Labor & Employment News

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Contents

Exhaustion of Administrative Remedies No Longer Required for California Whistleblower Retaliation Claims

The "whistleblower" provision of the California Labor Code prohibits employers from retaliating against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe the information discloses a violation of or noncompliance with a state or federal statute or regulation. In addition, it prohibits employers from retaliating against employees who refuse to participate in an activity that would result in violation of law.

Last year a split had developed between the California Courts of Appeal regarding whether an employee had to first exhaust administrative remedies by filing a complaint with the California Labor Commissioner before filing suit against the employer. In 2009, in *Lloyd v. County of Los Angeles*,[1] the court had held no exhaustion requirement existed. In August of last year, however, another California court of appeals, in *MacDonald v. State of California*, held exhaustion was required. The court affirmed the trial court's dismissal of a suit brought by an employee who alleged he had been discharged in retaliation for complaining that his supervisors were illegally and/or inappropriately smoking at the office in violation of California law. The suit was dismissed because the employee had not first filed a complaint with the Labor Commissioner.

However, in October, Governor Brown signed into law legislation which states that "an individual is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision of this code, unless that section under which the action is brought expressly requires exhaustion of an administrative remedy." The "whistleblower" provision of the California Labor Code does not mention any requirement to exhaust any administrative remedy; so, apparently, no exhaustion of remedies is now required before filing a whistleblower suit.

Jenny Burke

[1] 172 Cal. App. 4th 320, 323 (2009).

Fifth Circuit Expands Scope of Same-Sex Harassment Claims

A majority of the U.S. Court of Appeals for the Fifth Circuit recently held that a plaintiff may rely on gender-stereotyping evidence to support a claim of same-sex harassment under Title VII of The Civil Rights Act of 1964. See *EEOC v. Boh Bros. Constr. Co.*, — F.3d —, 2013 WL 5420320 (5th Cir. Sept. 27, 2013). Although the full significance of this case cannot be predicted, it may be overshadowed by dissenting opinions which sharply criticized the evidence of "actionable" conduct which was relied upon and accused the majority of expanding Title VII to create "a government-compelled workplace speech code."

Kerry Woods served as iron worker in an all-male construction crew that was operated by Boh Bros. Construction Company. The supervisor of this all-male crew was notoriously vulgar and routinely used foul language when communicating with the members of his crew. Before long, Woods became a frequent target and his supervisor would repeatedly call him names (*e.g.*, "pussy," "princess," and "faggot"), make fun of him for using wet wipes in the bathroom, simulate sexual gestures and expose himself while urinating. However, both Woods and the harasser were heterosexual.

After filing an administrative claim, the EEOC brought suit against Boh Brothers on behalf of Woods, claiming unlawful sexual harassment (i.e., hostile work environment) under Title VII. At trial, the EEOC presented evidence that Wood's supervisor harassed him because he thought Woods was feminine and did not conform to the traditional notion of a "rough ironworker." The jury found for the EEOC and awarded compensatory and punitive damages. On appeal a three-judge panel of the Fifth Circuit overturned the jury's verdict, finding that the EEOC had failed to establish Woods was harassed "because of sex." The EEOC then filed a motion for rehearing *en banc* asking the entire 16 judge panel of the Fifth Circuit to review the case, and the court agreed.

On rehearing, the Fifth Circuit revisited the U.S. Supreme Court's original same-sex harassment case, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), in which the Supreme Court first recognized the possibility of same-sex sexual harassment claims under Title VII. In *Oncale*, the Supreme Court recognized three potential types of same-sex harassment which would constitute discrimination based on sex under Title VII if: (1) the harasser was gay/lesbian (or motivated by a sexual desire); (2) the harasser was motivated by a general hostility to the presence of persons of the same sex (as the harasser) in the workplace; or (3) comparative evidence demonstrated that members of the opposite sex were treated more favorably by the harasser. Before *Boh Brothers*, whether these three theories of same-sex sexual harassment were exclusive was an open question in the Fifth Circuit. A ten member majority of the court in *Boh Brothers* held they were not. The majority for the first time recognized a same-sex sexual harassment claim based on gender-stereotype.

