiff Lynn Grande ("Plaintiff") was assigned by staffing agency FlexCare, LLC ("FlexCare") to work as a nurse at Eisenhower Medical Center ("Eisenhower"). Plaintiff filed a class action lawsuit against FlexCare on behalf of FlexCare employees assigned to hospitals throughout California. Plaintiff and FlexCare eventually entered into a settlement agreement, and Plaintiff executed a release of claims.

Approximately one year later, Plaintiff filed *another* class action lawsuit, this time against Eisenhower. The lawsuit asserted the same wage and hour claims raised in this FlexCare litigation but was brought on behalf of non-exempt employees working at Eisenhower's facility. FlexCare moved to intervene in the Eisenhower litigation, arguing that (1) the judgment in the FlexCare litigation precluded Plaintiff's claims against Eisenhower, and (2) Eisenhower was a released party under the FlexCare settlement. The trial court ruled against FlexCare, and FlexCare appealed.

The court of appeal found that Plaintiff was not precluded from bringing the second action against Eisenhower for two reasons. First, the court determined that FlexCare and Eisenhower were not "in privity with" each other. To establish the existence of "privity," FlexCare had to demonstrate it shared "an identity or community of interest" with Eisenhower, and that interest was "adequately represented" in the first lawsuit. Though FlexCare and Eisenhower were jointly liable for Plaintiff's wages (as joint employers of Plaintiff), they were independently liable for their own conduct and maintained differing interests, as demonstrated by the separate and distinct defenses they raised to Plaintiff's claims. Moreover, there was no evidence that Eisenhower and FlexCare acted as the other's agent—Eisenhower maintained control over the nurses' job performance, assessed their competency during an orientation, subjected them to skills tests, and made decisions about assignments and discharge. The staffing agreement also required nurses to abide by Eisenhower's policies and procedures. Based upon these facts, the court found that FlexCare and Eisenhower lacked a shared identity or community of interest to establish privity.

The court also found that Plaintiff and FlexCare did not intend to include Eisenhower in their settlement agreement, as the list of parties Plaintiff released from liability did not include terms such as "clients," "joint employers," and "joint obligors." The court rejected the argument that the phrase "related and affiliated companies" included Eisenhower, as Eisenhower was not a company that controlled or was controlled by FlexCare. Accordingly, the appellate court determined that Plaintiff's lawsuit against Eisenhower could proceed.

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 | Tucson

www.pettitkohn.com

The *Grande* decision signals the importance of including detailed language in settlement agreements releasing all parties who could potentially be liable for the conduct at issue, particularly for employers utilizing staffing agencies or similar businesses that may constitute joint employers of the plaintiff. Employers should also include indemnity clauses in contracts with staffing agencies, to further limit potential exposure to wage and hour claims. Finally, companies should also request immediate notice of any claims brought by jointly employed employees, and request to specifically be named as a released party when settlements are reached.

California Court of Appeal Refuses to Expand the Attorney Client Privilege to Protect a Complainant's Communications with the Department of Fair Employment and Housing

In *Christynne Lili Wrene Wood v. the Superior Court of San Diego County*, the California Fourth District Court of Appeal held that Plaintiff Christynne Lili Wrene Wood ("Wood") failed to demonstrate that the Department of Fair Employment and Housing ("DFEH") lawyers formed an attorney-client relationship with her, such that her communications with them enjoyed the protection of the attorney-client privilege. Pursuant to the attorney-client privilege, the client may refuse to disclose, and prevent another from disclosing, a confidential communication between the client and the lawyer. The fundamental purpose of the attorney-client privilege is to safeguard the confidential relationship between clients and their attorneys as to promote full and open discussion of the facts and tactics surrounding individual legal matters. California statutes emphasize that the attorney-client privilege does not apply simply because a person discusses a legal matter with an attorney, or when a client seeks advice from an attorney. The attorney-client privilege applies when the client seeks advice from the attorney, while the attorney is operating in his or her professional capacity.

