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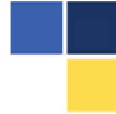

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Exempt Classification of Position of Employment Does Not Automatically Create Predominate Issue for Class Certification

A group of employees filed suit against a news organization on behalf of current, former and future non exempt employees at the company's Los Angeles facility. The class argued that the agency's reporters were not exempt from the overtime requirements of the Fair Labor Standards Act and, as a result, the employer wrongfully denied them overtime compensation, as well as other issues arising under state law. The class was certified and a jury returned a $2.5 million verdict. The U.S. Court of Appeals for the Ninth Circuit originally affirmed the trial court's ruling, but the U.S. Supreme Court vacated the opinion and remanded it for reconsideration in light of the Court's holding in *Dukes v. Walmart.* On remand, the court focused on whether common questions of law or fact predominated over individual issues, a requirement for the form of class action at issue. While the Ninth Circuit ultimately remanded the case to the district court, it held that predominance could not be presumed simply because the agency had a uniform policy of classifying all reporters as exempt. Rather, it was required to evaluate whether individual issues existed that would make class treatment impossible. This case creates a valuable

precedent for employers that a uniform policy does not in and of itself render class treatment appropriate, and thereby offers an additional basis on which to challenge class treatment.

[*Wang v. Chinese Daily News, Inc.*, Nos. 08-55483, 08-56740, (9th Cir., Mar. 4, 2013)]

Contact for more information: [Scott M. Gilbert]

Tenth Circuit Finds That Corporations Cannot Suffer From a Hostile Work Environment

A cleaning company owned by two white women had a cleaning contract with a city airport. Throughout the period of the contract, the cleaning company's owners and employees worked with a contract-compliance technician at the airport to arrange for cleaning services. According to the owners of the cleaning company, the technician, an African American male, made discriminatory comments regarding the owners' gender and race and made the work environment miserable for their employees. When the owners of the cleaning company complained that the airport staff was not treating them well and that the airport was discriminating against the company, the airport terminated the contract. Thereafter, the cleaning company sued the airport and the technician alleging gender and race-based discrimination and a violation of its constitutional rights. The district court granted summary judgment in favor of the airport, but allowed the suit against the individual technician to proceed, finding that there were genuine issues of fact regarding whether the technician was motivated by racial and gender bias and whether the technician "created a hostile work environment vis-à-vis the plaintiff by acting in such a way as to make plaintiff's contract unprofitable and its owners miserable." The U.S. Court of Appeals for the Tenth Circuit reversed the district court's ruling as to the cleaning company's hostile work environment claim against the technician. It held that the technician was entitled to qualified immunity on such a claim because an artificial entity could not prevail on a hostile-work-environment claim. The court noted that because such a claim has a subjective, as well as an objective, component, which presupposes feelings or thoughts, it was unlikely an artificial entity could succeed on such a claim. As such, employers should be aware that while hostile-work-environment claims can be made by individual employees, it is unlikely such a claim will succeed when brought in the name of the corporation.

[*Allstate Sweeping LLC v. Calvin Black,* No. 12-1027 (10th Cir., Feb. 7, 2013)]

Contact for more information: [Eileen M. Caver]

Participant in Defined Benefit Plan Not Entitled to Higher Discount Rate in Calculating Lump Sum Benefit

A senior executive participated in two defined benefit pension plans offered by his employer. At the time he was to commence receiving his pension benefits, the participant was offered a choice between an annuity or a lump sum payment, and the participant elected to receive a lump sum. The plans then communicated to the participant the amount of his lump sum benefits. The participant challenged the discount rate used by the plans in calculating those amounts, arguing that the rate used by the plans was too high (thereby reducing the amount of his lump sum benefit). The plans responded that their use of a discount rate higher than the one suggested by the participant was permitted under the terms of the plan, and the retroactive application of the higher rate was authorized by Congress through the

Pension Protection Act of 2006. The district court agreed with the plans and granted the defendant plans' motion for summary judgment. In an opinion affirming the judgment of the district court, the U.S. Court of Appeals for the Seventh Circuit described how discount rates are used to determine the present value of an annuity, and how the discount rate selected by the plans was consistent with the plan's terms. In particular, the court rejected plaintiff's contention that the use of the higher discount rate amounted to a "cutback" that was prohibited by ERISA. Employers who offer defined benefit pension plans should review the terms of their plans to ensure that they accurately reflect the discount rates to be used in calculating a participant's benefits.

