

Areas of Practice

Business Litigation

Civil Litigation & Trials

Employment / Labor

Healthcare Litigation

Premises Liability Litigation

Product Liability Litigation

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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

DLSE Issues an Opinion Letter about Reducing Wages and Work Days

The California Division of Labor Standards Enforcement (“DLSE”) recently issued an opinion letter stating that under certain circumstances, temporarily reducing an exempt salaried employee’s workweek to four days did not violate the salary basis test. Moreover, the employer was free to proportionally reduce the employee’s salary, which is consistent with federal law. However, in a previous opinion letter, 2002.03.12, the DLSE opined that exempt employees could not be subject to salary reductions in connection with a furlough.

The DLSE also failed to squarely address a distinct furlough question: whether the employer can mandate payout of vacation or PTO for furloughs of less than a full workweek. The issue remains muddled and employers are urged to proceed with caution.

Employee Free Choice Act Modifications

The Employee Free Choice Act (“EFCA”) (H.R. 800, S. 1041), while still likely to be enacted, continues to undergo modifications. Most significantly, Democratic senators have agreed to delete a provision known as the “card-check” rule, which would have required employers to recognize a union as soon as a majority of workers signed cards supporting unionization. The card-check rule would have done away with a necessity for secret-ballot election of employees seeking to unionize. The revised senate bill replaces the card-check provision with provisions permitting for shorter unionization campaigns and a more expedited election procedure.

II.

JUDICIAL UPDATE

Vicarious Liability for Vehicular Accident Involving Employee

Mark Brandon (“Employee”) worked for Warner Bros. Entertainment Inc. (“Warner Bros.”). In August 2006, Employee attended an out-of-town business conference. Warner Bros. approved the trip and paid all expenses associated therewith. On August 11, 2006, Employee left the conference early, retrieved his personal vehicle from the Burbank Airport, and proceeded to drive home. On his way, he was involved in a motor vehicle accident which injured three pedestrians, killing one. The surviving

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pedestrians and the family of the deceased filed a lawsuit against the Employee and Warner Bros., alleging causes of action for negligence and wrongful death.

The trial court dismissed the claims against Warner Bros., holding that because Employee was “simply returning home from work,” he was not acting within the course and scope of his employment, and therefore did not bind Warner Bros. with his actions. The Court of Appeal disagreed. In *Jeewarat, et al. v. Warner Bros. Entertainment, Inc.*, the Second Appellate District held that an Employee’s attendance at an out-of-town business conference may be considered a “special errand” under the “special errand doctrine,” which holds that an employee is acting within the course and scope of his employment while engaged in a “special errand” on behalf of the employer. The court further held that “when an employee intends to drive home from [an] errand, the errand is not concluded simply because the employee drives his regular commute route; rather, the errand is concluded when the employee returns home or deviates from the errand for personal reasons.”

Ninth Circuit Ruling Makes Summary Judgment in Discrimination Cases More Difficult to Achieve

In *Nicholson v. Hyannis Air Service*, the Ninth Circuit Court of Appeals set the bar low for employees challenging summary judgment motions filed in employment-based discrimination cases, holding that (1) a court may not consider a plaintiff’s subjective qualifications for a job during the first step of the *McDonnell Douglas* test,¹ and (2) a plaintiff need only introduce “minimal evidence” suggesting that an employer’s proffered legitimate reason for an adverse employment decision is merely a pretext for discrimination.

Plaintiff Nicholson, a pilot, alleged that her former employer, Cape Air, had discriminated against her on account of her sex when it suspended her from flying a two-pilot aircraft on the company’s new Guam and Micronesia routes. Nicholson was the only woman among the eight pilots selected to fly the new routes, all of whom were initially chosen based upon their seniority.

In reversing the district court’s decision to grant summary judgment in favor of Cape Air, the Ninth Circuit explained that Nicholson had met her burden both of establishing a prima facie case of discrimination *and* raising an inference that Cape Air’s proffered reason for suspending Nicholson—her alleged communication and cooperation problems—was pretextual. Nicholson argued that her communication and cooperation skills were sufficient (i.e., that she was qualified to do the job), and that regardless, those skills constitute subjective criteria that should not be considered during the first phase of the *McDonnell Douglas* test. The Court agreed with Nicholson, holding that “the qualifications that are most appropriately considered at step one [of the test] are those to which objective criteria can be applied.” The Court rejected Cape Air’s contention that “assisting the captain,” “maintaining a high degree of crew coordination and cockpit discipline,” and “performing other duties required by the captain” were objective requirements of the job, finding instead that such tasks merely represented a subset of Nicholson’s subjective communication and cooperation skills. The court also held that Nicholson had met her burden with respect to forth

¹ Under the *McDonnell Douglas* test, a plaintiff alleging discrimination in the employment context must first establish a prima facie case of illegal conduct. Specifically, the plaintiff must show that (1) she belongs to a protected class; (2) she was qualified for the position sought; (3) she was subjected to an adverse employment action; and (4) similarly situated individuals outside of her protected class were treated more favorably. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the challenged action. The plaintiff must then show that the articulated reason is pretextual.

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prong of the test by presenting cogent evidence that multiple male pilots had been treated more favorably with respect to the terms and conditions of their employment (e.g., they had received comprehensive remedial training in order to correct their performance deficiencies, while Nicholson had received no instruction and little, if any, constructive criticism prior to being suspended).

Although the Court determined that Nicholson's alleged communication and cooperation problems constituted legitimate, nondiscriminatory reasons for her suspension under the second step of the *McDonnell Douglas* test, it went on to hold that Nicholson had presented sufficient evidence to raise an inference of pretext. According to the Court, "very little evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive may suffice to raise a question that can only be resolved by a fact-finder." Given Nicholson's presentation of evidence confirming irregularities in her discipline proceedings, various departures by Cape Air from the procedures established in its employee handbook, comments from fellow male employees about "sexual competition," and multiple other questionable events, she had sufficiently met her burden under the final stage of the test.

Because the evidence was sufficient to raise a genuine issue of material fact as to whether Nicholson was qualified and whether similarly situated male pilots were treated more favorably, and because Nicholson introduced the minimal evidence required to raise a factual issue regarding Cape Air's true motive for suspending her, the Court concluded that the district court had erred in disposing of the case via summary judgment.



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3rd Annual Employment Law Symposium

Wednesday, November 18, 2009

8:00 am to 3:00 pm

Mission Valley Marriott

8757 Rio San Diego Drive, San Diego, CA 92108

WHO SHOULD ATTEND:

- Business Owners
- Human Resource Professionals
- Executives
- Managers and Supervisors

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This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Robert Hudock, Tyler Theobald, Jenna Leyton, Andrea Kaplan or Vanessa Maync at (858) 755-8500 or Eric DeWames or Mark Bloom at (310) 649-5772. For access to previous updates and reports, please go to <http://www.pettitkohn.com/EmployLabor.html>.

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Wednesday, November 18, 2009
San Diego Marriott Mission Valley
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Topics Include:

- ▶ Wage & Hour Update
- ▶ FMLA, CFRA & Leaves of Absence
- ▶ Harassment, Discrimination & Retaliation
- ▶ Successfully Resolving Administrative Claims

8:00 am - 9:00 am
Registration & Breakfast
9:00 am - 12:00 pm
Program
12:00 pm - 1:00 pm
Lunch Provided
1:00 pm - 3:00 pm
Program

Registration Information

Attendee Name(s) _____
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