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discharge decision authorized their conduct and had a history of making discriminatory statements.

DISCRIMINATION—SEX—Mo. Sup. Ct.: Divided en banc court says sex stereotyping is evidence of sex discrimination under MHRA

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An antenna design firm’s monitoring of a former employee’s personal Facebook messenger account for one month after his departure was not related to the firm’s breach of loyalty claim, so the unclean hands doctrine did not apply.

TORT CLAIMS—S.D.N.Y.: Discharged JPMorgan director’s suicide simply not foreseeable; no wrongful death claim

Although JPMorgan knew of a director’s long history of depression, the nexus between its actions following his attempt to return to work after more than two years of long-term disability leave and his suicide was simply too tenuous.

WAGE-HOUR—MINIMUM WAGE—Cal. App.: California minimum wage law applies to employees of charter cities

In a class action minimum wage lawsuit that set two provisions of the California Constitution against one another (home rule versus legislative authority to set the minimum wage), a California appeals court ruled that the minimum wage trumped the reservation of authority in charter cities.

WHISTLEBLOWERS—9th Cir.: FCPA violation report not protected under SOX as ‘SEC rules or regulations,’ but state public policy verdict stands

It was error to instruct the jury that statutory provisions of the FCPA constitute rules or regulations of the SEC for purposes of whether a whistleblower engaged in protected activity under Sarbanes-Oxley Act Section 806.

DOL NEWS—WHD recovers \$1.5M in back wages and damages for 1,745 employees

WHD investigations led to the recovery of \$1,552,219 for reported minimum wage, overtime, working time, misclassification, and other FLSA violations.

EEOC NEWS—Employer will pay \$150K to end suit for allegedly refusing to hire deaf applicant

The applicant had sought a job as a valet parking attendant; USA Parking Services also agreed recruit deaf and hearing-impaired applicants and provide other relief.

FEDERAL LEGISLATION—House clears bill to keep MSPB up and running

The bill would extend the holdover term of the sole MSPB member by a year to permit confirmation of new board nominees.

IMMIGRATION NEWS—DOL is updating its H-2B application processing procedures

Under the updated process, H-2B applications will be randomly ordered for processing based on the date of filing and the start date of work requested.

INDUSTRY NEWS, TRENDS—Littler adds systemic discrimination, affirmative action consultant

The firm's new non-attorney consultant can address all phases of the OFCCP compliance review process.

SENATE NEWS—HELP Committee again approves OSHA, WHD, and EEOC nominees

The HELP Committee has once again cleared the nominations of Scott Mungno, Cheryl Stanton, and Janet Dhillon.

STATE REGULATIONS—CALIFORNIA—Cal/OSHA reminds employers to electronically submit Form 300A by March 2

March 2 is the deadline for California employers to submit Form 300A injury and illness data for calendar year 2018.

TOP STORY

TOP STORY—9th Cir.: Foreign 'arbitral award' wasn't entitled to enforcement; vessel worker's injury suit revived

By [Lisa Milam, J.D.](#)

The employee was rushed into an impromptu meeting in a building lobby where an arbitrator signed some paperwork; this wasn't enough, under the New York Convention, for an arbitrator to simply "wave his wand" to transform a settlement into an arbitral award.

A federal district court had erroneously dismissed a suit brought by a seaman to recover additional medical costs related to his on-the-job injury after having already reached a settlement of the underlying dispute, the Ninth Circuit ruled. The employer argued there was already an enforceable arbitral award in place, entered in the Philippines, memorializing their settlement—and that the federal court was required to honor it under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. But a federal court does not owe deference to "an arbitral award in name only," the appeals court said. The arbitrator didn't *resolve* the dispute; the "award" here was nothing more than a slapdash rubber-stamping in a building lobby, a proceeding that didn't even adhere to the terms of the parties' original arbitration agreement, including the requirement that arbitration was to take place in American Samoa ([Castro v. Tri Marine Fish Co, LLC](#), February 27, 2019, McKeown, M.).

Injury claim settled. The employee, a citizen of the Philippines who relocated to American Samoa, fell down the stairs of a vessel while employed as a deck hand. He suffered a torn anterior cruciate ligament and a torn meniscus, and was transported to the Philippines for surgery and after-care (despite his request that he be returned to American Samoa so that he could seek treatment in Hawaii). The parties reached a hasty settlement of his disability claim (the employee needed the money quickly to pay for his father's cancer surgery) and they finalized the settlement in the office of the employer's agent in Manila.