Dennison v. MONY Life Retirement Income Security Plan, No. 12-2407, (7th Cir. Mar. 6, 2013)

Contact for more information: Anthony E. Antognoli

Being on Time to Work May Be Essential Function of Position

A city case manager who suffered from schizophrenia was taking medication on a calibrated schedule. His employer had a flex-time policy which allowed employees to arrive at work anytime within a one-hour window in the morning. If an employee was late, the employee was required to secure a supervisor's approval or disapproval of the tardy arrival. The employee often could not get to work within that window of time due to his calibrated medication schedule, and for roughly 10 years, the employer excused his tardiness and allowed him to arrive later. Later, however, the supervisor stopped approving the late arrivals. The employee repeatedly requested that he be permitted to arrive later so that he would not be disciplined for tardiness, but his supervisor refused. The employee's doctor recommended that his medication schedule not be altered at that time, which made it difficult for him to arrive earlier. The supervisor then recommended disciplinary action against the employee for his long history of tardiness, and at a grievance hearing, the City recommended his termination. The union representative argued that the employee's mitigating circumstances (the disability) should be considered. The employee then made formal requests for accommodation to arrive at work later, and a higher-level supervisor denied the request without having any discussion with the employee. He was then suspended for 30 days without pay as a sanction for his tardiness. The employee brought suit claiming violations of various state and local ordinances as well as the Americans with Disabilities Act (ADA). The district court dismissed all of the employee's claims on the grounds that arriving to work with some degree of consistency was an essential function of the employee's position. Because the employee could not arrive at work with that degree of consistency, the court held that the employee was unable to perform the essential functions of his position, with or without reasonable accommodation. The U.S. Court of Appeals for the Second Circuit reversed, finding that the district court granted summary judgment on the disability discrimination and failure to accommodate claims without undertaking a complete factual analysis. The court ultimately found that there was not a sufficiently fact-specific analysis conducted as to whether a specific arrival time was, in fact, an essential function of the job. There was evidence that the employee could offset time missed due to tardiness with additional hours worked so as to complete the essential functions of his position, so it was questionable why a specific arrival time was so significant. This case serves as a reminder to employers about the importance of conducting fact-specific analyses when addressing reasonable accommodation and disability issues.

McMillan v. City of New York, No. 11-3932 (2nd Cir., Mar. 4, 2013)

Contact for more information: Amy K. Jensen

Second Circuit Clarifies Proof Burdens in Sarbanes-Oxley Whistleblower Cases

During the midst of sustaining net operating losses for three consecutive years, the employer hired a new president and Chief Executive Officer (CEO). The vice president of technology commercialization told the employer's general counsel that he suspected that the new president and CEO of violating certain legal requirements. The vice president served on a financial transactions committee where he asserted that the company had to make certain disclosures under the Sarbanes-Oxley Act based on his suspicions. The other committee members disagreed. The vice president refused to sign certain disclosure forms. In response to its continuing financial challenges, the company took action to reduce its personnel, and as part of its reduction of personnel, discharged the vice president, who subsequently contested his discharge and claimed a violation of the whistleblower provision of the Sarbanes-Oxley Act under 18 U.S.C. sec. 1514A. He filed a complaint with the Occupational Safety and Health Administration ("OSHA"), an agency within the U.S. Department of Labor, alleging that his employer unlawfully retaliated against him in response to his refusal to sign the company's Sarbanes-Oxley disclosure forms. What followed were complex substantive hearings and procedural challenges that resulted in the case going through the administrative hearing and review process twice before it arrived in front of the Court of Appeals. The Seventh Circuit Court of Appeals considered the elements and burden of proof in making such a claim, finding that if the employee makes a *prima facie* case by showing that he engaged in protected activity, the employer knew that the employee engaged in the activity, the employee suffered an unfavorable personnel action, and the protected activity was a contributing factor in the unfavorable action. If the employer has "clear and convincing evidence" that it would have taken the same adverse personnel action in the absence of the alleged protected activity, it can avoid liability. Here, the employer ultimately prevailed by showing a lack of connection between the discharge of the vice president, which occurred due to the employer's dire economic circumstances, and the vice president’s protected activity of refusing to sign the employer company's Sarbanes-Oxley disclosures forms. While this case involves the unique legal framework and circumstances of the Sarbanes-Oxley Act, the opinion highlights the potential need for an employer to substantiate a lawful basis for terminating an employee that bears no connection to the other duties that person may perform for the employer.