The 10-judge majority held there was sufficient evidence that (1) Woods' supervisor harassed Woods because of Woods' sex; and (2), such harassment was sufficiently severe and pervasive to create a hostile or offensive working environment. Regarding the first element, *Boh Brothers* noted that the chief consideration was the harasser's perception of the victim—not whether the victim, in fact, failed to conform to prevailing gender stereotypes. Regarding the second element, the Court ruled there was sufficient evidence of repeated harassment to show that it was severe and pervasive within the social context, even though it took place at an all-male construction site.

The majority's opinion incited heated dissents by

Fifth Circuit Expands Scope of Same-Sex Harassment Claims, Cont'd

the remaining six judges, who accused the majority of (1) presuming the harasser's perception of Woods was based on sex; and (2) creating a "new world," in which Title VII prevents a myriad of undesirable conduct, regardless of whether such conduct even resembles sexual harassment. Regarding the latter, the dissenting judges expressed concern about the ramifications that the majority's opinion may have for employers in the Fifth Circuit and the expectation that they must now ostensibly regulate conduct that has no relation to sex. For example, Circuit Judge Edith Jones' dissent included a satirical company memorandum that questions whether employees must now refrain from discussing topics such as body building, hunting, fishing and football, for fear that such topics may be interpreted as "non-inclusive" and ultimately offensive to those who do not fit gender-stereotype identities.

The full ramifications of *Boh Brothers* remain unclear. However, in the interim, employers should strive to have comprehensive anti-harassment and discrimination policies in place, and to treat each complaint of harassment or discrimination seriously. Although Boh Brothers had a nondiscrimination policy in place, it spent a grand total of approximately 20 minutes investigating Woods' complaint of harassment. Had the company taken Woods' complaint seriously it may have been able to successfully assert the *Ellerth/Faragher* affirmative defense, and avoid vicarious liability for the harassment of its supervisor. Consequently, Employers would be wise to learn from Boh Brothers' mistakes, especially given that the EEOC's Strategic Enforcement Plan has declared the enforcement of LGBT rights a top priority for the Fiscal Years 2013–2016.

Jason T. Weber

Plaintiffs Cannot Evade Federal Court Jurisdiction Over Large Class Actions by "Artful Pleading"

Plaintiffs' attorneys generally prefer to litigate in state court, not federal. However, the Class Action Fairness Act of 2005 ("CAFA") provides that the federal "district courts shall have original jurisdiction" over any class action in which the "matter in controversy exceeds the sum or value of $5,000,000," and allows cases filed in state court which exceed that threshold to be removed to federal court. To "determine whether the matter in controversy" exceeds that sum "the claims of the individual class members shall be aggregated." In the past, Plaintiffs have attempted to avoid removal to federal court by filing suit in state court and stipulating that the amount in controversy is less than $5 million. The question presented in *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013), was whether a named plaintiff could file suit in state court and preclude removal to federal court by stipulating, before class certification, the amount of damages sought for putative class members was less than $5 million. In its first decision interpreting the CAFA, the Supreme Court unanimously held, "no."

Knowles filed the proposed class action in

Plaintiffs Cannot Evade Federal Court Jurisdiction Over Large Class Actions By "Artful Pleading," Cont'd

Arkansas state court against Standard Fire Insurance Company. Knowles claimed that when the company made certain homeowner's insurance loss payments, it had unlawfully failed to include a general contractor fee. Knowles sought to certify a class of hundreds of similarly harmed Arkansas policy holders. Standard Fire removed the case to Federal District Court under CAFA. Knowles moved to remand the case to state court on the ground that the District Court lacked jurisdiction. The putative class action complaint had expressly alleged "damages less than five million dollars," and in an attached affidavit, Knowles stipulated he "will not at any time during the case . . . seek damages for the class . . . in excess of $5,000,000 in the aggregate."

