

### LABOR AND EMPLOYMENT LAW REPORTER

Summer 2009

## Firm Obtains an Award of Attorney’s Fees for Employer Following Dismissal of Wage and Hour Class Action

Attorneys **Robert L. Rediger**, **Laura C. McHugh** and **Jimmie E. Johnson** worked together to obtain the dismissal of a wage and hour class action lawsuit brought by former employees against Immoos Fire Protection Company and an award of attorney’s fees for their client. Robert L. Rediger first conducted discovery into the plaintiffs’ claims of missed meal and rest periods, not being paid overtime, being required to work “off the clock,” and other wage-related allegations, obtaining several admissions



from the lead plaintiffs. Laura C. McHugh then defeated a motion brought by the plaintiffs to certify the lawsuit as a class action. After the plaintiffs dismissed their lawsuit with prejudice, Jimmie E. Johnson argued a motion for an award of attorney’s fees the employer incurred in defending those causes of action for which a “prevailing party” is entitled to

its fees. On July 9, 2009, the court entered an order awarding approximately \$50,000.00 in favor of Immoos Fire Protection Company.

#### IN THIS ISSUE

Firm Obtains Award of Attorney’s Fees.....	1
Supreme Court Overturns Decision in Favor of White and Hispanic Firefighters.....	1
Paralegal Miriam Sullivan Joins the Firm .....	2
Esmeralda Soria Joins the Firm as a Law Clerk ..	3
Plaintiff Must Show “Pervasive and Severe” Harassment Under Unruh Act.....	3
Employer Victories Under UCL and PAGA .....	4
Firm Summer Event at Raley Field .....	5
Associates and Law Clerks of the Firm .....	6
Recent Developments .....	6
Announcements.....	8

### U. S. Supreme Court Overturns Second Circuit’s Decision by Ruling in Favor of White and Hispanic Firefighters

By Isauro A. Villarreal

On Monday June 29, 2009, the last day of the United States Supreme Court’s term, the High Court reversed a federal district court decision that had been affirmed by the United States Court of Appeals for the Second Circuit in *Ricci v. DeStefano*.

Ricci, along with fifteen other white fighters and one Hispanic firefighter, sued the City of New Haven and several city officials, including its mayor John DeStefano, after the City refused to certify the results of promotional tests administered to fill vacant lieutenant and captain positions within the New Haven Fire Department. The City contracted with I/O Solutions (IOS), an Illinois company that specialized in developing promotional examinations for public safety departments (*continued on page 2*)

## PARALEGAL MIRIAM SULLIVAN JOINS THE FIRM

**Miriam Sullivan** has joined Rediger, McHugh & Hubbert as a litigation paralegal. Prior to joining the firm, Ms. Sullivan worked as a litigation paralegal with a top Sacramento firm specializing in health care and business litigation. She has worked on large complex cases, including wage and hour class action litigation. She brings with her a vast knowledge of software and computer technology. Ms. Sullivan majored in legal studies at the University of Maryland and received her paralegal certificate from the American Bar Association approved program at MTI College.

(continued from page 1), to develop the promotional exams. IOS conducted an extensive job-analysis during the test-design process to ascertain the tasks, knowledge, skills and abilities essential for the positions. IOS gathered information for the examinations by administering job-analysis questionnaires to most of the incumbent battalion chiefs, captains, and lieutenants in the department. The questionnaires were created after IOS interviewed, rode-along with, and observed incumbent captains and lieutenants. The IOS made a concerted effort to gather and apply input from minority incumbents.

After the tests were administered, the results came under scrutiny when they showed that white candidates had outperformed minority candidates. In the face of threatened litigation and arguments both for and against certifying the examination results, the City's Civil Service Board did not certify the results. The City feared that certifying results with a statistical racial disparity would create Title VII liability under a disparate impact theory. Title VII of the Civil Rights Act prohibits both intentional discrimination, known as "disparate treatment," as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities, known as "disparate impact." The white and Latino firefighters who would have likely been promoted based on their good test scores initiated the lawsuit.

At the trial court level, the federal district judge granted the City's motion for summary judgment, upholding the City's decision to scrap the test results. A panel of Second Circuit judges that included President Obama's nominee for the Supreme Court, Sonia Sotomayor, agreed with the federal district court's ruling in favor of the City.

