Labor and Employment Litigation Update

Friday, May 5, 2017 General Session; 10:30 a.m. – 12:15 p.m.

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WAGE & HOUR

TEXAS DISTRICT COURT RULING STAYS THE IMPLEMENTATION OF THE DEPARTMENT OF LABOR'S NEW OVERTIME RULE

Nevada v. United States DOL (2016) U.S. Dist. LEXIS 162048.

On November 22, 2016, the U.S. District Court of the Eastern District of Texas issued a preliminary injunction prohibiting the Department of Labor (DOL) from enforcing its new overtime regulations that increase the salary threshold for employees to qualify as exempt under the white-collar exemptions. The new rule was scheduled to take effect on December 1, 2016, but the status of the rule and its application are now uncertain. Under the new rule, employees must be paid a minimum annual salary of $47,476 in order to meet the salary threshold for exempt status from overtime pay requirements—more than doubling the previous salary level of $23,660; this salary level will also be adjusted automatically every three years.

The issuance of the preliminary injunction was a victory for the numerous plaintiffs involved in the lawsuit seeking to invalidate the DOL's new regulations, which included a number of states and various business advocacy groups. The District Court agreed with the plaintiffs' argument that doubling the salary level necessary for the overtime exemption gave the required salary level aspect of the exemption test an unfair amount of weight relative to the "salary basis" and "duties test" prongs, which is inconsistent with the language of the Fair Labor Standards Act. The District Court further found that permitting the new overtime rule to take effect would irreparably harm the state plaintiffs and that there was no harm in delaying the implementation of the new rule. For now all employers can do is simply wait anxiously while the DOL decides how to proceed.

DISCRIMINATION/HARASSMENT

TERMINATION FOR AN ACTIVITY THAT WAS ARGUABLY A PERMITTED AND ACCEPTED PRACTICE MAY NOT PROVIDE LEGITIMATE, NON-PRETEXTUAL BUSINESS REASON WARRANTING SUMMARY JUDGMENT ON GENDER DISCRIMINATION CLAIM

Mayes v. WinCo Holdings, Inc., 846 F.3d 1274 (9th Cir. 2017).

Katie Mayes worked at WinCo as a "Person in Charge" and she had a leadership role on the store safety committee. In her PIC capacity, she supervised night shift freight crew employees tasked with stocking shelves with new freight that sometimes required them to stay beyond their normal shifts. Mayes testified that, as a way to motivate the crew and boost morale, the former general manager gave her permission occasionally to take them cakes from the store bakery. She was to record the cakes in the in-store use log, and she did so. Several employees gave declarations stating that this was a common, accepted practice. In 2011, the bakery department instructed Mayes to take cakes only from the "stales" cart, which usually went to a food bank because the store could no longer sell them. They further told Mayes she did not need to log these "stales" because they had already been removed from the store inventory and tracked as lost product. In 2011, the then-store manager (Steen) − who had criticized Mayes (but not a male coworker) because she had children and could not stay late or come in on her days off − initiated a loss

prevention investigation against her and a co-worker regarding the cakes. (Steen had also allegedly stated previously that she did not like it that "a girl" was running the freight crew and that a man "would be better" as chair of the safety committee.) Mayes was fired for theft and dishonesty, and because the "gross misconduct" definition in WinCo's personnel policies included theft and dishonesty, WinCo denied Mayes COBRA benefits. She was replaced by a male worker with only one month of freight crew experience and no WinCo supervisory experience. Mayes sued alleging gender discrimination under Title VII and state law, as well as a claim for denial of COBRA benefits. WinCo successfully sought summary judgment on grounds that it acted for legitimate business reasons that Mayes had failed to show were pretextual.

The Ninth Circuit reversed, finding Mayes had presented direct evidence of discriminatory animus on the part of a manager who either participated in or made the decision to fire her. Further, multiple employees testified that is was a common, accepted practice – as opposed to an offense punishable by termination − for PIC's to take the stale cakes to the employees. That WinCo purportedly fired Mayes for following such a "common" and believed-to-be-authorized practice was deemed substantial and specific evidence that WinCo's proffered explanation was not believable.

DISABILITY/FAMILY MEDICAL LEAVE

COURT CONSIDERS WHAT CONSTITUTES A "DISABILITY" UNDER FEHA AND WHAT IS ADEQUATE "NOTICE" BY AN EMPLOYEE UNDER CFRA

Soria v. Univision Radio Los Angeles, Inc., 5 Cal.App.5th 570 (2016).

