

THARPE & HOWELL

LABOR & EMPLOYMENT LAW NEWSLETTER

RECENT DEVELOPMENTS

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Nevada Supreme Court Affirms Employer's Discretion Re Dealer Tip Pooling Policy

In, *Baldonado v. Wynn Las Vegas*, a class-action suit was filed against a casino by its dealer employees for changes made to the company's dealer tip distribution policy.

In this case, plaintiffs worked as table dealers for the defendant casino. At the time of hire, the dealer tip distribution policy held that all dealer tips would be distributed to the **dealers** based on a set formula. The employee handbook contained provisions stating that managers were prohibited from receiving tips, and that the casino could change any of its policies at any time. Although a voting policy involving the employee dealers was also in place, it was subject to veto by the casino.

The class-action lawsuit was filed when the casino changed its dealer tip distribution policy - effectively decreasing the dealers' compensation by up to 15%. The new policy created a team leader

position, combined the pit manager and floor supervisor positions, and re-distributed dealer tips between the dealers **and** various other members of the service team (including low-level managerial staff).

In the class-action, plaintiffs sued the casino employer for breach of contract and various violations of the Nevada Labor Laws. The employees argued the casino could not take their tips; force them to forgo that part of their compensation; or give any portion of their tips to managerial staff.

The employer casino responded by asking the Trial Court to dismiss the case on the basis that plaintiffs had no **private** right of action, and no sustainable Cause of Action for Breach of Contract as at-will employees. The Trial Court agreed with the casino, and the dealer employees appealed.

After researching legislative intent and hearing argument from both sides, the Nevada Supreme Court ruled the **exclusive** remedy for alleged labor law violations involving Nevada **at-will employees** is to file a Complaint with the Nevada Labor Commissioner. Further, as to the claims of these Nevada employee plaintiffs for breach of contract, the Court held that Nevada employers “may unilaterally modify the terms of an **at-will** employment arrangement in prospective fashion.” [Emphasis added.] So, **even if** the previous policy regarding dealer tip distribution and voting rights **may have** constituted a contract, the casino was free to modify it. The Court also noted the casino’s employee handbook contained a broad reservation of rights - which included the employer’s right to change the terms of the subject voting provision.

“Waiting Time” Penalties Not Recoverable Under California’s Unfair Competition Law

The California Court of Appeal recently held “waiting time” penalties under Labor Code Section 203 cannot be recovered as restitution under California’s Unfair Competition Law.

In *Pineda v. Bank of America*, plaintiff Pineda had given his employer, defendant Bank of America (“BofA”), two weeks notice of his last day of work - being May 11, 2006. However, BofA did not pay Mr. Pineda his final check until four days after the end of his employment - on May 15, 2006.

More than one year later, on October 22, 2007, plaintiff filed a class-action suit against BofA, on behalf of all persons whose final wage payment was made **after** their last date of employment. On behalf of himself and all other members of the class, plaintiff sought “waiting time” penalties under Labor Code Section 203 and restitution under the Unfair Competition Law.

BofA filed a Motion for Judgment on the Pleadings which the Trial Court granted **without** leave to amend. It held the claim for “waiting time” penalties under Labor Code Section 203 was barred by the **one year** statute of limitations; and that penalties could not be recovered as “restitution” under the Unfair Competition Law. Plaintiffs appealed.

The Court of Appeal agreed with the Trial Court and stated the one-year statute of limitations applies to waiting time penalty claims when there is no underlying claim for unpaid wages. (So, for example, if the employer would **not** have paid the wages at all - then the statute of limitations would

have been three years.) The Court of Appeal also found plaintiffs could not allege a cause of action under the Unfair Competition Law because Labor Code Section 203 penalties are not recoverable as restitution under Business and Professions Code section 17203.

Arizona Court of Appeals Upholds Sanctions Against Employers Who Hire Illegal Workers

In *Chicanos Por La Causa, Inc. v. Napolitano*, civil rights leaders brought suit disputing the validity of the Legal Arizona Workers Act, which allows Arizona courts to impose various sanctions against employers who knowingly or intentionally hire unauthorized aliens to perform work. Plaintiffs argued the Act is unconstitutional, and requested that the Court issue an injunction preventing further enforcement of various of the Act's provisions. The Trial Court upheld the Statute, and plaintiffs appealed.

The Court of Appeal upheld the Trial Court's decision and found the Act to be enforceable and in accordance with immigration law. Accordingly, the business licenses of Arizona employers who hire illegal workers can still be suspended or revoked.

Failure To Reimburse For Mileage Costs \$3 Million Dollars In Employment Class Action Suit

Starbucks has agreed to pay \$3 Million Dollars to over 6,000 disgruntled store managers to settle a

class-action suit. In *Lewis, et al. v. Starbucks*, plaintiff Lewis and other members of the class alleged that Starbucks failed to reimburse them for mileage recorded on duty-related trips. [The California Labor Code requires that all California employers reimburse its employees for all expenses incurred while performing work-related duties.] While denying liability, Starbucks agreed to pay the \$3 Million Dollar settlement and change its policy with regard to work-related travel.

Good News: Effective January 1, 2009, the IRS has **decreased** its standard mileage rate from 58.5 cents to 55 cents for business related travel. Recent case law holds that employers are in compliance with mileage reimbursement requirements when using the IRS standard rate.

Title VII Anti-Retaliation Protection Expanded By Supreme Court Ruling

In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, the United States Supreme Court expanded the class of employees who can file a claim for anti-retaliation to **include** employees who **participate** in internal investigations.

In this case, plaintiff Vicki Crawford was fired from her position with the Metro School District for Nashville and Davidson County after advising its investigators that the employee-relations director had sexually harassed her. Plaintiff Crawford had not proactively complained about the sexual harassment, but instead had merely informed investigators about the sexual harassment in response to an internal investigation

about sexual harassment prompted by other employee complaints.

The investigation subsequently concluded and no disciplinary action was taken against the accused employee-relations director. After the results of the investigation were released, plaintiff Crawford was fired from her position for alleged embezzlement (later determined to be unfounded); and other female employees who had been interviewed were terminated from their positions as well.

Plaintiff Crawford filed a claim for anti-retaliation with the EEOC and subsequently filed suit. The District Court found in favor of her employer, opining that participation in an investigation did not constitute opposition under the statute. The Court of Appeal affirmed.

The U.S. Supreme Court disagreed and found that Crawford's actions were protected under the Title VII anti-retaliation provision and reversed the Appellate Court's decision. It found that employees who **participate** in an internal investigation **are** also protected from retaliation under Title VII of the Civil Rights Act.

Tharpe & Howell has been part of the California, Arizona, Nevada and Utah Business Communities for more than 31 years, providing clients with experience, judgment, and technical skills. We are committed to delivering and maintaining excellent client service to give each client and case personalized attention, and to be an integral member of each client's team.

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