Bechtel v. U.S. Dept of Labor, Admin. Rev. Bd., No. 11-4918 (2nd Cir., Mar. 5, 2013)

Contact for more information: Ambrose V. McCall

Employee’s Discrimination, Harassment and Retaliation Claims Rejected

A female employee working as jail guard wrote a complaint to her employer, alleging that her supervisor was sexually harassing her by continuously asking her out on dates, asking to touch her hair, questioning her regarding her dating life and asking her to come to his home for dinner. After receiving the complaint, the employer advised the supervisor to speak to the employee only regarding work matters and subsequently relocated the supervisor to another part of the jail. A few months after submitting her complaint, the employee was terminated due to repeatedly showing up late for work.

The employee filed a lawsuit pursuant to 42 U.S.C. § 1983, alleging that she was discriminated against on the basis of her race and gender, subjected to sexual harassment, and retaliated against for complaining of sexual harassment. The U.S. Court of Appeals for the Eighth Circuit rejected the employee's claims. The court found that the employee had no claim for hostile-work environment sexual harassment because the conduct she was subjected to was not sufficiently "severe or pervasive" and when the employer confronted the supervisor about his conduct, he ceased his advances. Next, the court rejected the employee's discrimination claim, holding that she was terminated because she had 26 tardies in 18 months, not because of her gender or race. Finally, the court found that the employee had no retaliation claim because she failed to establish the requisite causal relationship between her complaints and her termination due to the fact that she was terminated almost three months after she complained about the supervisor and more than one month after the supervisor was transferred. This case demonstrates that when an employer takes prompt action in response to reports of sexual harassment and keeps good records of employee performance and disciplinary issues, the employer will have strong defenses to claims of discrimination, harassment and retaliation.

Butler v. Crittenden County, et al., Case No. 12-1993 (8th Cir., Mar. 5, 2013)

Contact for more information: Leigh C. Bonsall

Employees Entitled to Recover Unpaid Wages, Regardless of Immigration Status

Hurricane shutter installers filed suit against their employer, claiming that they were denied overtime wages in violation of the Fair Labor Standards Act (FLSA). The case was tried before a jury and the employees were awarded lost wages and liquidated damages. The employer filed a motion for a new trial. The motion was denied and the employer appealed. The U.S. Court of Appeals for the Eleventh Circuit upheld the jury's verdict and the trial court's award of liquidated damages. The court rejected the employer's arguments that the employees could not recover damages because they were wrongdoers because they were not lawfully authorized to work in the United States and utilized fraudulent work authorization documentation, or because they failed to report their income to the Internal Revenue Service. The court previously determined that undocumented aliens are "employees," who may recover unpaid wages under the FLSA. The court reiterated that an employee's ability to recover unpaid wages for work already performed does not depend on his or her immigration status. This case serves as a reminder to employers that failure to timely and properly pay employees' wages for work performed can lead to various damages and penalties under both state and federal law.

