

Rediger, McHugh & Hubbert, LLP

Representing Management in Labor, Employment and Unfair Competition Litigation

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Firm Prevails in Class Action Wage and Hour Lawsuit

Robert L. Rediger and Laura C. McHugh convinced a jury in Sacramento Superior Court to reject the wage and hour claims of two former employees who had been employed by Marquee Fire Protection Company. The plaintiffs had brought a class action lawsuit on behalf of themselves and other sprinkler fitters alleging that their employer had violated various California wage and hour laws in connection with their employment. The action had been certified as a class action, but



Robert L. Rediger and Laura C. McHugh

on the Defendants' motion made shortly before trial, the action was decertified. The matter proceeded to a two week trial with the plaintiffs alleging 1) a violation of California's unfair competition law, 2) failure to pay wages, 3) failure to pay overtime, 3) failure to provide accurate wage statements, and 4) failure to provide rest breaks and

meal periods. On August 28, 2008, the jury returned verdicts rejecting each cause of action. The firm is now seeking costs and attorneys fees for Marquee.

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ADA Amendments Act Expands Protections for the Disabled

By Sarah R. Lustig, Esq.

Under the Americans With Disabilities Act (ADA), a person is "disabled" if he or she has a physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or is regarded as having such an impairment. A series of decisions by the U.S. Supreme Court significantly narrowed this definition. Effective January 1, 2009, however, the ADA Amendments Act of 2008 (ADAAA) will overturn these Supreme Court decisions and expand the definition of disability, making it easier for workers to prove disability discrimination.

In 1999, the Supreme Court in *Sutton v. United Air Lines, Inc.*, held that whether an individual is disabled must be determined with reference to mitigating devices. The ADAAA provides that (Continued on page 2)

Announcements

Laura C. McHugh successfully represented an employer in an appeal brought by an a vehicle operator who had been denied unemployment benefits after he was terminated for refusing to sign a disciplinary notice as to receipt only. The employee had been informed that if he did not sign the document, such would be considered insubordination and he would be fired. The collective bargaining agreement (“CBA”) in effect between the employer and a union required vehicle operators to sign disciplinary notices. The employee refused to sign the document and was fired. The CUIAB affirmed an Administrative Law Judge’s determination that the employee was disqualified for unemployment benefits “due to misconduct connected with his most recent work.”

Jennifer J. Schultz prevailed on a motion to compel plaintiff to attend her deposition. The Defendants were awarded \$1,117.50 in monetary sanctions covering the cost of the motion and the court reporter fees.

the determination of whether a condition substantially limits an individual’s major life activities *must be made without regard to the effects of mitigating measures*, such as medication, medical equipment, low-vision devices (other than ordinary eyeglasses or contact lenses), prosthetics, hearing aids, mobility devices, oxygen equipment, assistive technology, auxiliary aids or services, learned behavior or adaptive neurological modifications, or reasonable accommodations. While the ADAAA specifically excludes eyeglasses and contact lenses from the list of “mitigating measures,” employers may not use qualification standards, employment tests, or other selection criteria based on an individual’s uncorrected vision unless the standard, test or other selection criteria is shown to be job-related for the position and consistent with business necessity.

The ADAAA also overturns the Supreme Court’s 2002 decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*. The ADAAA provides that the Supreme Court’s interpretation and the current EEOC regulation defining the term “substantially limits” imposed too high of a standard. Accordingly, the ADAAA provides that the determination of *whether an individual’s impairment is a disability under the ADA “should not demand extensive analysis” and that the definition of disability “shall be construed in favor of broad coverage of individuals.”*

The ADAAA also clarifies what constitutes a “major life activity.” Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Major life activities also include “operation of a major

bodily function” such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Under the ADAAA, *an impairment that is “episodic or in remission” is a disability even when inactive “if it would substantially limit a major life activity when active.”* Examples of an impairment may include cancer, epilepsy and post-traumatic stress disorder.

The ADAAA also clarifies when an individual is “regarded as” disabled. An individual meets the requirement of being “regarded as” disabled *whether or not the actual or perceived impairment actually limits or is perceived to limit a major life activity*. The “regarded as” prong of the definition of disability does not apply to impairments that are “transitory” (“actual or expected duration of 6 months or less”) and “minor.” However, while employers may not discriminate against an individual who is “regarded as” disabled, employers need not provide reasonable accommodation to such individuals.

The ADAAA’s expansion of the scope of the ADA will likely result in increased litigation for disability discrimination. Employers can expect more employees to fall within the definition of “disabled,” which in turn may trigger the employer’s duty to engage in the interactive process and/or provide reasonable accommodation. Therefore, it of paramount importance that employers take requests for accommodation seriously and, if intending to take an adverse employment action against an employee who is protected by the ADAAA, to have legitimate, non-discriminatory business reasons for the action.

