LYNCH, GILARDI & GRUMMER
A Professional Corporation
ATTORNEYS AT LAW
SINCE 1978

# California Employment Law Newsletter

## *What's New for California Employers?*

Ronald J. Souza
Lynch, Gilardi & Grummer
475 Sansome Street, Suite 1800
San Francisco, CA 94111
(415) 397-2800

The following is a summary of the significant employment law developments since our last newsletter.[1]

## INDIVIDUAL RIGHTS/LIABILITIES

*Non-Competition Agreements:* California courts may not bar companies from seeking to enforce non-competition agreements entered into in other states. *Biosense Webster, Inc. v Superior Court*. Here, the trial court had abused its discretion in issuing a temporary restraining order barring Biosense from seeking to enforce a non-competition agreement in a state where non-competition agreements are enforceable. *Comment:* If employers can invoke the laws of states which uphold non-competition agreements in crafting their own non-competition agreements, they should do so.

*Raiding:* Santa Clara Superior Court has granted a temporary restraining order against seven former Yahoo!, Inc. employees and their new employer from raiding Yahoo! for its trade secrets and employees. *Yahoo!, Inc. v M Forma Group, Inc.* Yahoo! accused its ex-employees and their new employers of "attempted and intended global theft of confidential and proprietary" trade secret technology involving Yahoo!'s plans and strategies to bring its web content to mobile phones, personal digital assistance and other mobile devices. *Comment:* The restraining order was issued by the Santa Clara Superior Court and is thus *not* legal precedent. However, it demonstrates a greater tendency in the trial courts to restrain conduct which can cause irreparable injury due to misuse of trade secrets.

*Anti-SLAPP:* The City of Los Angeles was unsuccessful in seeking a protective order against animal right activists who made a noisy protest at an employee's home. The request for the protective order was based on a violation of a statute prohibiting work place violence. *The City of LA v Animal Defense League*. The protesters filed an opposition to the motion by the City alleging California's anti-SLAPP statute (Strategic Lawsuit Against Public Participation) and the appellate court agreed, ruling that the protesters' conduct was in furtherance of their right to free speech and the work place violence petitions were void because the actions did not occur at the employee's work place. *Comment:* Courts will dismiss lawsuits seeking to restrain or redress constitutionally-protected conduct. Here, the City probably made a procedural mistake in proceeding under a Code section which prohibits work place violence rather than the statute which prohibits a broader category of harassment.

## DISCRIMINATION

*"Boy" Can Be a Discriminatory Term:* The US Supreme Court has ruled that the word "boy" without any words modifying it, can be a racist epithet, depending on the context, inflexion, tone of voice, local custom and historical usage. *Ash v Tyson Foods, Inc.* Here, two African

[1] This summary is intended to be a brief overview of significant legal developments and is not an in-depth analysis of the cases or statutes discussed. Our clients are advised to contact their employment attorney before making significant decisions related to the legal developments reported herein.

American superintendents at a poultry plant were denied promotion to a shift manager where the decision maker had made earlier reference to the African American candidates as "boy." *Comment:* Where a decision maker utters a discriminatory comment, all of his/her future decisions are subject to the claim that they are discriminatory. Supervisors must refrain from such usage or call into question the basis of all their future employment decisions.

*Small Employers:* The US Supreme Court has ruled that small employers may be subject to liability for violations of federal law (Title VII of the Civil Rights Act of 1964) even though that federal law is expressly directed to employers with fifteen or more employees. *Arbaugh v Y & H Corporation dba Moonlight Café.* Here, the Supreme Court held that it does not limit federal court jurisdiction, but is rather merely an element of plaintiff's claim for relief. *Comment:* There is fuzzy logic in this decision. The one lesson to be learned is that the defense of too few employees should be raised early (it was not raised until late in the proceedings in this case, which may have diminished its importance).

