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Firm Obtains Appellate Decision Establishing a Successful Employer’s Right to Attorney’s Fees on “Missed Rest Period” Claim

Rediger, McHugh & Owensby obtained a victory for employers who defeat claims by employees alleging a “failure to provide rest periods.” On July 27, 2010, the Third Appellate District Court of Appeal in *Kirby, et al. v Immoos Fire Protection Co.*, affirmed an award of attorney’s fees to the employer who had prevailed against the named plaintiffs on the sixth cause of action of their class action complaint. The plaintiffs sought “one straight time hour of pay for each missed rest break for and on behalf of all similarly situated employees.” The court of appeal remanded the case to the trial court with directions to award the em-



ployer reasonable fees for its defense of the sixth cause of action.

The *Kirby* Court did not address the issue of an award of attorney’s fees in the context of “meal periods” because the plaintiffs had not sought pay for alleged missed meal periods in their complaint. Given the identical language contained in the California wage orders regarding pay for missed meal and rest periods, however, the court’s decision in *Kirby* should also permit an employer that defeats a claim alleging a “failure to provide meal periods” to obtain an award of attorney’s fees against the unsuccessful employees.

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The Politics of Mandatory Arbitration Clauses in Employment Agreements

by Robert L. Rediger

On June 21, 2010, the United States Supreme Court in *Rent-A-Center West, Inc. v. Jackson* reversed the Ninth Circuit Court of Appeal and held that the determination of whether certain agreements to arbitrate an employment-related dispute is enforceable should be made by an arbitrator, not a judge. Like many employers, Rent-A-Center had required all employees, including Jackson, to sign an arbitration agreement whereby “all disputes arising out of his employment would be resolved by a private arbitrator in lieu of a judge or jury.” When Jackson filed a lawsuit alleging discrimination on the basis of race against Rent-A-Center in federal court in Nevada, the employer moved

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Summer Fellow Arnulfo Medina

Arnulfo Medina has joined Rediger, McHugh, & Owensby, LLP as a summer law clerk through the Sacramento County Bar Association's Diversity Fellowship Program. Mr. Medina completed his first year at UC Davis School of Law. He received a B.A. in Human Biology from Stanford University in 2002. After graduation from college, he worked as a research assistant for Stanford University School of Medicine and then UC Davis School of Medicine. He also worked for a statewide non-profit association in Sacramento which works to develop legislation and policies that improve mental health services for young adults and disadvantaged communities.



Arnulfo Medina

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to dismiss the proceeding, arguing that Jackson had agreed to resolve all disputes related to his employment through final and binding arbitration. In a 5 to 4 decision, the U.S. Supreme Court held that while there are times the issue of "arbitrability" should be decided by a judge, a parties' challenge to an arbitration agreement under the Federal Arbitration Act should be directed to the arbitrator.

Writing for the court, Justice Scalia struck a distinction between a challenge that is specific to the enforceability of the arbitration agreement, where a judge has jurisdiction to hear such a dispute, and a challenge that is made to the enforceability of the arbitration agreement as a whole, where the determination should be made by the arbitrator. In dissent, Justices Stevens, Ginsberg, Breyer and Sotomayor argued that an employment arbitration

agreement should be treated as any other contract where the parties' would likely expect a court to decide the issue of arbitrability.

Several commentators are characterizing the decision of the Supreme Court in *Rent-A-Center* as a mere pyrrhic victory for employers. Lead by Senator Patrick Leahy, who in a June 21, 2010, press release described the *Rent-A-Center* decision as "striking a blow to our nation's civil rights laws and the protections that American workers have long enjoyed under those laws," the Democrats are pursuing legislation that would prohibit the mandatory arbitration of employment-related disputes not arising under a collective bargaining agreement between the unionized employer and a labor organization. The Arbitration Fairness Act would render any "pre-arbitration agreements" unenforceable.■

Announcements

Jeff Owensby was successful at trial in the Sonoma County Superior Court, vindicating one of our clients in a wage and hour suit. The plaintiff had attempted to recover overtime, wages for alleged missed meal and break periods, attorneys' fees and costs. The former employee argued that the employer had incorrectly classified him as an "exempt" employee. In a detailed written decision, the court decided that the employer's evidence was more persuasive, rejected the plaintiff's arguments, and ruled against him on every claim presented.

Robert L. Rediger convinced the California Unemployment Insurance Appeals Board to reverse a decision of an administrative law judge granting an employee unemployment benefits. The ALJ found that the former employee had treated a child in her care in a rude and disrespectful manner and that such conduct could have resulted in the employer being fined, but excused the employee's action as an "error in judgment." The CUIAB agreed with the employer that the employee's actions amounted to "misconduct," resulting in the denial of benefits to her.