Lamonica v. Safe Hurricane Shutters, Inc., No. 11-15743 (11th Cir., Mar. 6, 2013)

Contact for more information: Cheryl L. Wilke

Public Employees' Speech May Be Protected As a Matter of Public Concern

Current and former sergeants of a police department claimed they were not promoted from the rank of sergeant to lieutenant during the tenure of the police chief and the mayor due to one of the sergeant's support of another mayoral candidate. The sergeants alleged that they passed the civil service examination, were ranked such that they should have been promoted, and that their promotions were

recommended by others, but that they were not promoted because the police chief was penalizing them for one sergeant's support of the opposing mayoral candidate. The police department denied these allegations, claiming that the lack of promotions was due to budgetary cuts and organizational decisions. The sergeants filed suit against the city, the police department, the police chief, and the mayor, claiming that they were retaliated against and discriminated against in violation of their First Amendment rights, 42 U.S.C. §1983, and New Jersey state law. The district court entered summary judgment in favor of the employer on the free speech and political affiliation claims and the sergeants appealed. The U.S. Court of Appeals for the Third Circuit vacated the district court's judgment. The district court previously held that the female sergeant's free speech claim failed because she was not speaking of a matter of public concern. The court of appeals disagreed, finding that complaints of gender inequality in the workplace dating back to the 1990s necessarily implicates a matter of public concern, as did the sergeant's report of sexual harassment against another female employee. Thus, the court concluded, the sergeant was engaged in protected activity because her speech involved a matter of public concern. The sergeant would then have to prove at trial that she was acting as a citizen when she made these complaints and that her speech was a substantial or motivating factor in her non promotion. Employers must be mindful that under certain circumstances, taking adverse employment action against one employee can negatively affect others and give rise to claims by other employees.

Montone v. City of Jersey City, Nos. 11-2990 and 11-3516 (3rd Cir., Mar. 8, 2013)

Contact for more information: Amy K. Jensen

Third Circuit Expands Protected Activity for SOX Whistleblowers

An accountant expressed concerns that certain expenses for company events were excessive and should be further reviewed by the employer's tax department. In addition, the employee refused to process the payment for one event because it was unclear to him whether a certain company officer had personally approved the expenses. The employee was terminated and filed suit alleging constructive discharge in violation of the anti-retaliation provision of the Sarbanes-Oxley Act of 2002 (SOX). Adopting the U.S. Department of Labor Administrative Review Board's interpretation of "protected activity" under SOX's whistleblower provisions, the U.S. Court of Appeals for the Third Circuit held that employees must simply show that they had a "reasonable belief" that the employer violated SOX. The court also held that claimants need not allege facts sufficient to sustain a fraud claim — such as those demonstrating scienter or materiality — in order to garner protection under the statute. Under this standard, employees must only put the employer on notice of potential fraudulent conduct through their communications to management. Given the "reasonable belief" standard articulated by the court in this case, employers must take caution when taking adverse employment action against an employee who has made such a complaint, or potentially face a SOX retaliation claim.

Weist v. Lynch, No. 11-4257 (3rd Cir., Mar. 19, 2013)

Contact for more information: Jennifer M. Ballard

School District Prevails in Title VII Retaliation Case Filed by the Basketball Coach

A high school girls varsity basketball coach sued a school district for gender discrimination after the school failed to hire her as the boys varsity basketball coach. The court found in favor of the coach and ordered the district to hire her to coach both teams. Around the same time that the coach took responsibility for both teams, parents filed a lawsuit against the state's high school athletic association, arguing that the state violated Title IX by not holding the girls' basketball season at the same time as the boys' season. After the coach held the dual role of boys' and girls' basketball coach for approximately five years, the school district removed her as coach of the girls' team but allowed her to remain as coach of the boys team. According to the school, the decision to relieve her from her girls' team coaching duties was done proactively in anticipation of the court's ruling in the Title IX suit, hoping to ease the transition in the event the court ordered the realignment of the girls' basketball season. Several months after she was removed as the girls coach, the court issued a final decision ordering the state to hold both girls' and boys' basketball seasons at the same time. Despite this ruling, the coach sued the school, arguing that it removed her as coach of the girls' basketball team in retaliation for her decision to file initial gender discrimination lawsuit against the school. There was at least a two-year time lapse between "protected conduct" of the final order in the gender discrimination lawsuit and the alleged retaliatory act of terminating her as the girls' coach. The U.S. Court of Appeals for the Sixth Circuit determined that the two-year gap in time between the "protected conduct" and the retaliatory act was fatal to the coach's attempt to demonstrate the necessary connection between the "protected conduct" and the alleged retaliation. As such, the coach could not meet her burden. While this case turned out favorably for the school district, employers must be careful to act deliberately and cautiously when taking actions against employees who have filed lawsuits, or who have even complained about alleged discriminatory practices of an employer.

