

THARPE & HOWELL

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RECENT DEVELOPMENTS

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Employee Arbitration Agreement Unenforceable In Class Action Suit

In *Franco v. Athens Disposal Company*, lead plaintiff Edixon Franco, a trash truck driver, filed a class-action lawsuit against his private employer

Athens Disposal for alleged violations of the Labor Code, including denial of meal and rest breaks for non-exempt hourly employees. In response to the action, defendant Athens Disposal petitioned the Court to compel arbitration based on a written agreement previously signed by plaintiff which specifically waived class-actions and precluded plaintiff from acting in "a private attorney general capacity" (essentially barring plaintiff's enforcement of the Labor Code on behalf of other employees). Plaintiff argued defendant's petition

for arbitration should be denied because the class-action waiver and private attorney general prohibition contained in the agreement were unconscionable. The Trial Court disagreed with plaintiff and granted defendant's petition - effectively limiting plaintiff's case to an arbitration of his *own* personal claim.

After considering the evidence and hearing argument from both sides, the California Court of Appeal reversed the Trial Court's decision and opined that the arbitration agreement was, indeed, unconscionable and unenforceable in its entirety. Accordingly, the class-action lawsuit filed on behalf of all class members will now be tried.

Employer's Statements To EDD Re Employee's Termination Did Not Constitute Defamation

In *Dibble v. Haight Ashbury Free Clinics*, a psychiatric counselor brought a lawsuit against her former employer for, among other things, defamation. The plaintiff had been employed as a psychiatric counselor for prison inmates and was terminated after an inmate for whom plaintiff had some responsibility committed suicide. Plaintiff's defamation claim was premised on statements that were made by the employer to the Employment Development Department in response to plaintiff's unemployment insurance claim - which alleged that plaintiff's negligence had resulted in the inmate's death.

The Court of Appeal considered whether the trial court was correct in granting the employer's Anti-SLAPP motion. [An Anti-Slapp motion provides a vehicle for a defendant to strike a claim made in a complaint where it arises from conduct that falls within the rights of petition or free speech. To be successful, a defendant must prove: (1) The

challenged action arises from a protected activity - i.e. that the act of which the plaintiff complains was taken in furtherance of the defendant's right of free speech in connection with a legislative, executive, judicial, or other official proceeding; and, (2) The plaintiff cannot prevail on its claim.]

The Court found that the employer's statement to the EDD, a state agency, was part of an official proceeding. In addition, the Court found that the plaintiff would likely be unable to prevail on her defamation claim since her complaint did not identify the words constituting the alleged defamation, nor did it state how and when the defamatory statement was republished. The Court further determined that the employer's statement to the EDD could not support a defamation claim since the plaintiff's claim for unemployment benefits was granted and therefore, the plaintiff could not establish that she had been damaged. Further, the Court found that the employer's statements *to the plaintiff* that she was being terminated for negligence were also insufficient to support a defamation claim since the plaintiff could not establish that the statement was published to someone other than the plaintiff. Therefore, the Court determined that the Anti-SLAPP motion had been properly granted.

"Non-Servers" Can Share In Tip Pool With Restaurant "Serving" Staff

In *Budrow v. Dave & Buster's of California, Inc.*, defendant Dave & Busters, a nationwide restaurant chain, achieved a significant win when the Court of Appeal ruled that the restaurant's tip sharing policy in California was legal.

In this case, cocktail server/employee Aaron Budrow brought a class action lawsuit against

Dave & Busters alleging its policy requiring servers to contribute one percent of their gross sales to bartenders and other *non-table* service personnel was in violation of Labor Code Section 351. [Section 351 provides in relevant part: “No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for.”] Essentially, plaintiff Budrow claimed the restaurant’s policy of giving a portion of the servers’ tips to bartenders was in violation of Section 351 - which he claimed legally limited participation in the tip pool to persons who had provided “direct” table service.