"Arbitral award." There were conflicting accounts of what transpired during that meeting (a disagreement exacerbated in part by language barriers); according to the company, the employee was told an arbitrator would review and approve the settlement and release documents to make it "legal and binding." The employee said he was simply told they were going to a different office to pick up the check and execute the paperwork acknowledging its receipt. Then he was ushered into the lobby of another building, where they sat down with an accredited maritime voluntary arbitrator, who rifled through the paperwork and then (despite there having been no arbitral case filed) signed off on a document dismissing the "filing" in this case, concluding the pre-signed "walk-in settlement" was satisfactory.

Lawsuit. The employee's surgery was *not* a success, and he had to undergo more surgery to correct the mistakes, so he sued in state court to recover the additional costs. Invoking the New York Convention, the employer removed the case to federal court and moved to confirm the order as a foreign arbitral award. The lower court confirmed the order and dismissed his suit.

Not an arbitral award. The Convention does not define the term "arbitral award," so the Ninth Circuit used common meaning, common sense, and the American Law Institute's recent restatement on international commercial arbitration to interpret the order before it. The court concluded that while it resembled an arbitral award "in a superficial sense," in that it was issued by an arbitrator, purportedly granted a monetary remedy, and dismissed a "case," it was not an arbitral award within the meaning of the Convention.

No genuine dispute. For one, there was no genuine dispute to arbitrate by the time it reached the arbitrator's (makeshift) desk, and a genuine disagreement is required to confer jurisdiction under the Convention. Having already settled their dispute, there was nothing for the arbitrator to arbitrate.

Not agreed-upon procedure. Also, the arbitration didn't conform to the procedures the parties already had set forth in their arbitration agreement, which the employee signed upon hire. Their agreement provided for arbitration in and subject to the procedural rules of American Samoa (and those terms were even reaffirmed in the executed agreement and the receipt for the settlement check). The lobby meeting with the arbitrator "was a far cry—in venue and law—from the agreed procedure," the appeals court said. (The proceedings also flouted Philippine arbitral rules.)

No waiver. And while parties can waive such terms, there was no mention of waiver in the final documents; nor did the employee's conduct demonstrate an intent to dodge their ground rules. As far as he knew, he had resolved the dispute and was just picking up his check (and he said the company led him to believe as much). "The setting and surroundings of the lobby sit-down suggested a coffee date more than an arbitral proceeding; little wonder, then, that Castro professed ignorance that the meeting supposedly constituted arbitration," wrote the court.

The complete deviation from procedures solidified the court's view that an arbitration did not occur here, and the resulting order was not an arbitral award entitled to enforcement under the Convention.

No effect on consent awards. The Ninth Circuit was careful to note that its holding in no way encroaches on the common practice, in international arbitration, of reducing settlements reached *during* arbitration into "consent awards." That's not what occurred here, the court emphasized; the parties settled and *then* went to the arbitrator. The employer insisted the court had elevated form over function—after all, it argued, all it would have to do was initiate the arbitral proceedings first, then finalize the settlement. But the employer was overlooking a key element of arbitration: that parties may not unilaterally withdraw from the proceedings (which renders it unique among other forms of alternate dispute resolution).

"Had the arbitrator here balked—for instance, by ordering a hearing on voluntariness or enforcing the venue provision pointing to American Samoa—Tri Marine could have taken its settlement and gone home," the court pointed out. "Although perhaps a modest hurdle, the modicum of formality required for a proceeding to constitute arbitration is no empty ritual."

The case is [No. 17-35703](#).

Attorneys: William L. Banning (Banning LLP) for Michael D. Castro. David R. Boyajian (Schwabe, Williamson & Wyatt PC) for Tri Marine Fish Co. LLC and Cape Mendocino Fishing LLC.

Companies: Tri Marine Fish Company LLC; Tri Marine Management Company LLC; Cape Mendocino Fishing LP; Cape Mendocino Fishing LLC

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STRATEGIC PERSPECTIVES—Jackson Lewis practitioners delve into 'independent contractor' issues

By [Lisa Milam, J.D.](#)

Jackson Lewis' Class Action and Complex Litigation Practice Group attorneys discuss the growing ranks of independent contractor relationships and the commensurate rise in legal challenges to this work arrangement.