Sofia Soria was an on-air radio personality host for Univision Radio Los Angeles, which hosted a midday radio show. She was diagnosed with a small tumor in her esophagus and stomach and worked for years without any issues until it was determined that the tumor had grown and she needed surgery. She consulted with several doctors regarding surgery and during this time, Soria missed work or arrived late approximately nine times due to doctor appointments related to her tumor. On each occasion, Soria notified her supervisors in advance and was granted time off from work. It was undisputed that she had no physical symptoms or impact from the tumor that resulted in an inability to perform her job duties. She claimed that she did have conversations with her supervisors about her tumor and the need for surgery and that she requested medical leave from work in order to undergo surgery to remove her tumor. Soria's supervisor claimed that she had not been told about the tumor or that the leave was for surgery. The supervisor further claimed that Soria's request was denied for work-related reasons. Shortly thereafter her employment was terminated and Univision claimed it was due to various performance issues, including tardiness and lack of preparation.

Soria filed a lawsuit against her former employer for disability discrimination, failure to provide reasonable accommodation, failure to engage in the interactive process under FEHA, and interference and retaliation under CFRA, among other claims. The trial court granted summary judgment for Univision on all claims finding that Soria did not have a physical disability or medical condition entitling her to protection, that Univision had shown a valid reason for her termination, and that Soria did not meet the CFRA requirements for requesting leave.

The Court of Appeal reversed the trial court's finding, holding that triable issues of material fact still existed that needed resolution. The court considered whether Soria was "disabled" even though her tumor did not arguably interfere with her work. The court concluded that it was a "disability" because she needed medical treatment for it and that this required time off for appointments, which interfered with work, which is a "major life activity" under FEHA. Further, her termination could have been based on discrimination because she allegedly disclosed her condition to her supervisor, her need for leave for surgery was close to the time of her termination, and her tardiness had been an issue for many years without it being documented. In addition, Soria arguably had provided sufficient information of the need for leave and then it was up to her employer to determine the extent of time needed for her leave under CFRA.

The was appellate court found that absences caused solely by medical appointments (rather than incapacity from an underlying medical condition) may constitute a limitation on a major life activity and therefore a finding of a disability for purposes of FEHA. Moreover, failure of an employee to specify the duration of leave does not obviate an employer's responsibilities under CFRA as both are significant.

OPPOSING EMPLOYER ACTIONS DIRECTED AT GENERAL PUBLIC NOT PROTECTED ACTIVITY

David Dinslage worked for San Francisco's Recreation and Parks Department organizing programs for the disabled. As part of a large-scale restructuring of the Department's recreation programs, Dinslage's job classification was eliminated and he (along with several other employees) was laid off. Dinslage publicly criticized the Department and claimed that the Department's actions in eliminating programs were discriminatory to the disabled community. He applied for a new position created as part of the restructuring, made it to the second round of interviews, but ultimately was not selected.

Dinslage sued San Francisco for age discrimination, retaliation, and harassment under FEHA. With respect to his retaliation claim, Dinslage argued that his employment was terminated, in part, because of his expressed opposition to Department actions that discriminated against people with disabilities. The Court of Appeal held that Dinslage's advocacy for the disabled community and his opposition to Department policies were not protected activity. Since Dinslage did not oppose an unlawful employment practice under FEHA, he did not engage in any protected activity and therefore did not have a viable retaliation claim. "For protection under the 'opposition clause,' an employee must have opposed an employment practice made unlawful by the statute." A claim of retaliation under FEHA cannot be premised on an employer's conduct towards the general public. Rather, it must involve opposition to a specific employment practice. *Dinslage v. City and County of San Francisco*, 5 Cal.App.5th 368 (2016).

CALIFORNIA FAMILY RIGHTS ACT CONTAINS "REASONABLENESS" COMPONENT WITH RESPECT TO HOW AN EMPLOYEE MAY EFFECTIVELY REQUEST PERSONAL MEDICAL LEAVE

Bareno v. San Diego Community College Dist., 7 Cal.App.5th 546 (2017).

Secretary Leticia Bareno was disciplined in 2006 by her employer, the San Diego Community College District, due to significant attendance problems. In 2012, she received first a counseling memo and later a written reprimand for attendance and poor performance. In early 2013, she was to be suspended for three days for similar issues. Immediately following the suspension, on February 25, she called in sick because she required medical treatment and accompanying leave from work, and she requested medical leave from her supervisor because she was "sick, depressed, stressed and had to go to the hospital." Bareno provided medical certification for this request for leave. While out, she also emailed about her wish to appeal the suspension. The return to work date passed, but Bareno continued to be absent from work the week of March 4. On March 8, a human resources official sent a certified letter informing her that her absences constituted a voluntary resignation effective March 11, and indicating she could request a meeting with her supervisor within five days of the mailing of the letter. In fact, Bareno had e-mailed her supervisor on March 1 with a recertification of her need for another week of medical leave (and an email was produced), but the College claimed that Bareno's supervisor did not receive any such request from Bareno. She emailed two more work status reports from her provider and extended her leave until April 1. Bareno picked up mail from her P.O. Box on March 18 and found the letter of termination. She immediately phoned the HR representative who told her he could not speak with her because she was no longer an employee. Bareno set up a meeting with the chancellor and human resources and presented all of her documentation, arguing that she had been on medical leave since February 25, but the college rejected her position.