Wood was a member of a Crunch Fitness Club ("Crunch") in El Cajon, California. In 2016, Wood began transitioning from male to female. After she was harassed by another member in the Crunch men's locker room, Wood provided Crunch with medical verification of her transition and requested use of the women's locker room. Crunch declined Wood's request but told her she would be allowed to use Crunch's more exclusive "platinum" men's locker room. Wood reluctantly agreed and continued using the gym. The following year, Wood legally changed her name and gender marker to female. She repeated her request to Crunch that she be allowed to use the women's locker room. Crunch again declined. The company told Wood that she would need to complete "sex-reassignment surgery" in order to use the women's locker room. However, after Wood was again harassed by another member in the platinum men's locker room, Crunch consented to Wood's use of the women's locker room.

Wood contacted the DFEH and reported the alleged gender discrimination. After an investigation, DFEH filed a lawsuit against Crunch alleging discrimination based on gender identity and expression. Wood intervened as a plaintiff in the lawsuit. During discovery, Crunch requested that Wood produce all of her communications with DFEH with regard to Crunch. Wood refused to produce one communication on the grounds of attorney-client privilege—a pre-litigation email she sent to DFEH lawyers regarding her DFEH complaint. Crunch moved to compel production of the email, arguing the document was relevant, discoverable, and nonprivileged. The trial court compelled Wood to produce the email. The appellate court agreed the email had to be produced.

The appellate court noted that, as a preliminary matter, the DFEH does not represent the employee when the agency files a civil lawsuit or even when the employee files an administrative complaint. Rather, the DFEH attorneys represent the agency.

Wood argued that the attorney-client privilege nonetheless applied because (1) she subjectively believed her communications with the DFEH were confidential and (2) she was seeking legal advice from the agency. The court rejected these arguments, holding that the attorney-client privilege requires something more than simply speaking to an attorney about a legal matter. Even though Wood was seeking the assistance of the DFEH in filing her complaint, she was not in the position of a prospective client seeking an attorney to represent her. Outside the context of a prospective client seeking representation, an actual attorney-client relationship is required to sustain claims of the privilege. The court held that Wood could not establish an actual attorney-client relationship, and therefore, she could not claim the privilege.

The court's opinion in *Wood* emphasizes the boundaries of the attorney-client relationship in the context of agency investigations and litigation. Given that no attorney-client relationship exists between an employee and the DFEH, employers facing litigation prompted by the DFEH should seek the production of all communications between the agency and the complainant during discovery.

Court of Appeal Affirms "Me Too" Evidence Determinations and Lack of Judicial Bias in Sexual Harassment Trial

In *Schmidt v. Superior Court*, a California appellate court affirmed a bench trial verdict rejecting sexual harassment claims by two court employees. The plaintiffs, Tamika Schmidt ("Schmidt") and Danielle Penny ("Penny"), were employees of the Superior Court of California in Ventura County. Schmidt and Penny (collectively, "Plaintiffs") complained about the court's weapons and security screening system at the court's entrance. The screening procedure required all building entrants to place personal belongings on a conveyor belt and walk through a metal detector. If the metal detector flagged the potential presence of metal on an entrant's body, security guards were trained to wave wands over the areas of the body where metal was suspected to be present. Guards were specifically trained not to place their wands too close to the body of the person being searched.

Plaintiffs complained that one of the court's guards, David Jacques ("Jacques"), inappropriately "wanded" female employees, scanning their breasts and buttocks for longer than necessary. Schmidt alleged that Jacques engaged in such behavior approximately 100 times over the course of several years, though analysis of video footage could not corroborate this allegation.

During the trial, four "me too" witnesses, as well as several percipient witnesses, offered testimony. ("Me too" evidence is evidence offered by other

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 | Tucson

www.pettitkohn.com

employees who supposedly experienced the same unlawful conduct alleged by the plaintiff.) During Schmidt's testimony, the court played video of surveillance footage involving Plaintiffs and "me too" witnesses undergoing security screenings by Jacques. The "me too" witnesses and Plaintiffs argued that the video revealed sexual harassment and inappropriate behavior which Schmidt described as "disgusting," "lewd," and "a molestation." The trial court found that the video actually *disproved* the allegations, as it did not show Jacques hovering the wand over women's breasts or buttocks or lingering for any extended period of time. After the trial ended, the judge issued a lengthy opinion addressing the testimony of each witness, finding Jacques and several defense witnesses to be credible and Plaintiffs and the "me too" witnesses not credible. The court ultimately concluded that no sexual harassment had occurred. Schmidt and Penny disagreed with the trial court's findings and appealed.