Who is an "employee"? This seemingly simple question is rich with complexity, increasingly so as the nature of work itself rapidly evolves. The rising prevalence of independent contractor work arrangements has brought increased focus on the distinction between "employees," as defined by statutory and common law, and "independent contractors"—a distinction that faces increasing legal challenge.

In the [Winter 2019 issue](#) of the Jackson Lewis *Class Action Trends Report*, the firm's attorneys discuss the steady stream of class litigation alleging that workers who have been designated as independent contractors are, in fact, employees. The issue has attained critical significance amid a rapidly changing economy brought on by the advent of new business models, sweeping cultural changes, and a technology transformation that has forever changed the way we work.

Read it here: [Winter 2019 Jackson Lewis Class Action Trends Report](#) .

Attorneys: (Jackson Lewis).

CASES

CONTRACT CLAIMS—N.D. Ohio: Breach of contract claim for employer's failure to payout accrued PTO survives motion to dismiss

By [Ronald Miller, J.D.](#)

Security guards employed by G4S, who had accrued PTO remaining at the time a contract with GM expired, survived a motion to dismiss their breach of contract claim based on the employer's failure to payout termination benefits triggered by the loss of the contract.

A federal district court in Ohio refused to dismiss claims for breach of contract, promissory estoppel and fraudulent misrepresentation brought by security guards who alleged that an employer's loss of its contract with GM triggered their entitlement to termination benefits under its PTO Policies. According to the employees, the employer assured them it would be distributing checks for "full vacation pay" in accordance with the policy, but later notified them that it had decided not to make any payouts. However, the court granted the employer's motion to dismiss a civil RICO claim, concluding that the employer correctly noted there were no allegations that either of two enterprises identified by the employees had any involvement with the alleged conspiracy or the underlying predicate acts of racketeering ([King v. G4S Secure Solutions \(USA\) Inc.](#), February 22, 2019, Nugent, D.).

G4S Secure Solutions supplies security personnel to corporate customers in a variety of industries. In fall 2011, it entered into a contract to provide security personnel for General Motors. Beginning in January 2012, the employer hired security personnel to work in GM facilities throughout the country. The 17 employees in this action were hired as either salaried or hourly employees of G4S to work at various GM plants.

Paid time off policies. With respect to the salaried employees, they were provided with copies of various employer policies including a "Paid Time Off" (PTO) policy under which eligible salaried G4S employees were awarded a designated number of PTO hours on January 1st each year, depending on years of service with GM, and any unused portion would be paid out in the event of the employee's termination. The PTO policy covering hourly employees was set forth in a collective bargaining agreement. Under the CBA PTO policy, eligible hourly employees were awarded a designated number of PTO hours on their anniversary date each year, depending on years of service with GM, and any unused portion would be paid out in the event of the employee's termination.

Loss of GM contract. In fall 2017, the employer lost its bid to renew the GM contract and as a result, employees assigned to GM were terminated upon termination of the GM contract on January 31, 2018, triggering their entitlement to termination benefits under the PTO and the CBA PTO Policies.

The employees alleged that prior to the termination of the GM contract, individual defendants participated in conference calls to discuss the termination of their employment and transition to the winning subcontractor. According to the employees, the individual defendants assured them that the employer would be distributing checks for "full vacation pay" in accordance with "the policy." However, it later notified the employees that it had decided not to make any payouts.

Reliance on employer assurances. The employees asserted that in reliance on the employer's assurances, they elected not to use their accrued PTO or take action to terminate their employment with G4S prior to the expiration of the GM contract. After expiration of the GM contract, the employer did not pay out termination benefits or other economic entitlements to the employees. Based on these allegations the employees brought claims for breach of contract, promissory estoppel, fraudulent misrepresentation

and concealment, breach of fiduciary duty, civil theft/conversion, civil RICO, and civil conspiracy. The employer filed a motion to dismiss.

Preemption. As an initial matter, the employer asserted that the hourly employees are members of a union and that the terms and conditions of their employment were governed by a CBA, and as such Section 301 of the LMRA completely preempted their state-law claims if the resolution of the claim necessitated analysis of, or substantially depended on, the meaning of the CBA. Here, the court found the employer's contention to be premature because there was no allegation in the complaint that the employees were union members. Rather, they stated that G4S used the PTO Policy set forth in the CBA to calculate PTO benefits of hourly employees.