Bareno sued, alleging that in effectively terminating her employment, the College retaliated against her for taking medical leave in violation of the California Family Rights Act (CFRA). The College successfully moved for summary judgment, arguing that Bareno had not shown that she properly requested the leave or that the doctor's note met CFRA requirements. Bareno appealed.

The Court of Appeal reversed finding that there was triable issues of material fact in dispute and that the record was capable of supporting a judgment in facor of Bareno. The appellate court held that Bareno did provide sufficient notice of her need for CFRA-protected leave. CFRA is silent with respect to how unforeseeable leaves may be requested, but the regulations say verbal notice may be sufficient if the employee communicates "as soon as practicable" with an underlying reason that may be CFRA-qualifying. The burden is then on the employer to inquire further by requesting certification. "CFRA and its implementing regulations clearly contain a reasonableness component with respect to an employee's request for personal medical leave."

PAST POLICY AND PRACTICE OF ASSIGNING INJURED WORKERS TO TEMPORARY LIGHT DUTY POSITIONS RESULTS IN FINDING THAT SIMILAR ACCOMMODATION FOR TRAINEES IS NOT UNREASONABLE

Atkins v. City of Los Angeles, 8 Cal.App.5th 696 (2017).

Five LAPD police academy recruits suffered temporary injuries while training at the academy. At the time they were injured, the Department had been assigning injured recruits to light-duty

administrative positions indefinitely until their injuries healed or they became permanently disabled. The Department ended this practice while the plaintiffs were still recuperating from their injuries. Rather than allowing them to remain in their light-duty assignments, the Department asked them to resign or the Department would terminate them, unless they could get immediate medical clearance to return to the Academy. None of the recruits was able to obtain the necessary clearance, and the Department terminated or constructively discharged all of them. The five recruits brought this action, and the jury found for the plaintiffs, finding that the City unlawfully discriminated against the plaintiffs based on their physical disabilities, failed to provide them reasonable accommodations, and failed to engage in the interactive process required by FEHA.

The City appealed, arguing that the plaintiffs were not "qualified individuals" under FEHA because they could not perform the essential duties of a police recruit with or without a reasonable accommodation, and that the City was not required to accommodate the plaintiffs by making their temporary light-duty positions permanent or by transferring them to another job with the City. With respect to the plaintiffs' claim for failure to engage in the interactive process, the City argued that because there were no open positions available for the plaintiffs, the City did not have to continue the required interactive process.

The Court of Appeal agreed that the plaintiffs were not "qualified individuals" under FEHA for purposes of their discrimination claim but concluded that they satisfied this requirement for their failure to accommodate claim. The court determined that requiring the City to assign temporarily injured recruit officers to light-duty administrative assignments was not unreasonable as a matter of law in light of the City's past policy and practice of doing so. Because the court affirmed City's liability on this basis, it did not reach the City's challenge to the verdict on the plaintiffs' claim for failure to engage in the interactive process.

PUBLIC AGENCY

Discipline

COURT FINDS THAT EMPLOYEE'S CLAIM IS BARRED BASED ON HIS INTENTIONAL FAILURE TO PARTICIPATE AND ATTEND EVIDENTIARY HEARING ON HIS TERMINATION

Thaxton v. State Personnel Board, 5 Cal.App.5th 681 (2016).

Plaintiff Kevyn Thaxton was employed as a corrections officer by the Department of Corrections and Rehabilitation (CDCR). Shortly after Thaxton was dismissed from his position, he filed an appeal with the State Personnel Board. Because Thaxton did not appear during his evidentiary hearing with the State Personnel Board, the board dismissed his case. Shortly thereafter, Thaxton filed a petition with the trial court to review his case. The trial court ordered that Thaxton be reinstated to his former position and receive back pay. CDCR challenged the trial court's order, arguing that Thaxton's claim was properly dismissed by the board when he failed to personally attend his own evidentiary hearing. The court on appeal decided that Thaxton's failure to personally appear at the evidentiary hearing constituted a failure to proceed with the case. Based on this, his failure to authorize his attorney to accept service of subpoena on his

behalf, and failure to explain the circumstances that led to his lack of attendance, the court found that Thaxton's behavior indicated that he was purposely avoiding service of a subpoena with the intent to deprive his employer of its statutory right to examine him. The court determined that Thaxton's behavior evidenced a purposeful avoidance of the law and that he would not be allowed to invoke the hearing process when he had prevented his employer from exercising its right to cross-examine him.