Recent Developments

Kin Care Law Does Not Permit Unlimited Use of Paid Sick Leave

On February 18, 2010, the California Supreme Court in *McCarther v. Pacific Telesis Group* reversed a decision of the First Appellate District Court of Appeal and held that California Labor Code section 233 does not apply to paid sick leave policies that provide for an uncapped number of compensated days off. In its decision, the California high court explained that the legislature did not intend section 233 to apply to every type of sickness absence or sick leave policy, but rather, it intended to limit its reach to policies in which employers provide “accrued increments of compensated leave.” The *McCarther* Court held that because the defendant-employer’s sick leave policy was not “an accumulation policy,” Labor Code section 233 did not apply to it.

Federal Law Amended to Permit Breaks for Mothers to Express Milk for Their Infant

On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act into law. Among other things, the Act requires employers to provide “reasonable” breaks and a private space other than a restroom to mothers to express milk for their infants who are up to one-year-old. The new law does not apply to employers with less than 50 employees if the new rule imposes “an undue hardship by causing the employer significant difficulty or expense.”

Court May Vacate Arbitrator’s Award Regarding Unwaivable Statutory Claim

On April 26, 2010, the California Supreme Court in *Pearson Dental Supplies, Inc. v. Superior Court* vacated an arbitrator’s decision and award where the arbitrator made a “clear error of law” by not applying the tolling provisions of California Code of Civil Procedure section 1281.12. The court in *Pearson Dental Supplies* held that the arbitrator erred by granting the employer’s motion for summary judgment and finding that an employee’s age discrimination claim filed under the Fair Employment and Housing Act was barred by his failure to assert it in arbitration within one year. Although cognizant of the limited grounds available to a court when reviewing an arbitrator’s decision and award, the *Pearson Dental Supplies* court held that when an employee is not able to receive a hearing on the merits of his or her unwaivable statutory claim because of an arbitrator’s legal error, a trial court has the authority to vacate the award.

A Two-Member Quorum of a Three-Member Group of the NLRB May Not Issue Decisions

On June 17, 2010, the United States Supreme Court in *New Process Steel, L. P. v. NLRB* reversed a decision of the Seventh Circuit Court of Appeal and held that the NLRB lacked the authority to decide cases with two members. The Court in *New Process Steel* noted that the Taft-Hartley Act had increased the size of the Board from three members to five, increased the Board’s quorum requirement from two members to three, and allowed the Board to delegate its authority to groups of at least three members. In December 2007, the Board had only four members and delegated its powers to a group of three members, but after one group member’s appointment expired, the Board issued decisions for the next 27 months as a two-member quorum of a three-member group.

Federal Contractors and Subcontractors Must Post Notice Regarding Unionization

Effective June 21, 2010, certain federal contractors and subcontractors must post a notice informing their employees of their right to join a union and engage in concerted activity. On January 30, 2009, President Obama signed Executive Order 13496 which stated, “The attainment of industrial peace is most easily achieved and workers’ productivity is enhanced when workers are well informed of their rights under Federal labor laws, including the National Labor Relations Act.” President Obama’s Executive Order revoked President Bush’s Executive Order 13496 which had required certain employers who did business with the federal government to post a “Beck notice,” which had informed employees of their right to object to a union expending funds on activities unrelated to collective bargaining, contract administration or grievance adjustment.

Congratulations to our **Associate Attorney Jimmie Johnson** who ran his first ever marathon on July 25, 2010. After a number of months of training, Jimmie finished the San Francisco marathon in 3 hours and 51 minutes. He conspicuously called in sick the next day.

DOL Regulations Permit Gay Employees to Use FMLA Leave

In 1993, Congress passed the Family and Medical Leave Act that allows eligible employees to take up to 12 weeks of unpaid leave for various reasons, including attending to the serious health condition of their spouse. On June 23, 2010, the Department of Labor issued regulations based on its new interpretation of the FMLA extending the rights afforded by the law to eligible gay employees.

Court Rejects Applicant's Assertion of Age Discrimination

On July 9, 2010, the First Appellate District Court of Appeal in *Reeves v. MV Transportation* affirmed a summary judgment entered in favor of the employer who had refused to hire a 56-year old staff attorney, giving the job to someone who was 40-years old. The *Reeves* Court found that the evidence was undisputed that the Plaintiff did not have "clearly superior paper credentials" and that Defendant did not offer inconsistent justification for the hiring decision. Finally, the court rejected the plaintiff's argument that the Defendant's failure to produce copies of applications for employment in regard to the open position amounted to the "spoliation of evidence" and created a triable issue of fact.

Employer Need Not Offer an Accommodation to an Employee Who Does Not Ask

On July 15, 2010, the Fourth Appellate District Court of Appeal in *Milan v. City of Holtville* reversed a judgment of a lower court finding that an employer had engaged in disability discrimination against an employee who had sustained an on-the-job injury when it discharged her because it believed she did not perform the essential functions of the job at a municipal water treatment plant. The *Milan* Court agreed with the employer that because they employee never expressly requested an accommodation or otherwise indicated that she wanted to continue working, the employer had no duty to offer her any accommodation. The employee had accepted workers' compensation benefits and had not contacted her employer directly regarding her status resulting in the employer informing her that she had been terminated 18 months after she was injured.