Breach of contract. With regard to the employees' breach of contract claim, the employer asserted that it must be dismissed because the PTO Policy was not specifically incorporated into their employment contracts. In support of their claim, the employees offered a one page letter contract. There was a notation at the bottom of the contract entitled "Enclosures." The court observed that on its face, the contract was ambiguous in that summary of benefits was not defined in the body of the contract but could be defined by documents in the enclosures. Because of the ambiguity, the court could look outside the four corners of the contract which would require more evidence than is available in the context of a motion to dismiss. Thus, the motion to dismiss was denied.

Promissory estoppel. As to the employees' promissory estoppel claim, the employer asserted that their reliance on ambiguous representations was not reasonable, they suffered no injury, and their claim was barred by the doctrine of at-will employment. Here, the court observed that the complaint detailed clear promises made by the individual defendants; in reliance on these representations, the employees alleged they justifiably relied on promises to their detriment by electing not to utilize accrued PTO or resign prior to expiration of the GM contract; and the employees contended that their employment with G4S was terminated and they were due payment in accordance with the employer's PTO Policy. Thus, at this point, the employees successfully pleaded a claim of promissory estoppel.

Fraud claim. Next, the employer contended that the employees' fraudulent misrepresentation and concealment claims should be dismissed because they failed to plead fraud with the specificity required by Rule 9(b) and because the claim was barred by the economic loss rule. The allegations, however, stated who made the representations, sufficiently detailed what the representations were, specified the dates of calls and emails, and it seemed likely that the calls between the employer and employees occurred at workplaces. Thus, the complaint provided sufficient detail to afford the employer fair notice of the substance of the fraud claim and satisfied Rule 9(b).

RICO claim. However, the court dismissed the employees' claim of civil RICO. RICO prohibits certain conduct involving a "pattern of racketeering activity," and makes a private right of action available to "[a]ny person injured in his business or property by reason of a violation of RICO's substantive restrictions § 1964(c), provided that the alleged violation was the proximate cause of the injury."

The employer asserted that the employees failed to plead a RICO claim with the specificity required by Rule 9(b) or to allege a distinct "person" and "enterprise" or a "pattern of racketeering activity." The court observed that the employer correctly noted there were no allegations that either of the two enterprises identified by the employees had any involvement with the alleged conspiracy or the underlying predicate acts of racketeering. Further, there were no allegations explaining how the employer participated in the conduct of the enterprises. Accordingly, the court dismissed the civil RICO claim.

The case is [No. 1:18 CV 448](#).

Attorneys: Mark E. Kremser (Wuliger & Wuliger) for Joseph M. King. Kelly E. Eisenlohr-Moul (Dinsmore & Shohl) for G4S Secure Solutions (USA) Inc.

Companies: G4S Secure Solutions (USA) Inc.

DISCRIMINATION—DISABILITY—D. Me.: Jury to decide whether Supercuts refused to hire hair stylist because of his epilepsy

By [Kathleen Kapusta, J.D.](#)

Although Supercuts claimed it put off hiring the applicant until he fixed his bottom teeth—they were rotten and discolored—the court found a triable fact issue under the MHRA as to whether it did not hire him, at least in part, due to his disability.

Denying summary judgment against an applicant's claim Supercuts refused to hire him because of his epilepsy, a per se disability under the Maine Human Rights Act, a federal court in Maine noted that the summary judgment motion substantially narrowed the issues here—the applicant confirmed he was not claiming that if the company refused to hire him because of the poor condition of his teeth, it violated the MHRA, and he also withdrew his claim that his epilepsy medication caused his teeth to deteriorate. The court found odd, however, the company's statement that hiring him would not be "appropriate," noting the explanation was "as significant for what it does not say as for what it says" and here all indications were that he was a competent hairstylist and that there was an open position at the store ([Bachelder v. MijM Enterprises, Inc.](#), February 25, 2019, Woodcock, J., Jr.).

At the age of 47, the applicant had taken epilepsy medication for over 20 years. He claimed he'd been told by a neurologist that years of taking the medication could damage his teeth. After graduating from a beauty school and passing his state boards, he contacted a Supercuts manager about a job at her store. The day before the scheduled interview, however, he had a seizure. He told the manager what had happened and over the next three weeks, he kept in contact with her as he began to feel better.