On the basis of the evidence presented by Standard Fire, the District Court found that the amount in controversy would have been in excess of the $5 million jurisdictional minimum, but because of Knowles' stipulation the court concluded the amount fell beneath the threshold. The court ordered the case remanded to the state court.

In a decision delivered by Justice Stephen G. Breyer, the U.S. Supreme Court held that a plaintiff who files a proposed class action cannot legally bind members of the proposed class to a damage amount before the class is certified. The Court recognized that a non-named class member is not a party to the class-action litigation before the class is certified. Knowles did not have authority to bind others to a stipulated claim amount. Moreover, the Court reasoned that federal jurisdiction cannot be based on contingent future events. For example, as the Court explained, hundreds of persons in Arkansas may have similar claims, and if each of those claims places a significant sum in controversy the state court might certify the class and permit the case to proceed, but only on the condition that the stipulation be slashed to $5,000,000 or less. In addition, the Court indicated that Knowles may be an inadequate class representative because of the artificial cap he purported to impose on class recovery, and that potentially another party could intervene with an amended complaint (without a stipulation limiting damages). The court ruled that individual plaintiffs, who are masters of their complaints, may control jurisdiction through stipulation, but a named plaintiff in a not yet certified class action cannot. Knowles, as representative of the class, could not bind the absent class members.

Thereafter, in Rodriguez v. AT&T Mobility Services LLC, ___F.3d ____ (9th Cir. 8/27/13), the Ninth Circuit held that, in light of *Standard Fire Ins. Co.*, a "defendant seeking removal of a putative class action must demonstrate, by a preponderance of the evidence, that the aggregate amount in controversy exceeds the jurisdictional minimum," but defendants need now only satisfy a lighter "preponderance of the evidence" burden. Under the "preponderance of the evidence" standard, the defendant need only provide evidence "establishing that 'more likely than not' the amount in controversy exceeds [the jurisdictional minimum]."

Hao T. Nguyen

California Highlights

Domestic Workers Gain Rights to Overtime Under New California Law

California has now adopted a "Domestic Worker Bill of Rights" requiring overtime for domestic work employees who are personal attendants, *e.g.*, in-home nannies and caregivers. Unlike other California overtime provisions, overtime is payable when an employee works more than 9 hours *in a workday*, or works more than 45 hours in a workweek. Also, unlike federal law, the new California law applies to privately employed personal attendants, *i.e.*, it is not limited to in-home workers placed by agencies. The law took effect January 1, 2014 - one year before the new federal law. There is a sunset provision, January 1, 2017, so that a committee can study and report to the Governor on the effects of the Act.

Amendment of California Labor Code Limits Defense Attorney's Fees to Lawsuits Brought in Bad Faith

Existing California law mandates that when a lawsuit is brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court is to award reasonable attorney's fees and costs to the prevailing party, if any party requests attorney's fees and costs when suit is filed, except in certain specified actions (lawsuits for recovery of minimum wage and overtime pay are not affected by this section). The new law limits an award of defense attorney's fees and costs to suits determined to have been brought by the employee in bad faith. The new law took effect January 1, 2014.

More Expansive Paid Family Leave

Currently, California workers can collect state disability insurance for up to six weeks if they take time off to care for a seriously ill child, spouse, parent or domestic partner, or to bond with a new child, including a minor, foster or adopted child. The new law takes effect July 1, 2014, and will expand the categories of relatives covered by the law and permit workers to collect benefits for caring for seriously ill grandparents, grandchildren, siblings and in-laws.

Minimum Wage Hike

Existing California law requires that, on and after January 1, 2008, the minimum wage for all industries be not less that $8.00 per hour. This new law increases the minimum wage, on and after July 1, 2014, to not less that $9.00 an hour, and further increases the minimum wage, on and after January 1, 2016, to not less than $10.00 per hour.