In an opinion authored by Justice Kennedy, a 5 to 4 majority reversed, holding that before an employer can engage in intentional discrimination (disparate treatment) for the asserted purpose of avoiding unintentional discrimination (disparate impact), it must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take race-conscious action.

The *Ricci* Court had little difficulty finding that the City had acted discriminately in discarding the test scores, "Whatever the City's ultimate aim-however well-intentioned or benevolent it might have seemed-the City made its employment decision because of race." Instead, the Court iterated that the real issue is whether the City had a "lawful justification" for "its race-based action," and asked, "Whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination."

Justice Kennedy avoided a constitutional analysis by deciding the case on statutory grounds. In its analysis, the *Ricci* Court stated, "Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions." The Court continued, "A threshold showing of a significant statistical disparity" without more "is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results." Though the Court did not hold that a private or government actor may never intentionally discriminate to avoid unintentional discrimination, the decision's application of "a strong basis in evidence" standard will surely impact future employment litigation, especially disputes concerning the discriminatory impact of promotional examinations. ■

## ESMERALDA Z. SORIA JOINS FIRM AS A LAW CLERK FOR THE SUMMER



**Esmeralda Z. Soria** has joined Rediger, McHugh & Hubbert as a summer law clerk through the Sacramento County Bar Association’s Diversity Fellowship. In August, Ms. Soria will be starting her second year at UC Davis School of Law. She graduated from UC Berkeley in 2005 with a B.A. in Political Science and Chicano/a Studies. After graduating from UC Berkeley, she worked for a non-profit agency in the East Bay, helping underprivileged students attend college. In 2006, she moved to Sacramento to work in the State Capitol as a legislative aide for Senator Gilbert Cedillo where she learned the complexity of the policy making process, drafted legislation, made voting recommendations, and met with community advocates and lobbyists.

## Plaintiff Must Show “Pervasive or Severe” Harassment Under Unruh Act

By Susana P. Solano, Law Clerk

In *Hughes v. Pair*, the Court of Appeal of the Second District adopted the definition of “pervasive or severe” sexual harassment under Title VII and the FEHA to define “pervasive or severe” sexual harassment under the Unruh Act (Civil Code § 51.9.) Cal. Civ. Code section 51.9 prohibits sexual harassment outside the workplace when a business or professional relationship exists between the plaintiff and the defendant. Under section 51.9, a defendant is liable when 1) there was a qualifying business or professional relationship; 2) defendant made sexual advances, requests, or demands, or engaged in other verbal, visual, or physical conduct of a sexual or a hostile nature based on gender, which were unwelcome *and* pervasive or severe; 3) there was inability for the plaintiff to easily terminate the relationship; and 4) plaintiff suffered or will suffer, as a result of the conduct, economic loss or personal injury.

Federal and California law prohibit hostile environment and *quid pro quo* sexual harassment in the workplace. (42 U.S.C.S. 2000e *et seq.*; Cal. Gov. Code, § 12940 *et seq.*) A claim for hostile environment sexual harassment is actionable only when the defendant’s conduct is “pervasive or severe.” Conduct that may be offensive or occasional, sporadic, isolated, or trivial is not actionable. California courts have held that physical violence or threat thereof may suffice to establish extreme severity.

*Quid pro quo* harassment, based on rejection of the sexual advances, exists when there is a causal connection between that rejection and some tangible adverse employment action. In assessing liability of

either theory of harassment, courts consider all the circumstances surrounding the conduct, and do so from the objective perspective of a reasonable person and from the subjective perspective of the alleged victim.

In *Hughes v. Pair*, the plaintiff, who was the mother of a trust beneficiary, alleged the defendant’s statements during two conversations amounted to hostile environment and *quid pro quo* sexual harassment in violation of Civil Code section 51.9. The defendant was one of the trustees of plaintiff’s son trust, and had been the business associate of plaintiff’s decedent ex-spouse. Prior to any offensive conversation, the plaintiff had requested payment for a two-month vacation rental, but the trustees had only granted payment for one-month. During a telephone conversation, initiated by the defendant to invite plaintiff’s son to a private show, the defendant called plaintiff “sweetie” and “honey,” and said he thought of her “in a special way, if you know what I mean.”

When the plaintiff inquired as to why the trustees had only authorized half of her request, the defendant expressed that he could be persuaded to vote for an additional month if plaintiff would be “nice” to him. He then said, “You know everyone always had a thing for you. You are one of the most beautiful, unattainable women in the world. Here is my . . . number . . . call me when you’re ready to give me what I want.” After plaintiff’s retort of his comments as “crazy”, defendant asked, “How crazy do you want to get?”