Seizures and teeth. A second interview was scheduled during which the manager discussed Supercuts' personal appearance guidelines and, according to the employee, expressed concern about the appearance of his bottom teeth, which were discolored and rotten (his upper teeth had been removed after a car accident and although he had dentures, he did not wear them to the interview). When the applicant told the manager about his epilepsy and his history of seizures, she replied that she had the same condition and also suffered from seizures. Although she mentioned the need to work at other stores, he told her he couldn't drive because of his seizures.

Second interview. The manager set up a second interview during which the applicant performed a haircut demonstration on his stepson, which purportedly impressed the manager. Afterward she and the applicant discussed his seizures, tattoos, and body piercing, as well as the appearance of his teeth. According to the applicant, he told her he was looking into having them removed. The manager told him she would speak to her supervisor. Shortly thereafter, she contacted the applicant to tell him her boss did not think it would be appropriate to hire him.

Clarification. Addressing Supercut's motion for summary judgment on the applicant's disability discrimination claim under the MHRA, the court first noted that he conceded he could not adequately link the poor state of his teeth with his epilepsy medication. Nor was he contending that his poor dental health provided a separate basis for claiming Supercuts violated the MHRA. Rather, his sole claim was that Supercuts discriminated against him based on his epilepsy when it did not hire him.

Temporal proximity in application process. Because epilepsy is defined as a per se disability under the MHRA, the applicant did not need to show it substantially limited a major life activity. Supercuts argued, however, that the applicant could not show his epilepsy played any role in the decision not to hire him. While he pointed to the close temporal proximity between the company's discovery of his epilepsy and the nonhire decision, the court pointed out that in the context of an application for employment, the employer's decision not to hire is almost always temporally close to the application. While logically, said the court,

there may be circumstances where consideration of temporal proximity in the employment application process would be appropriate, that wasn't the case here. Instead, the applicant told Supercuts at the outset that he suffered from epilepsy and it proceeded with his application through the second step. Accordingly, the court observed, "it is difficult to credit the temporal closeness between the application and the refusal to hire as convincing evidence of discrimination."

Knowledge. But that did not end the matter, said the court, rejecting Supercuts' contention that only the manager was aware of the applicant's epilepsy. Although he interacted primarily with her, she told him she needed to speak to her supervisor about hiring him and after doing so, told him her supervisor didn't think it "appropriate to hire him."

Not appropriate. Finding it reasonable to infer she discussed the applicant's history of seizures with her supervisor, the court was concerned about Supercuts' explanation that hiring him would not be "appropriate." Explaining that "appropriate" means "suitable or fitting for a particular purpose," the court found the company's explanation was "as significant for what it does not say as for what it says." If there was a job opening and if he was competent to do the job, and all indications were that he was, it would have not been "appropriate" to hire him only because something about him made him unsuitable, said the court, noting that the record revealed only two possibilities: his teeth and his epilepsy.

And here, there was evidence he was unable to attend his first interview for three weeks while he recovered from an epileptic seizure, he and the manager discussed his epilepsy during the first interview, and, in response to her statement that he might be required to work in different stores, he told the manager that due to his epilepsy, he was unable to drive. Further, while the manager praised him after the haircut demonstration, a few hours later, after she talked to her supervisor, hiring him was deemed not to be appropriate. While it was a close question, the court found a triable fact issue as to whether Supercuts did not hire him, at least in part, because of his epilepsy.

Consideration of pretext evidence at prima facie stage. At oral argument, the applicant argued that the court could consider pretext evidence in evaluating whether he met his initial prima facie burden. Noting that this was an uncertain issue of Maine law and that there were no First Circuit cases directly on point, the court observed that "If evidence is relevant at two stages of an inquiry designed to determine whether there was unlawful discrimination, it would be counterintuitive to confine the consideration of evidence to specific stages of the inquiry." Nonetheless, because it had found the applicant "inched by his burden" to prove his prima facie case without evidence of pretext, it declined to definitely rule as to whether he could point to pretext evidence to sustain his prima facie case. However, the court noted that if pretext evidence could be considered for purposes at this stage under the MHRA, the applicant would easily sustain his burden and defeat summary judgment.

Conflicting reasons. Specifically, Supercuts proffered several conflicting reasons for not hiring him. First, in a letter to the governing state administrative agency, it stated that it never rejected the applicant and that the manager, in both interviews, found he did not comply with the company's professional appearance standards in that he "wore sneakers, pants that were not well fitted, his hair was not properly styled," and he had an unpleasant body odor. In its summary judgment motion, however, it said that it delayed hiring the applicant until he fixed his teeth to be in compliance with its professional appearance guidelines.