Many Government Employers May No Longer Ask Job Applicants About Felony Convictions

A new California law bans most government employers from asking about their criminal record until later in the hiring process, thereby extending the state's policy to some local and regional government agencies. Most California government employers are now prohibited from using applications that ask, "Have you ever been convicted of a felony?" Positions which by law require a conviction background check, such as police officers, are exempt. The new law lends momentum to a growing nationwide "ban the box" movement that some groups, including unions and civil rights groups, perceive to be discriminatory. The new law will take effect July 1, 2014.

California Highlights, Cont'd

Expansion of Labor Law Protections for Immigrants

A new California law authorizes suspension or revocation of an employer's business license for threatening to report the immigration status of any employee or their family members in retaliation for the employee exercising his or her labor rights. It expands existing law by prohibiting any person acting on behalf of the employer from doing so. It further provides for suspension, disbarment or other discipline of an attorney who threatens to report the immigration status of a witness or party because the person exercises or has exercised a right related to his or her employment.

Uniform Trade Secrets Act Adopted in Texas

The Uniform Trade Secrets Act, which had been previously adopted in some form by forty-seven other states as well as the US Virgin Islands and the District of Columbia, was recently adopted in Texas. The Texas Uniform Trade Secrets Act (Chapter 134A of the Civil Practice and Remedies Code), now known as "TUTSA," became effective on September 1, 2013. [1] TUTSA largely codifies Texas common law, however it also provides for some material changes of which employers and employees should be aware:

- *Attorney's Fees are now available to both Plaintiffs and Defendants.* Under TUTSA, the court may award reasonable attorney's fees to the prevailing party if (1) a claim of misappropriation is made in bad faith; (2) a motion to terminate an injunction is made or resisted in bad faith; or (3) willful and malicious misappropriation exists. Tex. Civ. Prac. & Rem. Code §134A.005. Practically, it will be difficult for a defendant to obtain attorney's fees as it is a rare case that "bad faith" can be shown. Additionally, the standard for a Plaintiff to obtain fees has changed—Plaintiffs previously had to file a separate cause of action under the Texas Theft Liability Act and then show a defendant "knowingly" engaged in certain conduct. Now, although a separate cause of action is unnecessary, a Plaintiff must show the conduct was "willful and malicious."

- *Injunctive relief is now more broadly available.* Texas courts have historically hesitated to enjoin "threatened misappropriation." TUTSA now expressly provides that both actual and threatened misappropriation may be enjoined. Tex. Civ. Prac. & Rem. Code §134A.003(a). Employers who want to prevent a former employee from misappropriating a trade secret before any damage occurs now have a mechanism by which to do so. Additionally, an injunction—which previously terminated when the trade secret ceased to exist, *i.e.*, when the cat was out of the bag—may now be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation. Tex. Civ. Prac. & Rem. Code §134A.003(b). Lastly, TUTSA provides the court with the power to compel affirmative acts to protect a trade secret. Tex. Civ. Prac. & Rem. Code §134A.003(c).

- *Protection of trade secrets by the court has been enhanced.* TUTSA provides a presumption in favor of granting a protective order to preserve the secrecy of a trade secret. Tex. Civ. Prac. & Rem. Code §134A.006. TUTSA expressly provides that protective orders may

Uniform Trade Secrets Act Adopted in Texas, Cont'd

include (a) limiting access to confidential information to only attorneys and experts, (b) holding in camera hearings, (c) sealing court records, and (d) ordering individuals involved in the litigation not to disclose an alleged trade secret without prior court approval.