Fuhr v. Hazel Park School District, No. 11-2288, (6th Cir., Mar. 19, 2013)

Contact for more information: V. Brette Bensinger

Ninth Circuit Finds 401(k) Plan Sponsor Breached Fiduciary Duty By Inclusion of Retail Funds in 401(k) Plan Investment Choices

Current and former employees and participants in a defined contribution individual account plan brought a class action lawsuit under the Employee Retirement Income Security Act (ERISA) in federal district court against the employer sponsor of the plan and different parties they claimed were fiduciaries. The Plaintiffs brought numerous claims alleging prohibited transactions and fiduciary breaches related to the administrative and investment fees paid by the plan including whether defendants breached their duties of loyalty and prudence when they invested in the more expensive retail share classes rather than the cheaper institutional share classes of mutual funds. The district court held that the plan did breach its fiduciary duty of prudence under Section 404(a) of ERISA because, based on all the facts and circumstances, there was no advantage offered by the more expensive retail funds and there was no evidence that the fiduciaries considered offering the less expensive institutional funds. The decision was then appealed to the U.S. Court of Appeals for the Ninth Circuit, which upheld the decision of the district court finding that plan breached its fiduciary duty by offering the retail funds. The court found that there were no salient differences between the retail and institutional share classes and that the defendants never demonstrated that they considered the

difference between the different classes. The court stated that the fact that an investment consultant was used and relied on to make its selection of funds did not matter as the consulting firm was the fiduciary's consultant, not the fiduciary, and reliance on the consulting firm was not reasonable because the plan could not demonstrate that it or its consultants considered the different share classes. Based on this decision, employers sponsoring pension plans should be prudent in ensuring they follow an appropriate process in determining what investment funds to include in their plans.

Tibble v. Edison, No. 10-56415, (9th Cir. Mar. 21, 2013)

Contact for more information: Elizabeth H. Earl

Plaintiff Unable to Avoid CAFA Removal by Stipulating to Damages Cap

The U.S. Supreme Court recently resolved a split of authority among federal circuit courts regarding whether a plaintiff in state court can prevent removal of a case to federal court by signing a stipulation at the beginning of the case, stating that the class will not seek damages in excess of $5 million. Several circuits have found that a plaintiff could avoid removal in this manner. Other circuits denied this practice because a named plaintiff cannot bind absent class members without certification. The U.S. Supreme Court, however, ultimately concluded that a stipulation by a class-action plaintiff that he or she and the class will seek damages that are less than the threshold for jurisdiction under the Class Action Fairness Act of 2005 (CAFA) does not defeat federal jurisdiction under the act. The unanimous decision eliminates a forum-shopping tool used by plaintiff's class action lawyers to avoid federal court. This is not an employment case, however, many press reports confirm that wage and hour class actions pose one of the greatest financial threats to employers. This decision will benefit potential class action defendant employers by allowing a federal forum for the action. Class plaintiffs generally prefer state courts, so they often try to defeat federal jurisdiction — as the plaintiff tried in this case.

Standard Fire Ins. Co. v. Knowles, No. 11-1450 (U.S. Sup. Ct., Mar. 19, 2013)

Contact for more information: Clint D. Robison

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