Both the applicant and his stepson, however, testified that he dressed professionally for his interviews, said the court, observing further that while Supercuts claimed it did not hire him pursuant to its professional appearance standards, the reason it viewed him as failing to comply with those standards changed over time. Thus, he easily sustained his prima facie case.

Proffered reason and pretext. Next, the court found that Supercuts offered a legitimate, nondiscriminatory reason for not hiring the applicant—it delayed hiring him until he fixed his teeth to comply with its professional appearance guidelines. Noting once again the evidence of pretext, the court found a fact issue as to whether Supercuts discriminated against him because of his disability.

The case is [No. 2:17-cv-00454-JAW](#).

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Companies: MjjM Enterprises, Inc.; SuperCuts, Inc.

Cases: DisabilityDiscrimination StateLawClaims Discrimination MaineNews

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DISCRIMINATION—N.D. III.: Race and age bias claims go forward based on evidence of manager's animus

By Nicole D. Prysby, J.D.

Two employees who were fired ostensibly for violating their employer's hiring practices have viable discrimination claims based largely on their own deposition testimony that the manager who made the discharge decision authorized their conduct and had a history of making discriminatory statements.

The race and age discrimination claims of two African-American employees fired for allegedly violating their employer's hiring practices survived summary judgment based on evidence of a history of racially charged and age-based discriminatory statements by the manager who made the termination decision. Moreover, this manager had authorized their supposed noncompliance with the company's hiring practices, according to the employees. A federal court in Illinois found a jury could reasonably credit their explanation and find that the employer's stated reason for their termination was pretext. The court also held that the employees could, for summary judgment purposes, rely on their own depositions as evidence. Finally, the court rejected the employer's contention that the after-acquired evidence doctrine (based on text messages later found on one employee's work phone) defeats their claim for back pay ([Turner v. The American Bottling Co.](#), February 26, 2019, Feinerman, G.).

Breach of hiring protocol? The two employees, age 47 and 48, were discharged after an investigation by HR determined that they had failed to follow the employer's established guidelines for the interviewing process during the hiring of two job applicants—the distant relative of one of the plaintiffs, and her partner. The manager who recommended the terminations stated that one plaintiff violated the hiring policy by not disclosing to management and HR that he knew the applicants, and by pressuring the other employee to recommend them. The second plaintiff allegedly was fired because he failed to admit that he had been pressured, and because he conducted interviews by phone instead of in person.

However, the first plaintiff testified that he had informed the manager of his personal connection to the applicants, and the manager told him to go ahead and have them apply. The second plaintiff testified that the manager had authorized him to conduct the interviews by phone. They employees also alleged the manager had a history of making racially charged and age-based discriminatory statements. The plaintiffs were replaced with Caucasian employees, both of whom were younger than 40.

Discrimination. The employer asserted the employees were fired based on an honest belief that they violated its interviewing and hiring practices. The employees responded with evidence that the investigation was a pretext to cover up the manager's discriminatory motives—specifically, that he knew of the relationship between the first employee and the new hires, and had told the second employee that phone interviews were authorized, then turned around and reported them to HR for the very conduct he authorized. The employer argued that the employees' evidence was unreliable because it consisted solely of their own deposition testimony and was contradicted by the HR investigator's notes. But the court rejected that argument, noting that deposition testimony may be relied upon to introduce facts to defeat summary judgment. Moreover, the employees also produced evidence that the discharge decision was made before the HR investigation concluded, and that their termination letters did not mention their supposed dishonesty.

The court also held the manager's statement that "new blood" was needed could be used as evidence of age-based animus. It rejected the employer's argument that this and other discriminatory comments by the manager were just stray remarks that could not be used to show animus; those statements could be considered by the jury as part of whole picture of the evidence. The comments, combined with their testimony that the manager condoned the behavior for which they were later discharged, was sufficient evidence from which a jury could conclude that race and age discrimination were the real reasons for their termination.

After-acquired evidence. After their discharge, the employer discovered text messages to the job applicants on one of their phones, telling them to quickly complete their applications because the job posting could not be kept open much longer. There was also evidence he told his relative that he did not want other employees to know that he had referred a relative for hire. The employer argued these after-acquired text messages would have led to their termination, and so defeats their claim for back pay.