The Brinker Decision's Effect on Wage and Hour Class Actions

By Isauro A. Villarreal

There are more than a few phrases that worry defense attorneys, but “class action lawsuit” is definitely near the top of the list. Conversely, nothing gets a plaintiff attorney’s mouth watering like the potential for a large recovery. Class action lawsuits based on wage and hour claims are no different, endangering large and small businesses with considerable exposure to liability. Alarming, wage and hour class actions are on the rise, but a recent decision may slow their proliferation.

In *Brinker Restaurant Corp. v. Superior Court*, the Fourth District Court of Appeal vacated a trial court’s order certifying a wage and hour class action that alleged rest break, meal period, and off-the-clock time shaving violations. The *Brinker* court held that the trial judge had failed to properly consider the legal elements of plaintiffs’ claims in determining if they were amenable to class action treatment.

For a lawsuit to be certified as a class action, it must be the “superior method” of trying the case. The plaintiffs’ claims must share common questions of law and fact, which in turn allows a single decision to be applied to every member of a class or subclass. If individualized questions of law or fact predominate over common issues, a court would become bogged down in trying each member’s individual claims. Therefore, not surprisingly, the issue of whether common questions of law or fact predominate over individualized ones is at the heart of every motion to certify or decertify a class action.

The *Brinker* case was no different. The plaintiffs argued that individualized inquiries were not necessary because the company’s policy created

a pattern and practice of violations, and statistical and survey evidence could be used to prove it. The defense countered with declarations from over 600 employees explaining that no uniform policy existed because of differences between various job types and variances between dinner and lunch shifts. The defense also submitted declarations from 30 managers that explained that managers were allowed to handle compliance at the local level. The trial court certified the class action finding that common questions regarding the meal and rest breaks were sufficiently pervasive and common, and arguments regarding the necessity of making employees take meal and rest breaks created a common legal issue.

On appeal, the *Brinker* court focused on the legal elements of the plaintiffs’ claims. The appellate court reversed the order of certification, reasoning that asking why the meal or rest breaks were missed, or why the employee worked off-the-clock, would require an individualized inquiry as to each employee, especially in light of Brinker’s policies against off-the-clock work and missing meal and rest periods.

Requiring a trial court to focus on the substantive elements of the plaintiffs’ claims during a class certification hearing provides an advantage to employers being sued for alleged wage and hour violations. But a petition has been filed in the California Supreme Court challenging the Fourth District’s decision. On October 22, 2008, the California Supreme Court voted to review the *Brinker* decision leaving the holding of the Fourth District Court of Appeal in limbo for the present.

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California Courts Remain Hostile Toward Agreements to Arbitrate

By Jennifer J. Schultz

In *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal. 4th 83, the California Supreme Court articulated the minimum safeguards that must be an arbitration agreement for an employer to be able to require an employee to arbitrate his or her claims in lieu of bringing such to court. Such an arbitration agreement is lawful if it provides for (1) a neutral arbitrator, (2) more than minimal discovery, (3) a written award, (4) the types of relief that would otherwise be available in court, and (5) does not require the employee to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum. By including each of the *Armendariz* requirements in a mandatory arbitration agreement, an employer should be able to thwart an attack by a disgruntled employee who seeks to ignore the arbitration agreement and bring his or her employment-related claims in court.

The most recent case addressing the enforceability of an arbitration agreement is *Ontiveros v. DHL Express* (2008) 164 Cal.App. 4th 494. Relying on *Armendariz*, the *Ontiveros* court found the arbitration

clause to be unenforceable as a "contract of adhesion." The *Ontiveros* Court held that at least three provisions of the arbitration agreement were substantively unconscionable. First, the provision for arbitrator determinations of enforceability issues created a conflict of interest for the arbitrator because when deciding whether an arbitration contract is enforceable, an arbitrator's compensation will depend on the matter going to a hearing on the merits before that arbitrator. Second, the provision requiring that the plaintiff pay a portion of the arbitration-related costs and that each party would pay its own attorney fees violated one of the safeguards required by *Armendariz*. Finally, the provision "severely limiting discovery" also failed to meet another *Armendariz* safeguard.

Given the pronouncements of the *Armendariz* Court, and the lower courts' scrutiny of arbitration agreements when deciding whether to compel an employee to bring his or her claims in arbitration in lieu of court, it is important for an employer to review its mandatory arbitration clauses to ensure that such comport with the law.

