



CALIFORNIA EMPLOYMENT LAW UPDATE

A periodic newsletter summarizing legal developments of importance to California employers

DLSE Withdraws Emergency Regulations And Proposes New Regulations Clarifying Meal Period Requirements

As reported in our December 13, 2004 *Employment and Labor Alert* entitled "Emergency Regulation Allows Employees to Eat When They Are Hungry," the Division of Labor Standards Enforcement ("DLSE") issued proposed emergency meal period regulations on December 10, 2004 that would have significantly benefited California employers by clarifying California's meal period requirements. If the emergency regulations had been approved by the Office of Administrative Law, they would have (1) set forth the steps an employer must take to "provide" meal periods in compliance with Labor Code Section 512, (2) clarified the law regarding the timing of required meal periods, and (3) made it clear that meal and rest period penalties are "penalties," and not "wages."

However, on December 20, 2004, prior to being adopted or rejected by the Office of Administrative Law ("OAL"), the DLSE withdrew the emergency regulations and submitted new proposed regulations to the OAL. The new proposed regulations will be evaluated under the regular rulemaking process. While they differ in some respects from the proposed emergency regulations, the new proposed regulations cover the same three areas noted above. In addition, they define the term "work period." The DLSE will conduct hearings regarding the new proposed regulations in February 2005 and will take comments from the public until February 14, 2005. Copies of the new proposed meal period regulations can be found at <http://www.dir.ca.gov/dlse/MRPRregs.htm>.

Question Of Fact Exists Whether Meal Period Opinion Letters Constitute "Underground Regulations"

In *Westside Concrete, Co. v. Dept. of Industrial Relations*, 123 Cal.App.4th 1317 (Nov. 9, 2004), the California Court of Appeal held that a question of fact existed as to whether meal period opinion letters issued by the Department of Labor Standards Enforcement ("DLSE") were "underground regulations" adopted in violation of the Administrative Procedure Act ("APA"). The Court also held that the issue of whether

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the Industrial Welfare Commission (“IWC”) exceeded its regulatory authority in promulgating a one-hour pay penalty for violations of the meal period provision in Wage Order I was moot because the penalty had since been codified in Labor Code § 226.7.

“In the wake of this opinion, the DLSE voluntarily acknowledged that one of the two opinion letters at issue in the case had industry-wide application and withdrew it.”

In April and December 2001, the DLSE issued two opinion letters concerning the application of Wage Order I’s “on-duty” meal period provision to truck drivers employed by “ready-mixed” cement compa-

panies. Although the DLSE in these letters took the position that each circumstance should be decided on a case-by-case basis, it concluded that the nature of the drivers’ work did not, in all circumstances, qualify them for an “on-duty” meal period and that, in the DLSE’s view, it generally would be possible for the drivers to take an off-duty meal period.

Westside disagreed with the DLSE and initiated an action for declaratory and injunctive relief, alleging, among other claims, that (i) the DLSE’s opinion letters interpreting Wage Order I were invalid and unenforceable “underground” regulations that were adopted in violation of the Administrative Procedure Act (“APA”) and (ii) the IWC exceeded its regulatory authority in promulgating the one-hour penalty in Wage Order I. The trial court sustained Defendants’ demurrer without leave to amend, concluding that the opinion letters were “general advice letters to a private party” and not “administrative regulations” governed by the APA, and that the IWC had authority to promulgate the meal period provisions of its wage orders.

The California Court of Appeal reversed in part, concluding that a question of fact existed as to whether the DLSE’s opinion letters stated new policies that were intended to apply industry-wide, thereby operating as underground regulations in violation of the APA. The Court also held that the second question was moot because the meal period penalty had since been codified by the California Legislature in California Labor Code § 226.7. In reaching this latter holding, the Court’s discussion of the meal period penalty appeared to support the view that the one-hour pay provision is a statutory penalty, and not wages, an interpretation which significantly limits an employer’s liability for meal period violations.

