Labor & Employment Law Newsletter

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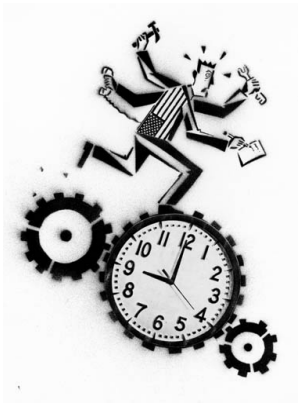
Recent Appellate Decisions

By Jonathan P. Geen, Esq.

Federal

In *Bush v. Integrity Staffing Solutions* (2013) 713 F.3d 528, the Ninth Circuit reversed various portions of the trial court's dismissal of a complaint that sought to assert wage and hour claims, both under the FLSA and under state (Nevada) labor laws. In a matter of first impression,



the court ruled that a collective action under the Fair Labor Standards Act and a state law class action are not inherently incompatible as a matter of law, despite the fact that plaintiffs must opt into the FLSA action and opt out of a class action. In *Bush*, workers had stated an unpaid wages claim under the FLSA by alleging that they had to undergo a security screening and were not paid for that time, despite the fact that the screening was to prevent employee theft and therefore 'integral and indispensable" to their principal activities. The Ninth Circuit nonetheless held that the requirement that the employees clock out before walking a long distance to the lunchroom, frequent interruptions of their lunch breaks by management simply to advise them of how much lunch time they had remaining, and the de minimis security check time did not as a matter of law convert their lunch breaks into compensable work time.

In the case of *Petersen v. Boeing Company* (2013) ___ F.3d ___, 2013 WL 1776975, the Ninth Circuit reversed the trial court's dismissal of plaintiff's complaint for improper venue as an abuse of discretion. The plaintiff was an American formerly employed in Saudi Arabia and was afraid to litigate his claims in Saudi Arabia. The plaintiff had alleged that he had been kept a virtual prisoner during his employment and was afraid to return there and feared he would be unable to get a fair trial. He further alleged that he had been induced to sign a forum selection clause in his contract for employment without reading it and only because he was told by his employer that if he did not sign it, he would have to return immediately to the United States at his own expense. The Ninth Circuit held that the district court should hold an evidentiary hearing to determine whether or not the plaintiff was induced by fraud or overreaching to agree to the forum selection clause in his employment contract.

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In *Dailey v. Sears Roebuck & Co.* (2013) 214 Cal.App.4th 974, the Fourth District affirmed the trial court's denial of certification of a class action by managers and assistant managers of Sears Roebuck, who claimed they had been misclassified as exempt. The complaint asserted alleged violations of California wage and hour laws, including those governing overtime pay and rest and meal breaks. The Court of Appeal agreed with the trial court that plaintiff's theory of liability that the defendant acted in a uniform manner toward the proposed class members, resulting in their widespread misclassification, was not amenable to proof on a classwide basis, and that individual issues predominated.

In *Hatai v. Department of Transportation* (2013) 214 Cal.App.4th 1287, the Court of Appeal for the Second District affirmed the trial court's judgment entered in favor of the defendant CalTrans on plaintiff's claims of discrimination based on his Japanese/Asian ancestry. In so ruling, the Second District agreed with the trial court's decision to exclude evidence of alleged discrimination by plaintiff's supervisor against other employees who were outside of plaintiff's protected class. The court rejected plaintiff's claims that evidence of discrimination to people in other protected classes should come in as so-called "me too" evidence.

In *Gonzalez v. Downtown L.A. Motors, LP* (2013) 215 Cal.App.4th 36, the Court of Appeal for the Second District affirmed a judgment in plaintiffs' automobile service technicians' favor after a bench trial on their wage and hour claims. That trial court had held, and the Court of Appeal agreed, that California's minimum wage law, when applied to automobile technicians, requires that if such service technicians are compensated on a "piece-rate" for repair work, they must be paid at a separate hourly minimum wage for time spent during their work shifts waiting for vehicles to repair or performing other nonrepair tasks directed by the employer.

In *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, the Second District reversed the trial court's decision denying the employer's motion to compel arbitration. The Second District ruled that an agreement to arbitrate employment-related claims contained in an employee handbook was not procedurally unconscionable, though in isolation it appeared to only require the employee, not the employer, to submit their claims to arbitration. The court ruled that looking at the language of the handbook in its entirety, established unmistakable mutual obligation on the part of employer and employee to arbitrate "any dispute" arising out of employment. The court ruled that though the employer reserved the right to alter the handbook, such rule was still limited by the covenant of good faith and fair dealing implied in every contract, and thus did not make the contract unilateral. The Second District further ruled that while the language in the arbitration clause requiring the employees to waive attorneys' fees was unconscionable to the extent it would deprive employees of nonwaiverable statutory remedies for employment discrimination, that language was nonetheless severable.

In the case of *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, the California Supreme Court affirmed the trial court's entry of a judgment on

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a special jury verdict for the plaintiff bus driver on a pregnancy discrimination claim under FEHA. In so ruling, the court held that under FEHA and in a mixed-motive case when the employer proves it would have made the same decision absent discrimination, the court may not award damages, back pay, or an order of restatement. However, the Supreme Court held that in light of FEHA's express purposes of preventing and deterring unlawful discrimination, as well as redressing such claims, the employer does not entirely escape liability. In such a case a plaintiff may still be awarded, where appropriate, declaratory relief or injunctive relief and may be eligible for reasonable attorneys' fees and costs.

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