(Continued on page 4)

When the plaintiff took her son to the private show, in front of other people, the defendant stated to her, “I’ll get you on your knees eventually. I am going to [sleep with] you one way or another.” The plaintiff sued for hostile environment and *quid pro quo* harassment. The defendant moved for summary judgment, arguing plaintiff had failed to state a claim for relief.

The trial court granted summary judgment for defendants. The Court of Appeal affirmed agreeing with the trial court’s assessment that the words “pervasive or severe” in Title VII and the FEHA imposed limitations on liability for workplace sexual harassment suits. Since the statements were not severe or pervasive under Title VII or the FEHA, the statements were likewise insufficient to meet the same “pervasive or severe” requirement under section 51.9.

On petition for review, the California Supreme Court stated, “when the statutory language includes words or terms that courts previously

construed, ‘the presumption is almost irresistible’ that the Legislature intended them to have the same ‘precise and technical’ meanings given by the courts.” Section 51.9 does not define “pervasive or severe” but those words have a well-settled judicial construction under Title VII and the FEHA. The *Hughes* Court concluded the Legislature intended for the terms to retain the same meaning.

After establishing the meaning of “pervasive or severe,” the Court analyzed the hostile work environment claim and found the conduct was not pervasive because it was not so egregious as to alter the conditions of the underlying professional relationship and that the plaintiff failed to show that there were more than a few isolated incidents. Under a *quid pro quo* theory, the *Hughes* Court held defendant’s comments aggregated to at most “unfulfilled threats,” which are more properly assessed under the hostile environment theory.

The California Supreme Court affirmed the holding of the Court of Appeal.■

## **California Supreme Court Issues Two Decisions Favorable to Employers Under the UCL and the PAGA**

By Esmeralda Soria, Law Clerk

On June 29, 2009, the California Supreme Court issued two decisions on the requirements for bringing representative actions under the Labor Code Private Attorney General Act of 2004 (PAGA) and Unfair Competition Law (UCL).

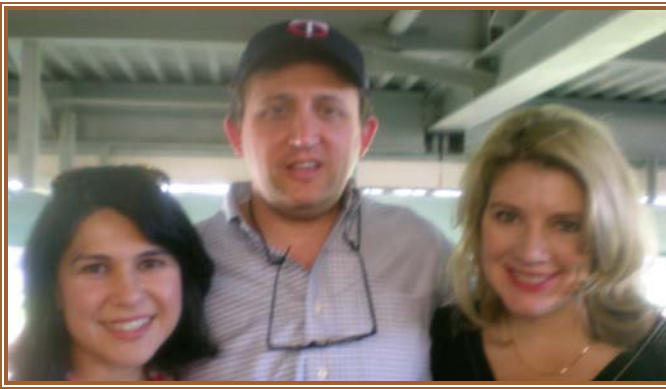
In 2003, the California Legislature enacted a law that allows a private citizen to sue for civil fines and penalties for violations of certain provisions of the Labor Code. Prior thereto, only state agencies or the California Attorney General had “standing” to bring such actions. The PAGA permits a civil action “by an aggrieved employee on behalf of himself or herself and other current or former employees” to recover civil penalties for certain labor violations. Before bringing such an action, the plaintiff must comply with the statutory requirements under Labor Code section 2699.3.

Before an action is commenced in court under the PAGA, a written notice of the alleged

violations must have been provided to both the employer and the Labor and Workforce Agency. If the Agency does not respond within 33 days, does not issue a citation within 158 days of the written notice, or if it notifies the employee and employer that it will not investigate, then the plaintiff may file suit.

In *Arias v. Superior Court (Angelo Dairy)*, the plaintiff, on behalf of himself and other former and current employees, filed a UCL and PAGA suit alleging that their employer had violated various labor laws by failing to pay all wages due, provide rest and meal periods, maintain adequate payroll records, pay all wages on termination, offset proper amounts for employer-provided housing, and provide necessary tools and equipment. The Supreme Court held that an employee who brings a representative claim under UCL must satisfy the class action requirements, but not if he or she seeks civil penalties under PAGA. (*Continued on page 5*).

