



REDIGER, MCHUGH & OWENSBY, LLP

LABOR AND EMPLOYMENT LAW

LABOR AND EMPLOYMENT LAW REPORTER

Summer 2011

Firm Continues Its Support of County Bar’s Diversity Hiring and Retention Program

Attorneys of Rediger, McHugh & Owensby joined state and federal judges, justices of the Third Appellate District, and officers of the Sacramento County Bar Association to meet and greet the summer associates who are participating in the Sacramento County Bar Association’s Diversity Hiring and Retention Program. The Firm has participated in the Program for many years and was a sponsor of this year’s event which took place on



July 21st at The Park Ultra Lounge.

The Program provides diversity law students an opportunity to work in a law firm between the first and second years of law school. Through the Program, Greg Porter clerked at our firm this summer. In addition to the experiences Greg had at RM&O, he attended numerous events sponsored by the Program, including

visits to the federal and state courts, tours of different law firms, and several meet and greet events.

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U.S. Supreme Court Rejects Nation-Wide Class in Sex Discrimination Case

By Robert L. Rediger

On June 20, 2011, the U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes et al.*, reversed a decision the Ninth Circuit Court of Appeal that had upheld a district court’s order certifying a class of current and former female employees of Wal-Mart. In their lawsuit, the plaintiffs alleged gender discrimination under Title VII of the Civil Rights Act of 1964. Referring to the case before it as “one of the most expansive class actions ever,” the high court in *Wal-Mart* ruled that the certification of a class of approximately one and a half million plaintiffs was not consistent with the requirements of the Federal Rules of Civil Procedure (FRCP).

The *Wal-Mart* court noted that the crux of a Title VII inquiry revolves around “the reasons for a particular employment decision” and that Rule 23(a) of the FRCP required the plaintiffs to show that “common questions

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Greg Porter Joins Firm As Summer Law Clerk

Greg Porter has joined Rediger, McHugh, & Owensby, LLP as a summer law clerk through the Sacramento County Bar Association's Diversity Hiring and Retention Program. Mr. Porter has just completed his first year at Pacific McGeorge School of Law. He received his B.A. in International Business from San Diego State University in 2005. After graduating from college, he moved to Japan where he taught English for two years as a participant of the Japan Exchange and Teaching (JET) Program. Upon his return to California, Mr. Porter worked for Bloomberg Financial and the Consulate General of Japan in San Francisco.



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of law or fact” existed regarding the employment decisions made by Wal-Mart’s managers. Writing for the majority, Justice Scalia wrote, “Without some glue holding together the alleged reasons for those decisions, it will be impossible to say that examination of all the class members’ claims will produce a common answer to the crucial discrimination question.” Although the *Wal-Mart* court was unanimous in its reversal of the decision the Ninth Circuit, it further held by a 5-4 vote that the class members’ claims for backpay should not have been certified under Rule 23(b)(2) of the FRCP because such was “not incidental to the requested injunctive or declaratory relief” also sought in the suit.

The *Wal-Mart* decision will limit the number of class action suits alleging violations of Title VII in federal

court. Lawsuits brought under other federal laws, such as the Fair Labor Standards Act (FLSA), however, are not subject to Rule 23 of the FRCP. The *Wal-Mart* decision will likely cause lower courts to identify and focus on the specific employer policy plaintiffs claim affects all members of a putative class. In the words of Justice Scalia in *Wal-Mart*, “demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s.” It also remains to be seen whether and how the Supreme Court’s decision in *Wal-Mart* impacts trial judges’ decisions to certify class action lawsuits filed in California courts where state law establishes criteria and procedures that are similar, but not identical to, the FRCP. ■

Announcements

Robert L. Rediger defeated a motion brought by several plaintiffs to certify their lawsuit alleging violations of California’s wage and hour laws as a class action. In its order denying the plaintiffs’ motion, the court found that the claims presented by the plaintiffs were “fact sensitive,” and would require numerous “mini-trials” over whether members of the putative class received meal and periods in accordance with California law. The court also noted that the declarations the plaintiffs submitted in support of their motion, stating that they were not permitted to stop for lunch or meal breaks when driving their ready-mix cement trucks, were contradicted by their deposition testimonies where they testified that they were never told that they could not stop for a meal or rest period while working. (*Warzee et al. v George Reed Inc.* Tuolumne Co. Sup. Ct.- April 20, 2011).