In the wake of this opinion, the DLSE voluntarily acknowledged that one of the two opinion letters at issue in the case had industry-wide application and withdrew it. The case serves as an important reminder to California employers that DLSE opinion letters do not necessarily have the weight of law in California courts.

Employer May Have Breached Settlement Agreement By Failing To Remove References To Termination From Employee’s Personnel File

In *Pardi v. Kaiser Permanente Hosp., Inc.*, 389 F.3d 840 (Nov. 15, 2004), the United States Court of Appeals for the Ninth Circuit ruled that Kaiser Permanente (“Kaiser”) may have violated a settlement agreement with a former employee by failing to remove references to the employee’s termination from the employee’s personnel file.

Plaintiff Stephan Pardi, a licensed respiratory care practitioner, worked at Kaiser Medical Center in Oakland, California. He informed Kaiser that he suffered from depression, a disability protected under the Americans with Disabilities Act (“ADA”). Between 1997 and 1999, Pardi filed a series of union grievances against Kaiser, as well as several charges with the Equal Employment Opportunity Commission, alleging, among other things, that Kaiser failed to accommodate his disability.

Kaiser terminated Pardi’s employment for cause in 1999 after physicians and patients made complaints about his unprofessional conduct. Kaiser reported Pardi’s termination to the Respiratory Care Board (“RCB”), which oversees the practice of respiratory care in California. In 2000, Kaiser and Pardi entered into a Settlement Agreement and General Release (the “Settlement Agreement”) whereby Kaiser agreed to pay Pardi \$130,000 in exchange for a general release of claims. One of the terms of the Settlement Agreement was that Kaiser would “accept the voluntary resignation” of Pardi, which resignation was to “become effective” seven days following the date on which Pardi signed the Settlement Agreement.

Less than two weeks after Kaiser settled with Pardi, an investigator with the California Department of Consumer Affairs (“DCA”) contacted Kaiser as part of the DCA’s investigation of the report Kaiser made to the RCB. Several days later, the inves-

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tigator reviewed Pardi's personnel file, which had not been updated to reflect Pardi's resignation rather than his termination for cause. After the DCA investigator's review of Pardi's personnel file, Kaiser directed that termination paperwork be removed from Pardi's personnel file and replaced with documents indicating that Pardi had voluntarily resigned.

Pardi thereafter filed suit against Kaiser in federal court, alleging, among other claims, that Kaiser breached the Settlement Agreement by failing to remove documents from his personnel file reflecting his termination. The District Court granted summary judgment to Kaiser. The Ninth Circuit reversed, holding that the terms "accept the voluntary resignation" and "become effective" in the Settlement Agreement were ambiguous and that a reasonable jury could find that the Settlement Agreement obligated Kaiser to remove all references to Pardi's termination from his personnel file and update its personnel records to reflect Pardi's voluntary resignation.

In another important aspect of the case, Pardi asserted that Kaiser had retaliated against him in violation of the ADA by, among other things, reporting his termination to the RCB. The District Court granted summary judgment to Kaiser, ruling that Kaiser's conduct in connection with the RCB investigation was protected by the state "litigation privilege" found in California Civil Code § 47(b). Section 47(b) shields from liability certain communications made in the course of litigation or other official proceedings. The Ninth Circuit reversed, holding that the litigation privilege of § 47(b) does not apply to bar an action under the ADA. Relying on the Supremacy Clause of the United States Constitution, which provides that federal law is the "supreme law of the land," the court held that a state litigation privilege purporting to confer immunity from suit cannot defeat a federal cause of action.