## Firm Summer Event at Raley Field



Under *Arias*, if an aggrieved party prevails in a PAGA suit by proving that the employer violated the Labor Code, the employer will be bound by the final judgment and aggrieved non-parties will be able to invoke the doctrine of collateral estoppel against the employer to obtain remedies other than civil penalties for the same violations. If the employer prevails in the case, the aggrieved non-parties will not be bound by the ruling with respect to the remedies other than civil penalties. An employee may use a PAGA claim as a “back door” to sue his or her employer for workplace violations without having to meet stringent class certification requirements.

A companion case, *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (First Transit Inc.)*, was filed by two labor unions seeking restitution on behalf of employees for unpaid wages and for failure to provide them with meal breaks. The court held that the unions lacked

standing under both the UCL and the PAGA because neither union had suffered actual injury under UCL, nor could either be considered an “aggrieved employee” under PAGA. The court also rejected the unions’ arguments that the employees who had suffered actual injury could “assign” their claims to the union and that the unions could bring an action based on the legal concept of “associational standing.”

What do the *Arias* and *ATU, Local 1756* decisions mean for employers? Employers may see a rise in PAGA claims as grieved parties bring representative claims without having to meet the stringent class certification requirements and will still be able to challenge UCL claims where a plaintiff can not meet the requirements to have the action certified as a class action. Employers should see a decline in lawsuits brought by labor organizations under the UCL and the PAGA.■



**Jimmie E. Johnson, Isauro A. Villarreal, Esmeralda Z. Soria, Susana P. Solano and Sarah R. Lustig attended the Barristers' Club of Sacramento's "17th Annual Summer Associates Reception" on July 16, 2009**

## **Recent Developments**

### **Employees May be Required to Arbitrate Discrimination Claims**

On April 1, 2009, U.S. Supreme Court in *1410 Plaza v. Pyett* held that where a collective bargaining agreement (CBA) “clearly and unmistakably” requires members of a labor union to arbitrate claims arising under the Age Discrimination in Employment Act (ADEA), an employee covered by that CBA may not bring an action in federal court against the employer for age discrimination. The *1410 Plaza* Court held that as the exclusive bargaining representative of the employees, the Service Employees International Union (SEIU) was authorized to waive its members’ right to a judicial forum under the ADEA. The high court refused to rely on the *Gardner-Denver* line of cases that were critical of the use of arbitration for the vindication of statutory rights, dismissing anti-arbitration dicta in those cases as “skepticism that rested on a misconceived view of arbitration that this Court has since abandoned.”

### **Arbitration Agreement May Encompass Claims for Unpaid Wages**

On May 29, 2009, a California Court of Appeal in *Sonic-Calabasas A, Inc. v. Moreno* reversed an order of a trial judge denying an employer’s motion to compel arbitration of an employee’s claim for unpaid wages that he filed with the California Labor Commissioner. The *Sonic-Calabasas* court held that the parties’ agreement to arbitrate did not amount to the waiver of an unwaivable right in violation of public policy and did not run afoul of the standards and protections developed by the California Courts for an arbitration agreement to be enforced.

### **Contract May Condition Salesperson’s Commission on Continued Employment**

On June 3, 2009, a California Court of Appeal in *Nein v. Hostpro* affirmed summary judgment in favor of an employer where the employment contract it had with a salesperson stated that he was eligible for commission pay “so long as he remains employed with the Company” and the transaction he had suggested to his employer was still being negotiated and was not consummated until one month after his employment was terminated. The *Nein* Court cautioned that “there is an exception to this principle when a contract provision is unconscionable,” such as where there is nothing further for the employee to do regarding the sale and the employer is simply waiting for the customer to remit payment on which the commission is based.

### **Plaintiff Need Not Show Intentional Discrimination for ADA Violation Under Unruh Act**

On June 11, 2009, the California Supreme Court in *Munson v. Del Taco* held that a plaintiff alleging the denial of full and equal treatment on the basis of disability in violation of the Unruh Civil Rights Act and the Americans with Disabilities Act need not prove “intentional discrimination” to prevail. California’s Unruh Civil Rights Act requires that public accommodations be open to everyone, without arbitrary discrimination

based on various protected categories. As a result of a recent change made by the California legislature in the law, the *Munson* court held that a plaintiff may show a violation of the ADA that forbids denying disabled people equal access to public places, without having to prove that such was the result of “intentional” discrimination.