In response to plaintiff’s Complaint, defendant Dave & Busters filed demurrers to two of plaintiff’s three causes of action which were sustained without leave to amend, and then moved for Summary Judgment - which was granted by the Trial Court. In its defense, defendant Dave & Buster’s argued that it did *not* allow management personnel to share in the tip pooling proceeds (which *would have* been in violation of Labor Code Section 351); and that its bartenders *do* serve food and drinks to patrons sitting at tables - an assertion plaintiff Budrow adamantly denied.

In rendering its decision affirming the Trial Court’s ruling in favor of defendant Dave & Busters, the Appellate Court focused on Labor Code Section 351 which does not distinguish “direct” table service from “indirect” table service, or mention the specific functions performed by various restaurant employees. The Court noted that previous cases on point found that when leaving a tip, the patron intends to tip more restaurant staff than just the server or waiter. The Court further found that it is reasonable to conclude a bartender

who mixes or pours a drink for a patron that is delivered to the patron’s table is, in fact, “directly” serving the table in any event. Lastly, the Court stated that tip pool sharing with “non-service” staff such as bartenders is legal and exists to minimize friction between employees and to enable the employer to manage the potential confusion about gratuities in a way that is fair. Accordingly, the Trial Court’s decision favoring defendant Dave & Busters will stand.

The Lilly Ledbetter Fair Pay Act of 2009

On January 29, 2009, President Obama signed into law the “Lilly Ledbetter Fair Pay Restoration Act of 2009.” The Act overturns the United States Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.* which held that the statute of limitations for a pay discrimination claim began when the *original* pay-setting decision was made, and not when the discriminatory act may have been discovered.

The new law amends Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act of 1967 to provide that the charge-filing periods (300 days in most states and 180 days in states that do not have a fair employment agency) would commence when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to the decision or practice; or (3) an individual is affected by an application of a discriminatory compensation decision or practice (including each time wages, benefits, or other compensation is paid). Thus, the statute of limitations now restarts each time an employee receives a paycheck based on a discriminatory compensation decision.

Failure To Disclose Gives Insurer Basis To Rescind

In an unpublished decision, the California Court of Appeal recently affirmed an EPLI carrier's right to rescind consecutive insurance policies where the insured failed to disclose previous employment related claims when specifically asked on the underlying application for insurance.

In *Admiral Insurance Co. v. Debber, et al*, defendant Data Control Corporation had completed its first EPLI application for insurance on behalf of itself and others in 2002. Based on the information provided, a policy was issued by Admiral and then later renewed. Both the original application and the renewal application specifically asked Data Control Corporation whether any claims had been made against it within the previous five years. In response to these questions, Data Control responded "no."

In May of 2004, an employment related lawsuit was filed against Data Control and others - which was then tendered to Admiral for indemnity and defense. The lawsuit alleged that Data Control had defended at least three other employment related lawsuits since 1996 - and that the allegations in those actions were similar to the ones at hand.

In response to the tender, Admiral accepted the defense subject to a reservation of rights. Subsequently, it sought rescission of the policies on the grounds that the information provided by the insured in the underlying applications for insurance had been false. Data Control opposed the motion, arguing that the information omitted was not "material" to the EPLI policies.

The Court found Data Control had failed to disclose the prior lawsuits on the applications and that the original policy would not have been issued

by Admiral had it been made aware of the previous employment claims. Therefore, the questions on the applications were material and the insured's failure to disclose the previous suits merited rescission of the insurance contract.

Settlements With Potential Class Members After Class Action Lawsuit Filing Are Valid

In *Chindarah v. Pick Up Stix, Inc.*, employees brought a class action lawsuit against their employer for unpaid overtime, penalties, and interest due to the misclassification of their job as exempt from overtime pay. While the action was pending, the employer entered into settlement agreements that contained a general release with some of the potential class members.

In response to a challenge to the settlement agreements, the Court held that the settlement agreements with individual employees that were potential class members were valid, and barred the employees from further participation in the class action. Of significance, the Court further found that while the statutory right to receive overtime pay is unwaivable, an employee and employer may settle a bona fide dispute over past overtime wages.

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