On appeal, the court found that substantial evidence supported the trial judge's findings regarding witness credibility—the testimony of several witnesses either did not match video evidence of Jacques' conduct, was uncertain, or referenced isolated incidents. For example, one witness testified about a single instance where the security wand used by Jacques touched her body. The witness was uncertain if the touching was intentional, and she was also friends with Schmidt and Penny (suggesting the witness was biased in favor of Plaintiffs). The appellate court agreed that the witnesses' testimony was insignificant.

Plaintiffs next argued that "me too" evidence should be categorically believed. The court of appeal rejected this contention, holding that finders of fact, whether a judge or a jury, must apply an independent evaluation or appraisal of evidence regardless of the source.

Lastly, Plaintiffs alleged the trial judge was biased in favor of the defendant, the Superior Court. The court of appeal explained that California provides a statutory framework for litigants to address judicial bias. Pursuant to this framework, Plaintiffs were required to file a complaint of judicial bias in the trial court. But Plaintiffs failed to do so or to raise any allegations of bias during trial. Importantly, the appellate court noted that a trial judge's expressions of opinion based on review of the evidence and observation of witnesses do not constitute judicial bias, nor do "numerous and continuous rulings against a party."

The *Schmidt* decision reveals the importance of video surveillance in sexual harassment cases. The trial court found that much of Plaintiffs' testimony, and that of the "me too" witnesses, was not corroborated by the objective video evidence. The opinion also highlights the high standard required to prove judicial bias and importance of raising that issue through the appropriate procedural channels.

More Than One Unconscionable Term in an Arbitration Agreement Renders the Agreement Unconscionable

In *Gerald Lange v. Monster Energy Company,* a California appellate court affirmed a trial court's denial of Monster Energy's ("Monster") motion to compel arbitration of a disability discrimination action brought by Gerald Lange ("Plaintiff"). When Plaintiff was hired by Monster, he signed an employment agreement that contained an arbitration agreement. The arbitration agreement

Areas of Practice

Appellate

Business Litigation

Civil & Trial Litigation

Community Association 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

required Plaintiff to waive punitive damages as a remedy for all nonstatutory claims and reserved Monster's right to litigate its claims of trade secret misappropriation against Plaintiff, while compelling Plaintiff to arbitrate all of his claims against the employer. After Plaintiff's employment ended, he filed suit in the California Superior Court. In response, Monster filed a motion to compel the dispute to arbitration. The trial court denied the motion, concluding that the agreement contained more than one unconscionable provision and therefore the court was prohibited from severing any of the provisions, as the agreement was necessarily permeated with unconscionability.

Though the appellate court agreed that the arbitration agreement contained multiple unconscionable terms, the court disagreed that this fact alone rendered the agreement "permeated with unconscionability" such that offending terms could not possibly be severed—the trial court still needed to analyze each term to see if severance was possible and/or appropriate in the context of the entire contract and the circumstances of contract formation.

Lange v. Monster Energy highlights the needs for employers to carefully review and understand their arbitration agreements to ensure no unconscionable provisions are included. Due to the ongoing volatile nature of the arbitration landscape in California, employers should consider having their arbitration agreements reviewed by counsel to ensure they are compliant with the most recent legal precedent in this area.

This is Pettit Kohn Ingrassia Lutz & Dolin PC's employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Ryan Nell, Shannon Finley, Jennifer Suberlak, Blake Woodhall, Carol Shieh, Shelby Harris, Brittney Slack, or Rio Schwarting at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Andrew Chung, Jennifer Weidinger, Rachel Albert, or Mihret Getabicha at (310) 649-5772.