Jeff Owensby and **Jimmie Johnson** prevailed on a motion for summary judgment on behalf of a California Central Valley hospital in a wrongful discharge case. The plaintiff had sued the hospital for failure to provide reasonable accommodation for claimed disabilities that caused her excessive absences, and other causes of action. In its motion, the hospital argued that the plaintiff’s failure to file an administrative charge of discrimination within one year after her discharge barred her statutory claims. The court rejected the Plaintiff argument that even though she was told she was discharged on August 5, 2008, her actual discharge date should be considered to be October 11, 2008 because on August 5, 2008 her physician had placed her on disability leave until that later date. The court also adjudicated

the two contract claims in favor of the hospital citing undisputed evidence that established that the hospital had a policy regarding absenteeism and that plaintiff exceeded the numerical ceiling of permissible absences. Having earlier rejected the “reasonable accommodation” and “CFRA leave claims,” plaintiff was held to the same standard as all other employees. The trial court entered judgment for the hospital and awarded costs to the prevailing hospital.

Managing Risk in the Employment Relationship: Wage and Hour Class Actions

by Jeff Owensby

The California Supreme Court is currently considering cases that may change the landscape of wage and hour claims dealing with missed meal periods or missed break periods. However, during the last several years, a litigation industry focusing on class action wage and hour suits has sprung up in California. Even if the Supreme Court rules in a way that limits claims arising from missed meals and breaks, it is likely that the class action industry will still seek new grist for its voracious appetite.

As the frequency of class action suits has increased, several common themes emerge in the class action suits that are filed in California. Some of the more common bases for such suits include the following:

1. Misclassification of non-exempt workers as exempt;
2. Failure to comply with the intricate calculation of “Regular Rate of Pay” which serves as the cornerstone of claims for improper calculation of overtime premium pay rate;
3. Employers’ inability to prove that individual workers took meals or breaks due to adoption of practices that excuse clocking out for meals or otherwise recording meals and breaks;
4. Failure to comply with the exacting standards for conducting elections and otherwise establishing Alternative Work Schedules for workdays longer than eight hours;
5. Managers who modify timecards in ways that exceed the “rounding” provisions related to early punch-in or late punch-out;
6. Failure to provide each statutorily required data field on check stubs; and
7. Failure to capture and preserve accurate records of all hours in which a worker is “suffered or permitted to work.”

Some employers fail to recognize how simple claims mushroom in the context of a class action. Imagine

for a moment that overtime has been miscalculated by a few cents per hour in a given department for a considerable length of time. To envision the potential scope a plaintiff’s attorney sees, perform the following simple arithmetic: Estimate the hourly pay differential; e.g., 20 cents per hour; Multiply by the overtime hours per shift per employee; Multiply by the number of affected employees per day; Multiply by the number of work days per year; Multiply by the number of years for which claims are permitted under the applicable statute of limitation; Add the per violation penalties for each short check; Add the liquidated damages for each shortage; Add the costs of defense of the claim; Add the costs of plaintiffs’ attorneys’ fees for any successful claim; Etc ... etc etc

When analyzed according to the foregoing model, the value of meticulous record keeping and strategic auditing of exemptions, payroll rules, calculation methods, time records and related data becomes evident. The systematic auditing of these key data and other time/attendance records can avert huge potential claims. The expense of employing or engaging auditing services often costs dramatically less per year than even the first month of legal and overhead expenses associated with defending a class action. Given these harsh economic realities, management would be well served to evaluate how best to confirm that its payroll records are being properly completed and maintained.