Recent Developments

Court Clarifies California Law Regarding Meal Periods and Rest Breaks

On July 22, 2008, the California Court of Appeal for the Fourth Appellate District in *Brinker Restaurant Corp. v. Superior Court* reversed an order of a trial court certifying a lawsuit brought by employees as a class action. The *Brinker* court held 1) while employers cannot impede, discourage or dissuade employees from taking *rest periods*, they need only provide, not ensure, rest periods are taken; 2) employers need only authorize and permit rest periods every four hours or major fraction thereof and they need not, where impracticable, be in the middle of each work period; (3) employers are not required to provide a *meal period* for every five consecutive hours worked; (4) while employers cannot impede, discourage or dissuade employees from taking meal periods, they need only provide them and not ensure they are taken; and (5) while employers cannot coerce, require or compel employees to work off the clock, they can only be held liable for employees working off the clock if they knew or should have known they were doing so. On October 22, 2008, the California Supreme Court voted to review the Fourth Appellate District *Brinker* decision so it may no longer be cited as controlling law.

Drivers in California May Not Write, Send, or Read Text Messages While Driving

On September 24, 2008, Governor Schwarzenegger signed Senate Bill 28 which amended Section 12810.3 of the Vehicle Code to prohibit a person from driving a motor vehicle while using an electronic wireless communications device “to write, send, or read a text-based communication.” The bill also provides for a fine of \$20 for a first offense and \$50 for each subsequent offense. A person is not in violation of the law if he or she reads, selects, or enters a telephone number or name in an electronic wireless communications device for the purpose of making or receiving a telephone call, nor does the law apply to an emergency services professional using an electronic wireless communications device while operating an authorized emergency vehicle in the course and scope of his or her duties.

Change to Overtime Exemption for Employee in the Computer Software Field

Under existing law, work performed by a non-exempt employee in excess of eight hours in one workday, 40 hours in a one workweek, and the first eight hours on the seventh day in a workweek, must be compensated at a rate of at least 1 1/2 times the employee’s regular rate of pay. An employee in the computer software field is “exempt” from these overtime compensation requirements if his or her hourly rate of pay is at least \$36.00 and he or she meets the other requirements for an exemption that are set forth in the applicable Wage Order. On September 30, 2008, the Governor signed Assembly Bill 10 that provides that this exemption from overtime for an employee in the computer software field also applies if he or she earns an annual salary of not less than \$75,000 for full-time employment, paid at least once a month and in an amount of not less than \$6,250.00.

Exemption for Volunteers From Having to be Paid Prevailing Wages Extended

Under existing law, all workers employed on public works projects generally must be paid not less than the general prevailing rate of per diem wages for work, but until January 1, 2009, a “volunteer” is not considered someone who must be paid the prevailing wage rate for working on such projects. On September 30, 2008, the Governor signed Assembly Bill 2537 that extends the exclusion for volunteers until January 1, 2012.

EEOC Issues Guidance on Performance and Conduct Standards Under the ADA

On September 30, 2008, the Equal Employment Opportunity Commission issued a Notice entitled “The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities.” In its Notice, the EEOC addresses how the ADA affects personnel issues such as performance and conduct standards, seeking medical information when there are performance or conduct problems, attendance, dress codes, alcoholism and illegal use of drugs. The publication provides practical guidance, offers examples to demonstrate the responsibilities of both employees and employers when performance and conduct issues arise, and discusses the role of reasonable accommodation. To obtain an electronic copy of the EEOC’s Notice, please call our office (916) 442-0033 or request such by email: info@rmlaw.net.

Employer Did Not Fail to Promote Employee Based on a “Perceived Disability”

On October 22, 2008, a California Court of Appeal in *Mangano v. Verity, Inc.* affirmed a summary judgment in favor of an employer where the trial judge found that it had not discriminated or harassed an employee based on a “perceived” mental disability in violation of the California Fair Employment and Housing Act. The *Mangano* court affirmed the lower court’s finding that the employee failed to show that the employer’s legitimate business reasons for not promoting Plaintiff, i.e. that it filled the position with more competent person, was a pretext for discrimination. The *Mangano* court further rejected the Plaintiff’s claim that he was subjected to unlawful harassment because any comments made to him were ambiguous and insufficient to create a hostile work environment. Finally, in regard to costs and fees, the *Mangano* court affirmed the award of \$20,000 in costs to the Defendant, but affirmed the denial of its request for attorney’s fees because the Plaintiff’s action was not “frivolous, unreasonable, or groundless.”

Upcoming Events

November 13, 2008—Lorman Education Services will present a seminar in Sacramento entitled “Employment Law in California from A to Z.” Robert L. Rediger will join other speakers at the one day seminar and lecture on “Leaves of Absences Required by Law in California” and “How to Discipline and Discharge Employees.” Contact Tobey J. Guntner with Lorman at (715) 833-3940 ext. 1243 for more information.

January 27, 2009—National Business Institute will present a seminar entitled “Advanced Employment Law.” Robert L. Rediger will join other speakers at the one day seminar in Sacramento and begin the program with a one hour lecture on “Wage and Hour Update” and then present a two hour interactive program entitled “Unlawful Harassment in California.” **The two hour anti-harassment program Mr. Rediger will present will satisfy the anti-harassment training required of larger employers by California law.** (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 interactive 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).

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