AN OFFICER MUST FACE PUNITIVE OR DISCIPLINARY ACTION TO CLAIM A VIOLATION OF POBRA

Perez v. City of Westminster, 5 Cal.App.5th 358 (2016).

Brian Perez was an officer on the SWAT Team of the Westminster Police Department. Perez was initially given a notice of his employer's intent to terminate his employment, but after the Chief of Police determined that the allegations against Perez could not be sustained, Perez was not fired. Although Perez was not fired, he was removed from the SWAT Team and was not assigned any trainees as a field training officer. Perez sued the City for a violation of his rights under POBRA. Although Perez was removed from the SWAT Team and not assigned any additional trainees, the court found that he was not subject to punitive action within the meaning of POBRA. The court found that the SWAT Team and training officer positions were collateral assignments, not formal, full-time assignments. Moreover, the court noted that two months after the decision was made not to terminate Perez, he received a scheduled pay raise. The pay increase was not consistent with an adverse employment action. Therefore, because Perez did not face any punitive employment action, his rights did not vest under POBRA and he was not entitled to claim any of its protections.

Peace Officers' Procedural Bill of Rights

DISCLOSURE OF A PEACE OFFICER'S PERSONNEL RECORDS NOT LIMITED TO SITUATIONS WHERE THE OFFICER OBSERVED OR PARTICIPATED IN MISCONDUCT

Riske v. Superior Court, 6 Cal. App. 5th 647 (2016).

While working as a detective for LAPD, Robert Riske reported two colleagues for filing false police reports. He later testified against them in an administrative hearing that resulted in their termination. A number of Riske's coworkers thereafter referred to him as a "snitch" and refused to work with him. He applied for 14 Detective I and II positions, but lost out to allegedly less qualified candidates. He sued for retaliation (as a whistleblower) and filed a *Pitchess* motion seeking production of all documents submitted by the successful candidates for the relevant positions and all documents relied on by the Department to select those officers for the positions. The City produced some documents, including rating sheets and ranking matrices used by the Department's decision makers for each position, but nothing from the selected candidates' confidential personnel files. Riske asserted the documents he sought were necessary to show the City's stated business reason for its promotion decisions—the successful candidates were more qualified than Riske—was pretext for retaliation. The City opposed the motion, claiming the officers' personnel records were not subject to discovery because the officers were innocent third

parties who had not witnessed or caused Riske's injury. The superior court agreed and denied Riske's motion.

Riske filed a petition for writ of mandate, which the appellate court granted and ordered the records produced. The statutory scheme governing the discovery of peace officer personnel records is not limited to cases involving officers who either witnessed or committed misconduct. If a plaintiff can demonstrate the officer's personnel records are material to the subject matter of the litigation, the records must be produced by the custodian of records and reviewed by the court at an in camera hearing in accordance with the statutory procedures to assess the discoverability of the information contained in them. The court must then order production of those records that are relevant and not otherwise protected from disclosure.

Public Employment Relations Board

CITY COULD NOT REFUSE CONSENT TO A "MODIFIED SHOP" ELECTION BASED ON LEGAL POSITION THAT UNION'S PROPOSED MODIFIED SHOP STRUCTURE FAILED TO COMPLY WITH MMBA

During negotiations for a successor MOU, the employee association proposed a "modified" agency shop arrangement that would require new employees hired on or after a specified date to either join the union or pay a service fee. The District rejected this proposal on grounds that Gov't Code section 3502.5 does not authorize such an arrangement. The following year the association requested the MOU be reopened to implement the proposed modified shop arrangement, and the District again rejected the request. Later that same year the association served a petition for an agency shop election seeking the same modified shop arrangement, and when the District refused to consent to an election, the association filed an unfair practice charge. PERB's administrative law judge concluded (after hearing) that the District had violated section 3502.5 by refusing to participate in a properly petitioned-for agency shop election and that the District had offered no valid defense. The Board adopted the ALJ's decision, and the District petitioned for extraordinary relief under section 3509.5(b).

The Court of Appeal agreed, finding that the language of section 3502.5 encompasses agency shop arrangements that apply to either all or some unit employees. Thus the District wrongfully withheld its consent to the holding of an election for a modified agency shop. *Orange County Water District v. Public Employment Relations Board*, 8 Cal. App. 5th 52 (2017).