**OTHER DEVELOPMENTS**

*Immigration:* The US Supreme Court is now considering whether employers who knowingly hire undocumented workers can be liable for RICO (Racketeering Influenced and Corrupt Organizations Act) violations. *Mohawk Industries, Inc. v Williams*. While most employers are well aware of the penalties and problems that can result from hiring undocumented workers or failing to comply with Form I-9 documentation procedures, RICO liability carries much higher stakes. *Comment:* While the Supreme Court has not yet decided this question, court-watchers are anticipating that the Court may extend RICO into these areas. If so, employers can face greater consequences, including the make-up of depressed wages, treble damages, attorneys' fees, punitive damages, etc.

*Wage and Hour:* An employer was not required to compensate employees for travel time where use of a parking lot shuttle bus was not mandatory. *Overton v Walt Disney Company.* Here, a class action was unsuccessfully brought against Disney seeking wages for time spent traveling to the park entrance. Disney provided an employee parking lot one mile from the entrance to Disneyland, and also provided a shuttle from that lot to the employee entrance, but did not *require* employees to use the parking lot or the shuttle in getting to work. *Comment:* This is a welcome restriction on the "donning and doffing" rule recently announced by the US Supreme Court, which held that as soon as an employee donned a company uniform, he/she was entitled to pay while walking to a specific job location (see prior newsletter). Happily, the Court here did not penalize the employer for being more generous to employees than required.

*Punitive Damages:* A ratio of 6 to 1 of punitive to compensatory damages was the constitutional maximum that can be awarded in a sexual harassment case. *Gober v Ralph's Grocery Company.* Here, the jury had awarded punitive damages to the various plaintiffs ranging from 25:1 to 100:1. *Comment:* This is the latest decision restricting punitive damage awards on constitutional grounds. Note, however, all courts have indicated that if the

circumstances are sufficiently egregious, ratios beyond these may be constitutional.

*Cal-WARN:* The California WARN Act prohibits employers from ordering a "mass layoff," "relocation," and/or "plant closing" at any establishment with at least seventy-five full or part-time employees without first provided sixty day notice to employees effected by the action. Failure to comply with the Act subjects employers to damages, including back pay for the sixty day period, lost benefits, a civil penalty of $500 for each day of violation and attorneys' fees. However, where an employer transfers the employees to a new company along with the sale of its assets, the WARN Act may not apply. *MacIsaac v Waste Management Collection and Recycling, Inc*. The Court reasoned that the employees transferred from one company to the other were never technically "laid off" and thus did not come within the purview of the Act. *Comment:* While the WARN Act arises only infrequently (as company closures are rare), its implications can be great. A company attempting to go out of business can ill-afford to pay the penalties for violation of this Act as it "turns out the lights."

*Vicarious Liability:* An employer was not liable for the acts of its employee who engaged in a road-rage incident. *Kephart v Genuity*. Here, a car containing a family of five rolled over after being forced off the road by a driver during a road-rage incident. Although the employee was on-duty at the time, the Appellate Court found that the conduct was motivated entirely by personal malice and did not occur within the course and scope of his employment. *Comment:* Common sense prevails!

*Worker's Compensation:* A worker's compensation claim must be made within one year after the occurrence of a job-related injury. *Save-Mart Supermarkets v WCAB.* Here, the employee filed a claim for benefits nineteen months after a slip-and-fall accident which led to a wrist injury. The employee did not miss any work and did not become aware that he had fractured his wrist until an x-ray revealed the injury some seventeen months later. *Comment:* The "date of injury" can sometimes be uncertain where a latent occupational injury or disease is involved. Here the Court applied the test that the employee "knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employer." The Appellate Court sent this case back to the WCAB for a further determination in view of this rule.

*Defamation:* An employee fired following an investigation into allegations of sexual harassment against him, later sued his employer alleging that he had been defamed during the investigative process. *Olaes v Nationwide Mutual Ins. Co.* Here, the employer defended saying that any defamatory comments were made during a "legislative, executive or judicial proceeding and did not concern a matter of public interest," with which the Appellate Court disagreed. *Comment:* This is another case where defense counsel probably asserted the wrong legal defense. Employers' comments and actions in conducting legally-mandated investigations are conditionally privileged (i.e., so long as not undertaken with malice).

**********

If you have questions regarding any of the afore-mentioned employment law developments, contact your LGG attorney or Ron Souza at rsouza@lgglaw.com.