But the court rejected that argument, finding that the content of the text messages could be could be interpreted in several ways. They did not necessarily establish that the employee kept a job posting open for his relative; the jury could credit his explanation that he was merely putting pressure on them to go ahead and apply. Moreover, a jury could believe that the employee didn't want coworkers to know of his relationship to the new hires because he didn't want them to think the new employees would get special treatment—not because he was attempting to violate hiring policies.

Also, because a jury could conclude that the manager authorized the employees' conduct, it could also find that the employer wouldn't have fired them even if it had found out about the text messages earlier.

The case is [No. 1:17-cv-04023](#).

Attorneys: Eugene K. Hollander (The Law Offices of Eugene K. Hollander) for Curtis Turner. Richard Patrick McArdle (Seyfarth Shaw) for The American Bottling Co., Dr. Pepper Snapple Group, Inc. and Dr. Pepper Snapple Bottling Group, Inc.

Companies: The American Bottling Co.; Dr. Pepper Snapple Group, Inc.; Dr. Pepper Snapple Bottling Group, Inc.

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DISCRIMINATION—SEX—Mo. Sup. Ct.: Divided en banc court says sex stereotyping is evidence of sex discrimination under MHRA

By [Lorene D. Park, J.D.](#)

The divided court distinguished between sexual orientation discrimination, which is not proscribed by the MHRA, and sex discrimination, which may be evidenced by sex stereotyping.

Addressing an issue for the first time, the Missouri Supreme Court, sitting en banc, ruled that an employee may demonstrate sex discrimination through evidence of sexual stereotyping. The fact that the employee was gay was "merely incidental" to his claim of discrimination based on his failure to conform to male stereotypes. Thus, the Missouri Commission on Human Rights (MCHR) erred in finding that he and a coworker were alleging sexual orientation discrimination and dismissing their charges under the Missouri Human Rights Act (MHRA). The state high court reversed a trial court's grant of summary judgment for the MCHR and remanded with instructions that the Commission issue the employee and his coworker right-to-

sue letters. Judge Wilson wrote a concurring opinion. Judge Fischer dissented in part and Judge Powell dissented ([Lampley v. Missouri Commission on Human Rights](#), February 26, 2019, Draper, G., III).

Alleging that his state employer discriminated against him based on sex because his behavior and appearance did not conform to traditional male stereotypes, the employee filed charges under Sections 213.055(1) and 213.070(2) of the MHRA with the EEOC and the MCHR. According to the employee, his employer treated him differently from similarly situated employees who conformed to gender stereotypes.

MCHR charges. His coworker and friend also filed charges alleging retaliation based on her association with the employee. The MCHR, finding it lacked jurisdiction over claims based on sexual orientation, terminated the proceedings without addressing their theory of sex discrimination evidenced by sex stereotyping.

Lower court proceedings. Both employees petitioned the trial court for administrative review or alternatively, for a writ of mandamus directing the MCHR to issue notices of right-to-sue letters. The court consolidated the petitions and granted summary judgment to the MCHR. The court reasoned that the claims fell under a 2015 state appellate decision, *Pittman v. Cook Paper Recycling Corp.* which held that the MHRA does not include claims of discrimination based on sexual orientation. The trial court extended that rationale to include claims for sex stereotyping.

The employees appealed and a divided Missouri Supreme Court, sitting en banc, reversed.

Point of procedure. The state high court first addressed a procedural issue raised in the dissent, which asserted that a court should not issue a writ of mandamus that fails to strictly follow writ procedure. The majority noted that none of the parties nor the lower court objected to or questioned the procedure and it was clear the parties believed they were acting properly. Moreover, decisions in which the court had provided guidance on proper writ procedure were decided after the parties here had filed their petitions. The majority refused to penalize them for failing to follow precedent that was not yet established.

On the merits, the state supreme court explained that the trial court's reliance on *Pittman* was misplaced because *Pittman* declined to address whether sex discrimination based on sex stereotyping was covered under the Act because that claim was not at issue in *Pittman*.

Claims were based on sex, not sexual orientation. Here, the employee's sexual orientation was *merely incidental* to the sex discrimination complaints filed by him and his coworker. While both of their charges stated that the employee was gay, they checked the boxes for "sex" and "other" and claimed they were discriminated against on the basis of sex because the employee does "not exhibit the stereotypical attributes of how a male should appear and behave." There was no allegation that the discrimination was based on his sexual orientation. Thus, the MCHR erroneously characterized their claims as sexual orientation discrimination.