Future Lost Earnings For Detrimental Reliance Recoverable Even If Based On Former At-Will Employment

In *Toscano v. Greene Music*, 124, Cal.App.4th 685 (Dec. 2, 2004), the California Court of Appeal held that a plaintiff could collect damages from a would-be employer on a theory of promissory estoppel stemming from an unfulfilled promise of employment that caused the employee to resign from an at-will employment position with his former employer. The Court held that, even

though plaintiff's former employment was at-will, lost wages that plaintiff would have earned from his former employer had he not relied on the promise of employment by the defendant were recoverable as long as the damages were not speculative or remote and were supported by substantial evidence.

While holding such damages recoverable, the Court also found that, because plaintiff had introduced no evidence of his former employer's intention of retaining him, plaintiff's claim that he had lost nearly 15 years of future earnings was too speculative to support an award over that entire period of time. The Court accordingly remanded the case for a new trial on damages only.

This decision underscores the importance of exercising caution in connection with employee recruiting efforts, as promises of employment made to prospective employees that do not materialize may result in liability.

California Supreme Court Endorses "Catalyst Theory" Of Recovery Of Attorneys' Fees

In a pair of companion cases, the California Supreme Court endorsed the so-called "catalyst theory," under which plaintiffs may be awarded statutory attorneys' fees if they can establish that their lawsuit motivated defendants to provide voluntarily the relief plaintiffs sought in the lawsuit. *Graham v. DaimlerChrysler Corp.*, 21 Cal.Rptr.3d 331 (Dec. 2, 2004); *Tipton-Whittingham v. City of Los Angeles*, 34 Cal.4th 604 (Dec. 2, 2004). Of particular significance to California employers is *Tipton's* holding that the catalyst theory applies to attorney-fee awards under the California Fair Employment and Housing Act ("FEHA"), Government Code § 12965(b).

Graham involved a plaintiffs' request for fees under Code of Civil Procedure § 1021.5 (which applies to cases involving the public interest), while *Tipton* addressed a fee request in a class action alleging race and sex discrimination under the FEHA. In both cases, the California Supreme Court confirmed that plaintiffs may be awarded statutory attorneys' fees even if the lawsuit does not result in "a judicially recognized change in the legal relationship between the parties," e.g., a judgment on the merits, a consent decree, or a judicially ordered settlement. In order to obtain fees without such a judicially recognized change, however, the Court held that plaintiffs must establish that (1) the lawsuit was a catalyst motivating defendants to provide the primary relief sought; (2) the lawsuit had merit and achieved its catalytic effect by threat of

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victory, not by dint of nuisance and threat of expense; and (3) plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit.

By endorsing the catalyst theory under California law, the Court expressly declined to follow federal law, which abolished the catalyst theory in 2001 as a basis to recover federal statutory “prevailing party” attorneys’ fees. *Buckhannon Board & Care Home Inc. v. West Virginia Dept. of Health and Human Servs.*, 532 U.S. 598 (2001).

As a result of these cases, California employers could face exposure to statutory attorney-fee awards, including under the FEHA, even where they act voluntarily to provide the requested relief and no court has ruled in the plaintiffs’ favor. It remains to be seen, however, how stringently lower courts will interpret and enforce the three requirements plaintiffs must meet to obtain a fee award under the catalyst theory.

“Anticipatory” Retaliation Theory Adopted By Appellate Court

Rejecting twenty-eight year-old precedent from another appellate panel, in *Lujan v. Minagar*, 124 Cal.App.4th 1040 (Dec. 9, 2004), the California Court of Appeal held that a cause of action exists for employees who allege they have been fired due to “anticipatory” (as opposed to actual) retaliation for making a protected complaint against the employer under Cal-OSHA.

“The Court reasoned it was important to recognize “anticipatory” retaliation as a viable theory so as to prevent the “perverse incentive” for employers to preempt complaints by terminating employees they suspect will make them.”

In *Minagar*, the Labor Commissioner, on behalf of the employee, alleged that the employee had been terminated — not for a complaint that she made — but rather, based on a complaint that a co-worker made. The Labor Commissioner’s theory was that the employer feared that the employee, like her co-worker, would make similar complaints of Cal-OSHA violations. In fact, the employer had admitted at trial that she was “afraid [the employee] will be the next one to report me.” On Minagar’s motion after trial, the court dismissed the Labor Commissioner’s enforcement action.