### **Employer May Settle With an Employee Before a Wage and Hour Lawsuit is Certified**

On June 15, 2009, the California Supreme Court refused to review a decision of the Fourth Appellate District Court of Appeal in *Chindarah v. Pick Up Stix* that allowed a defendant-employer to settle wage and hour-related claims with employees before the action had been certified as a class action. In *Chindarah*, the employer had approached employees, informed them of their rights, and afforded them the opportunity to speak with counsel before entering a settlement agreement and waiving their right to participate in the pending litigation if the action was eventually certified. After 236 employees signed such settlement agreements with the employer, the potential class was reduced to 68 former employees who could not be located.

### **Union Lacks Standing to Bring UCL or PAGA Suit**

On June 29, 2009, the California Supreme Court in *Amalgamated Transit Union Local 1756 v. Superior Court (First Transit, Inc.)* held that a labor union that had not suffered actual injury may not sue under the Unfair Competition Law (UCL), nor may it sue as “an aggrieved employee” under the Private Attorney General Act (PAGA). The *Local 1756* court further held that even under the “doctrine of associational standing,” a labor organization is not exempt from the express statutory standing requirements in the UCL and PAGA.

### **Employee Bringing Suit under UCL Must Satisfy Class Action Requirements**

On June 29, 2009, the California Supreme Court in *Arias v. Superior Court (Angelo Dairy)*, held that an employee suing on behalf of himself and other similarly situated employees under the California Unfair Competition Law (UCL) must satisfy class action requirements, but a plaintiff need not satisfy class action requirements when he or she brings the representative action against an employer seeking only civil penalties under the Private Attorney General Act (PAGA). The *Arias* court affirmed the decision of the court of appeal, which had affirmed the judgment of the trial court, granting the defendant’s motion to strike various wage and hour-related causes of action brought by plaintiff because he had failed to satisfy the requirements for bringing a class action under the UCL.

### **Employer May Include a “Waiting Period” in its Vacation Policy**

In *Oden v. Macy’s, Inc.*, the Second Appellate District Court of Appeal held that an employer was not required to provide an employee with “pro-rated” vacation when it had a clear policy establishing that “a new employee earns no vacation time during the first six months of employment.” The *Oden* court rejected the plaintiff’s argument that California law requires an employee to be credited with vacation starting from the very first day of employment, holding instead that an employer is not required to provide any vacation at all and it may, in its discretion, establish a “waiting period” prior to the accrual of the vacation. The *Oden* court also noted that a “cap” on the accrual of vacation is legal.

### **Offensive Conduct Must be “Pervasive or Severe” to be Actionable**

On July 2, 2009, the California Supreme Court in *Hughes v. Pair* affirmed a decision of a Court of Appeal that had affirmed a trial court’s granting of a defendant’s motion for summary judgment, dismissing a plaintiff’s suit brought under California Civil Code section 51.9 for sexual harassment because such conduct was not “pervasive or severe.” Civil Code section 51.9 prohibits sexual harassment in certain business relationships outside the workplace and uses the same standard found in the Fair Employment and Housing Act (FEHA) which is that for offending conduct to be actionable, it must be “pervasive or severe.” The *Hughes* court affirmed the lower court’s decision finding that the alleged sexual harassment consisted only of offensive comments made during a single telephone conversation and a brief statement made to the plaintiff in person later that day.

## Announcements

**Robert L. Rediger** prevailed before a labor arbitration on a grievance filed by a union alleging that the employer had violated the parties' collective bargaining agreement (CBA) by laying off the grievant instead of an employee with less tenure with the employer. Acknowledging that "issues surrounding the reduction of a workforce often include difficult decisions," Arbitrator William Riker recognized that section 13 of the parties' CBA was a "modified seniority clause," permitting the employer to "review the ability and skills of employees" before considering the employees' date of hire. The arbitrator found that the employer had engaged in a proper "analysis and deliberation as to the employees affected" and that it based its decision on "relevant data," leading him to deny the grievance. *Millmen Union, Local 1618 and A-1 Door*, \_\_ LA\_\_ (Riker, Arb.) (May 22, 2009).

**Increase in Federal Minimum Wage Rate** - Effective July 24, 2009, the federal minimum wage will increase from \$6.55 to \$7.25 per hour. Employers in California will not be affected by the increase in the federal minimum wage rate as the minimum wage in California is \$8.00 per hour.

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