We have also observed that there is a heightened likelihood of wage and hour claims at certain times in the labor and employment environment including when an employer has been targeted with individual wage claims, when it resists a union organizing campaign, and when it reduces its work force. It would therefore seem prudent for an employer to conduct an audit now, rather than during a period of heightened stress in the workplace. ■

Legal Alert -IRS Increases Standard Mileage Rates for 2011

Effective July 1, 2011, the Internal Revenue Service increased the reimbursement rate for business miles to 55.5 cents per mile. As of January 1, 2011, the standard mileage rates had been 51 cents per mile for business miles drive, 19 cents per mile driven for medical or moving purposes, and 14 cents per mile driven in service of charitable organizations. (For more information visit the IRS website at www.irs.gov.)

Recent Developments

Title VII Permits Third Party Retaliation Claims

On January 24, 2011, the U. S. Supreme Court in *Thompson v. North American Stainless* held that an employee has standing to allege “unlawful retaliation” under Title VII when his employer fires him because his finance filed a charge of sex discrimination against their employer with the EEOC. Even though the plaintiff had not engaged in any activity protected by Title VII, the High Court in a unanimous decision noted that Mr. Thompson’s employer had fired him in retaliation for the protected activity engaged in by his finance. The *Thompson Court* left for another day the question of whether the firing of “an employee’s girlfriend, close friend, or trusted co-worker” would also bestow “standing” on such a person to maintain an action alleging unlawful retaliation under Title VII.

Employer’s “Pre-Emptive Strike” in Firing Non-Union Employee Unlawful

On January 28, 2011, the National Labor Relations Board in *Parexel International, LLC*, held that an employer committed an unfair labor practice when it discharged a non-union employee who had complained to her supervisor about wages and possible discrimination after she had discussed such matters with her coworkers. Reversing the recommended decision of an administrative law judge, the Board in a 2-1 decision found that the discharge of the employee violated Section 8(a)(1) of the Act “regardless of whether the initial conversations were themselves concerted activity.” Noting that federal law protects union and non-union employees, and “encompasses the right of employees to ascertain what wages are paid by their employer,” the Board held that an employer violated the law by terminating the employee “to be certain that she does not exercise her Section 7 rights.”

Explicit Mutual Wage Agreements for Nonexempt Employees are Valid

On February 7, 2011, the Second Appellate District Court of Appeal in *Arechiga v. Dolores Press, Inc.* held that “explicit mutual wage agreements” were not invalidated by Labor Code section 515(d) that provides, “For the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee’s regular hourly rate shall be 1/40th of the employee’s weekly salary.” The *Arechiga Court* rejected the plaintiff’s claim for 26 overtime hours per week where he had entered into a written agreement stating that he would receive a weekly salary of \$880.00 (11 hours per day, six days per week), and affirmed the trial court’s finding that his regular hourly wage was \$11.14 and his overtime wage was \$16.71.

Employer Must Prove Reasons for Denying Reinstatement to Employee on FMLA Leave

On March 17, 2011, the Ninth Circuit Court of Appeal in *Sanders v. City of Newport* reversed a judgment in favor of an employer, finding that the trial court’s jury instructions requiring the employee to prove that her employer lacked a reasonable basis for refusing to reinstate her following a FMLA leave of absence were erroneous. The employer had terminated the employee’s employment while she was on a FMLA leave of absence because it could not guarantee her a safe workplace due to her chemical sensitivity to paper, which had caused her to request the FMLA leave. The *Sanders Court* stated that once an employer fails to reinstate an employee from a FMLA leave of absence, the employee has established prima facie denial of her rights under the FMLA, and the burden of proof then shifts to the employer to prove that “the employee would have been dismissed, regardless of the FMLA leave.”

Anti-Retaliation Provisions of the FLSA Protect Oral and Written Complaints

On March 22, 2011, the U. S. Supreme Court in *Kasten v. Saint-Gobain Performance Plastic Corp.* reversed a decision of the Seventh Circuit Court of Appeal and held that the phrase “filed any complaint” in the anti-retaliation provision of the Fair Labor Standards Act, included “oral complaints.” In *Kasten*, an employee had alleged that he was fired because he had verbally complained to management that the company’s time clocks were positioned in a way to prevent workers from logging all time they spent donning and doffing their work clothes. In a 6-2 decision, the Supreme Court held that the courts must give a degree of weight to a federal agency’s views about the meaning of enforcement language in the underlying statute and held that Congress had intended the anti-retaliation provisions of the FLSA to cover oral, as well as written, complaints.