The Appellate Court reversed and remanded with instructions to enter judgment in favor of the Labor Commissioner, thus providing the employee with full backpay and reinstatement. In doing so, it relied on federal interpretations of similarly-worded federal anti-retaliation statutes holding that “anticipatory” retaliation is actionable. The Court reasoned it was important to recognize “anticipatory” retaliation as a viable theory so as to prevent the “perverse incentive” for employers to preempt complaints by terminating employees they suspect will make them.

Employee Not Entitled To CFRA Leave Where Evidence Establishes She Can Perform Essential Functions Of Job, Although For Different Employer

The California Court of Appeal in *Lonicki v. Sutter Health Central*, 124 Cal.App.4th 1139 (Dec. 10, 2004), held that an employee cannot be considered “unable to perform the functions of a job” for one employer under the California Family Rights Act (“CFRA”) while at the same time successfully performing the functions of an identical job for a different employer.

The plaintiff in *Lonicki* was simultaneously employed as a sterilizing technician by two separate hospitals, defendant Sutter Health Center (“Sutter”) and Kaiser Permanente Hospital. Upon learning that her shift had been changed at Sutter, Lonicki sought a leave pursuant to the CFRA, claiming that she was too emotionally upset by the shift change to work. Lonicki was subsequently found to be fit to return to work without restriction and was given a return date. Lonicki failed to appear on that date and Sutter terminated her employment. Thereafter, Lonicki filed a civil suit against Sutter claiming a violation of the CFRA.

Sutter moved for summary judgment and the trial court ruled, in part, that Lonicki was not entitled to CFRA leave because it was undisputed that, at the time she sought leave from Sutter, she was performing the identical functions for Kaiser, her other employer. The Court of Appeal affirmed the trial court’s rejection of Lonicki’s argument that the legal standard for an individual being “unable to perform the essential functions” of one’s position is employer-specific. Rather, the Court concluded that the words “unable to perform the essential functions” are, by necessity, words of restriction, not expansion, and that Lonicki’s attempt to

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interpret the language to cover her desire not to work during a particular shift due to purported stress was inappropriate.

The Court explained that “[i]f an employee is entitled to make legal demands on the employer because his or her boss creates stress, then at times entire offices might go understaffed. . . and supervisors would no longer be able to manage effectively, without fear of constant demands for transfer by their increasingly hypersensitive employees. [The CFRA was] not intended to tilt the balance so far.” Simply put, “[a]n employee who in fact successfully performs essential functions of a job cannot thereafter establish that he or she is incapable of doing so.”

California Supreme Court To Hear Bonus Case

In our October 27, 2003 *Employment and Labor Alert*, we reported on a case — *Ralphs Grocery Co. v. Superior Court* — in which a California appellate court called into question, under state law, the legality of a wide range of profit-based compensation programs for employees, including those provided to executives. According to the Court of Appeal, the program maintained by Ralphs Grocery Company violated California law with respect to both exempt and non-exempt employees as the company’s workers’ compensation costs were taken into account in the determination of payments made under the program. The Court also found that the program violated the applicable Wage Order as it also used cash and merchandise shortages in calculating bonuses with respect to non-exempt employees. On December 15, 2004, the California Supreme Court agreed to hear these same issues in a separate case involving Ralphs, *Prachasaisoradej v. Ralphs Grocery Company*, Case No. S128576.

Arbitration Provision, As Drafted, Did Not Apply To Pre-employment Claims

The California Court of Appeal’s decision in *Balandran v. Labor Ready, Inc.*, 22 Cal.Rptr.3d 441 (Dec. 15, 2004) provides a cautionary note for employers with respect to the language used in arbitration provisions. In *Balandran*, the trial court denied defendant’s petition to compel arbitration on plaintiffs’ pre-employment discrimination claims because it concluded that these claims were outside the scope of the arbitration clause. The

Court of Appeal affirmed the trial court’s ruling, noting that the arbitration clause, as drafted, did not apply to plaintiffs’ claims.