Employer's May Prevent Unions From Picketing on Their Private Property

On July 20, 2010, the Third Appellate District Court of Appeal in *Ralph's Grocery Co. v. UFCWU* held that an employer may prevent a union from picketing on its property, despite two California laws permitting the union to do so. The *Ralph's Grocery* Court held that an employer's rights under the First and Fourteenth Amendments to the U. S. Constitution trumped the California Labor Code because said statutes "forced the property owner to provide a forum for speech with which the owner disagrees."

Four Successful 2010 Labor Negotiations

Jeff Owensby's client Dameron Hospital Association has completed negotiation for four new multi-year collective bargaining agreements with four separate unions this year. Negotiations with one union lasted nearly six months and ultimately succeeded in an overwhelming ratification vote despite a previous strike vote and authorization given by the members of that union. The other agreements were negotiated more quickly and smoothly. A fifth agreement is still being negotiated.

As in all negotiations in these times, the employer was mindful of unique economic circumstances and opportunities presented to the employer. The negotiations were all conducted under the philosophy that the employer could offer terms in these agreements that benefitted the majority of members while simultaneously advancing the hospital's long-range labor philosophies and fiscal goals.

We invite you to contact us for advice if you are preparing to negotiate a collective bargaining agreement or would like us to do so on your behalf.

Employer's Work-Related Search of Employee's Text Messages Does Not Violate the Fourth Amendment

by Arnulfo Medina, Law Clerk

On June 17, 2010, the United States Supreme Court issued a decision holding that a public employer's search of transcripts of a police officer's text messaging over an employer-issued pager did not violate the employee's privacy rights under the Fourth Amendment. The Fourth Amendment states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"

In *City of Ontario v. Quon*, several officers of the Ontario Police Department sued the City of Ontario (City) alleging that the City violated their Fourth Amendment rights by obtaining and reviewing a transcript of Quon's pager messages. The City had issued pagers to help the SWAT Team mobilize and respond to emergency situations. The City had a general policy in place reserving its right to monitor e-mail messages and Internet usage and had notified its employees, including Quon, that text messages would be treated like e-mail messages. After Quon and another officer incurred overage charges for several continuous months, the chief of police requested a transcript of the pagers for auditing purposes. The wireless provider voluntarily disclosed the transcripts to the City without notifying Quon and the transcripts showed that a large portion of Quon's messages were personal and sexually explicit, resulting in him being disciplined.

Quon sued and a jury decided that the City's purpose in the search was to analyze the usage limit, so it found in favor of the defendants. The Ninth U.S. Circuit Court of Appeals, however, held that the officers had a reasonable expectation of privacy in the content of the text messages and the search was "not reasonable in scope." The Supreme Court reversed the Ninth Circuit's decision holding that because the search of Quon's text messages was motivated by a legitimate work-related purpose, and the search was not excessive in scope, the search was reasonable and the City did not violate the officers' Fourth Amendment rights. The Court has also held that the "special needs" of the workplace justify as an exception to the general rule that warrantless searches "are *per se* unreasonable under the Fourth Amendment."

The Court declined to resolve the broader question of whether Quon had "a reasonable expectation of privacy" in his activities. The Court ruled that the case could be decided by determining that the search was reasonable under the circumstances presented, even assuming that Quon had a reasonable expectation of privacy. The Court determined that the City had a legitimate work-related reason for the search, that the search was not excessively intrusive, and that the search was permissible in scope. The fact that the search revealed intimate details of Quon's life did not make it unreasonable.

Although the court did not decide that the Fourth Amendment provides employees a reasonable expectation of privacy, prudent employers may wish to review their policies that pertain to their employees' use of company-issued electronic devices to ensure that a workplace "no privacy policy" is in effect and that their policies address the use of employer-issued e-mails, text message devices, access to Internet, and any other work-related communications devices used by its employees. In light of the *City of Ontario* case, any audits conducted by employers that disclose the content of those devices should be conducted for "legitimate work-related" purposes in a manner that is not "excessively intrusive" of their employees' legitimate expectations of privacy. ■



Above: Laura C. McHugh, Justin Rediger, Arnulfo Medina, Sarah R. Lustig and Robert L. Rediger attend Summer Associates Reception.

Upcoming Events

As of January 1, 2006, employers in California that regularly employ 50 or more employees anywhere in the U.S. were required to provide two hours of anti-harassment training to their supervisors and managers. **An employer covered by the law must provide such training to each supervisory employee once every two years.** (AB 1825). To schedule a two hour training at your Sacramento facility, or at our law firm at a total cost of \$600.00 (including materials for all attendees), call Sara at our firm (916) 442-0034 ext. 300, or email us at info@rmlaw.net.

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