Employees of a Subcontractor May Organize on the Property of a Contractor

On March 25, 2011, following a remand from the Court of Appeal for the District of Columbia Circuit, the National Labor Relations Board issued a 3-1 decision in *New York New York* holding that a contractor may not prohibit its subcontractor’s off-duty employees from distributing union handbills on the contractor’s property. The Board found that the New York New York casino in Las Vegas violated section 8(a)(1) of the NLRA because it failed to demonstrate that the handbilling being conducted by the employees of Ark, a subcontractor with which the casino had contracted to provide food service to its guests and customers, “significantly interfered with its use of the property or that exclusion was justified by some other legitimate business reason, such as the need to maintain operations or discipline.” In its decision, the Board balanced “the two circumstances that pull in opposite directions: the Ark employees were not employees of NYNY, but they were regularly employed on NYNY’s property by its contractor.”

Employee’s Alleged Bipolar Disability Does Not Excuse Her Threatening Misconduct

On April 13, 2011, the Fourth Appellate District Court of Appeal in *Wills v. Superior Court of Orange County* affirmed a trial court’s summary judgment in favor of an employer on a bipolar employee’s claim of disability discrimination brought under the Fair Employment and Housing Act. The *Wills* Court first affirmed the lower’s court decision that the plaintiff failed to exhaust administrative remedies because the administrative complaint of discrimination she filed with the DFEH for “denial of family/medical leave” did not mention disability discrimination, retaliation, harassment or failure to accommodate a disability, which she alleged as separate causes of action in the Complaint she filed in court. The *Wills* Court then concluded that the employee’s threats of violence against her co-workers supported her employer’s decision to terminate her employment and that she had failed to show that such legitimate, non-discriminatory business reasons were a pretext for discrimination.

California’s Wage and Hour Laws Apply to Out-Of-State Residents Working in the State

On June 30, 2011, the California Supreme Court in *Sullivan v. Oracle Corp.*, held that the daily and weekly overtime provisions of state law apply to any worker who works for a California-based employer in the state for at least a full day, that California’s Unfair Competition Law (UCL) applied to the work performed by nonresident employees in the state, and that claims for overtime compensation brought under the federal Fair Labor Standards Act (FLSA) for work performed in other states cannot serve as predicates for UCL claims. Writing for a unanimous court, Justice Werdegar wrote, “Not to apply California law would also encourage employers to substitute lower-paid temporary employees from other states for California employees, thus threatening California’s legitimate interest in expanding the job market.” The lawsuit was brought as a class action by employees who worked for Oracle throughout the country, but who spent from 20 to 110 days working in California over three years.

City Ordinance Requiring Retention of Employees by Successor Employer is Valid

On July 18, 2011, the California Supreme Court in *California Grocers Association v. City of Los Angeles* held that an ordinance passed by the Los Angeles City Council requiring grocery stores of 15,000 square feet or larger to retain current employees for at least a 90-day transition period during a change of ownership, was valid. The Supreme Court in *Grocers Association* reversed the decision of the court of appeal that had found the ordinance was preempted by the California Health and Safety Code, the Labor Code, and the federal labor law, and that it violated the equal protection provisions of the California Constitution and the federal Constitution.

Upcoming Events

October 7, 2011—Lorman Education Services will present a seminar in Sacramento entitled, “Medical Marijuana and Other Drugs in the Workplace.” Robert L. Rediger will join other speakers at the one-day seminar and lecture on “Leaves of Absences and the Past and Present Drug User or Alcoholic.” Contact Elena Pantoja, Lorman Seminar Event Planner, at (800) 678-3940 or epantoja@lorman.com, for more information.

January 18, 2012—Lorman Education Services will present a seminar in Sacramento entitled, “Employment Law From A to Z.” Robert L. Rediger will join other speakers at the one-day seminar and lecture on “Leaves of Absences Required by Law in California” and “Employee Discipline and Discharge.” Contact Christa Dutter, Lorman Seminar Event Planner, at (800) 678-3940 or cdutter@lorman.com, for more information.

Check out our updated website at sacramentolaborlaw.com.

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