The arbitration clause, contained within defendant’s application form, required applicants to arbitrate “any disputes arising out of employment.” The application also contained a neighboring provision which stated that applicants were not considered “employed” until they were assigned to work on a job. The plaintiffs claimed that they were discriminated against because defendant only sent men to a particular worksite.

Concluding that the plaintiffs’ claims were pre-employment claims, the Court held that that under the plain language of the agreement, the plaintiffs were never employed and therefore could not be compelled to arbitrate their claims. The Court noted that its holding was compelled solely by the particular language of the arbitration agreement and that generally arbitration provisions contained within application forms that apply to both post and pre-employment claims are enforceable. Accordingly, the Court noted that a “different contract would have provided for a different result.”

Due Process Rights Of Public Employee Not Violated By Grievance Procedure In MOU That Gave Only Union The Right To Initiate Arbitration

In *Jones v. Omnitrans*, 125 Cal.App.4th 273 (Dec. 23, 2004) the California Court of Appeal held that the due process rights of a public employee were not violated by a grievance procedure in a memorandum of understanding (“MOU”) with the union which gave the union the exclusive right to initiate arbitration.

Jeffrey Jones, an employee of Omnitrans, a public transportation agency, was terminated from his employment for cause. The MOU between Omnitrans and the union set forth a three-step grievance procedure. Under Steps 1 and 2, an employee could submit the grievance to two levels of management. Management would then schedule a meeting with the employee and issue a written response. Under Step 3, the employee, with a union representative, could request that the grievance be referred to arbitration. The union denied Jones’ request to refer the matter to arbitration. Jones alleged that he had due process rights as a public employee and that those rights were denied by

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the provision in the MOU giving the union the exclusive authority to request arbitration. The trial court found that Jones' due process rights were not violated and dismissed his claim.

The Court of Appeal affirmed. The Court held that a public employee has a property interest in his employment and that a collective bargaining agreement must afford an employee an opportunity to be heard, and the opportunity for arbitration. In the situation where the union and not the employee is given the exclusive authority to request arbitration, the union must act under a duty of fair representation to satisfy due process requirements. The Court noted that Jones received written notice, was given the opportunity to be heard in two meetings, and his union considered his grievance before refusing to submit it to arbitration. The Court also noted that there is a strong public policy in favor of collective bargaining agreements which resolve disputes in a reasonable and effective manner. The Court held that based on the fact that the procedure was fair and adequate, and that Jones had rights to challenge the union's decision and recourse against the union if its decision not to pursue arbitration was arbitrary, discriminatory, or in bad faith, Jones' due process rights were not violated.

California Supreme Court To Decide When Employee Discharged

Pursuant to Labor Code § 201, most California employers are required to pay all earned wages immediately at the time of discharge. Whether or not this section applies to employees whose term of employment runs out is the issue to be decided by the California Supreme Court in *Smith v. Superior Court*.

L'Oreal, the employer in *Smith*, hired Amanza Smith to participate in a hair show for one day at a flat fee of \$500. Smith completed the one-day of work and it took L'Oreal, who considered Smith to be an independent contractor, more than two months to pay her. Smith filed a class action on behalf of herself and other L'Oreal models claiming that the delay in payment violated Section 201 and entitled her to up to 30 days of waiting time penalties under Labor Code § 203. Sustaining the order of summary judgment issued by the trial court in L'Oreal's favor, the Court of Appeal held that an employee was not "discharged" for purposes of Labor Code Sections 201 and 203 if their termination resulted from the completion of a project, as opposed to an affirmative dismissal. On January 19, 2005, the California Supreme Court agreed to hear Smith's claims.

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