- *Changed definition of Trade Secret.* TUTSA defines "trade secret" as information—including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers—that derives independent economic value from not being generally known or readily ascertainable and for which reasonable efforts are made to maintain its secrecy. Tex. Civ. Prac. & Rem. Code §134A.002(6). This definition is broader and likely easier to satisfy. Perhaps most beneficial to employers generally is the explicit inclusion of customer lists and financial data which will eliminate the case-by-case inquiry previously conducted by the courts. Importantly, employers now have greater power to protect themselves by simply setting up a system or process which is intended to maintain the secrecy of certain information before an alleged misappropriation can occur (i.e., get non-disclosure agreements signed, implement policies prohibiting employees from taking company information home, etc.)

In toto, TUTSA strengthens trade secret protections and provides greater certainty when asserting claims for trade secret misappropriation.

Jessica Kirker

[1] Pre-TUTSA law still applies to cases where the alleged misappropriation of a trade secret occurred before September 1, 2013—even if the case was filed on or after that date.

HR Law "Best Practices" Webinar Series - 2014

Thompson Coe's HR Law Webinar Series offers in-depth, timely and constructive legal guidance for anyone dealing with HR issues. These webinars will provide attendees with a profound understanding of the legal and practical issues that effect their businesses, and allow them to prosper in the increasingly complicated world of HR.

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- March 20: A Study Of Several Complicated Wage Payment Issues
- April 17: How To Properly Handle Employee's Struggles Due To A Disability
- May 15: Understanding Immigration Reform
- June 12: Conducting a Harassment & Bullying Investigation
- July 17: Understanding 5 Critical Documents Every HR Professional Needs
- August 21: Conducting Employee Background Checks in an Anti-Background Check World
- September 18: FMLA – Handling the Interplay...
- October 16: Key ACA Issues to Watch For in 2015
- November 20: Independent Contactors vs. Employees: Identifying the Distinctions
- December 18:Interview Questions – Do's, Don'ts, and Tips

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Eighth Annual Thompson Coe Labor & Employment Seminar

Arlington Hall at Lee Park
3333 Turtle Creek Blvd. Dallas, Texas 75219
March 6, 2014 | 8:00 a.m.-4:10 p.m.

8:00-8:35 a.m. Registration/Continental Breakfast

8:35 a.m. *Welcome and Introduction* - John L. Ross*^

8:40 a.m. *Judicial Update* - John L. Ross*^

9:35 a.m. *Is Your Handbook Up to Date? How Not to let Your Employee Handbook be Used Against You.* Stephanie S. Rojo *

10:15-10:30 a.m. Morning Break

10:30 a.m. *Why is the NLRB Investigating Us? Why the NLRB Wants to See Your Employee Handbook and How They Get It.* - Barry A. Moscowitz

11:15 a.m. *Health Care Reform and the Confused Employer: Obamacare, Mandates, Controlled Groups, Penalties, and Tax Credits...Oh My!* - Kevin M. Mosher +

12:00-1:00 p.m. Lunch

1:00 p.m. *The Federal Government's Increase Efforts to Thwart Human Trafficking in Employees* Robert Canino, Regional Attorney, U.S. Equal Employment Opportunity Commission, Dallas District Office

1:30 p.m. *Legislative Update* - Albert Betts, Jr.

2:15-2:30 Afternoon Break

2:30 p.m. *Trade Secret Protection and Litigation in the New Age* - Jessica L. Kirker

3:00 p.m. *Cyber Security after Target- Prepartaion is Key to Dealing with Data Breaches* Matthew J. McCabe

3:30 p.m. *Bring Your Hamster to Work!* - Wendell F. Hall, Jenny L. Burke, Hao T. Nguyen

4:10-5:00 p.m. Reception

This course is approved for 6 hours of credit from State Bar of Texas, Texas Department of Insurance and HRCI. This seminar is limited to Thompson Coe clients, prospective clients, or others who can benefit from a working relationship with Thompson Coe as well as individuals who have been invited by the firm.

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The Attorneys in the Labor & Employment Section of Thompson Coe counsel public and private sector management in connection with all federal, state and local laws regulating employment. Our experienced attorneys can help clients by simplifying the employment law maze, resolving sensitive employment-related issues and reducing the risk of costly lawsuits.

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