Under the correct analysis, the Act clearly provides that it is unlawful for an employer to discriminate on the basis of sex, and "stereotyping may give rise to an inference of unlawful discrimination upon a member of a protected class." Citing the U.S. Supreme Court's ruling in *Price Waterhouse* and the Eighth Circuit's opinion in *Lewis v. Heartland Inns*, the state high court further explained that "it is clear an employer who discriminates against 'women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination *because the discrimination would not occur but for the victim's sex.*" This, said the court, applies with equal force to a man who is discriminated against for acting too feminine.

Stereotyping evidences sex discrimination. This analysis, noted the court, was supported by the rules and regulations promulgated by the Commission, which already characterize sexual stereotyping as an unlawful hiring practice. In sum, said the court, "[s]ex discrimination is discrimination, it is prohibited by the Act, and an employee may demonstrate this discrimination through evidence of sexual stereotyping."

Right-to-sue letters. Though the employees requested reversal of the MCHR's determination that it had no authority to investigate and an order directing the Commission to reopen administrative proceedings, the time for that has passed, said the court, because the MCHR is limited to 180 days to process a

complaint. Consequently, the appropriate remedy was to construe their request as seeking right-to-sue letters and to direct the Commission to provide the letters. The case was therefore remanded with those instructions.

Concurrence. Judge Wilson concurred in the result, but wrote separately to express that the case should be disposed of entirely on the basis that the employees asserted sex discrimination claims under the MHRA. In Judge Wilson's view, the majority opinion should have stopped there rather than opining on whether sex stereotyping is a type of sex discrimination under the Act.

Partial dissent. Judge Fischer agreed on one procedural point (that this is a noncontested case) but would have resolved the case against the employees because they failed to comply with Rule 94 by seeking a summons rather than a preliminary order.

Dissent. Judge Powell raised procedural deficiencies, and also expressed that the question of whether the MHRA covers sexual orientation discrimination was not properly before the court. In his view, there was no abuse of discretion in the Commission finding that the complaints pleaded discrimination based on sexual orientation rather than sex stereotyping. He pointed out that the complaints made references to "stereotypical attributes" but identified no particular attributes other than being gay. He concluded that the majority should not have reached the hypothetical question of whether the MHRA covers discrimination based on sex stereotyping.

The case is [No. SC96828](#).

Attorneys: Jill A. Silverstein (Sowers & Wolf) for Harold Lampley and Rene Frost. D. John Sauer, Missouri Attorney General's Office, for Missouri Commission on Human Rights.

Cases: SexDiscrimination Discrimination Procedure StateLawClaims MissouriNews

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EMPLOYEE LEAVE—E.D. Mich.: Fired Lowe's manager who never provided return-to-work clearance can't pursue FMLA claims

By Harold S. Berman J.D.

A manager terminated by Lowe's after she failed to provide return-to-work clearance when her FMLA leave expired could not pursue FMLA interference or retaliation claims.

Despite Lowe's repeated requests, a manager failed to provide medical clearance to return to work by the time her FMLA leave expired, and even several months thereafter, so she couldn't claim that Lowe's interfered with her FMLA rights or retaliated against her for taking FMLA leave. Granting summary judgment for Lowe's, the federal court in Michigan also tossed her ADA claim because Lowe's took no adverse action against her because of her disability. Her ERISA claim also failed because Lowe's provided her with all her entitled insurance and disability coverage ([Shimko v. Lowe's Home Centers, LLC](#), February 26, 2019, Berg, T.).

Poor job performance. The employee worked as a manager for Lowe's. In early 2010, Lowe's transferred her to another store at her request because she believed her supervisor had unfairly disciplined her for poor performance. However, her job performance did not improve at the new location.

FMLA leave. A few months later, she took 12 weeks of approved FMLA leave to undergo surgery. When she returned, she continued to perform poorly, and in August 2013, and again in September, received disciplinary notices for deficient work. In late 2013, Lowe's placed her on a performance improvement plan.

However, after continuing to struggle with her job responsibilities, in part due to medical issues, she decided to take medical leave. She was approved for continuous FMLA leave from mid-May to the end of June 2014. A day before the employee's leave was to expire, she requested that it be extended until August. Nevertheless, she never provided the requested documentation to extend her leave beyond June.

Repeated requests for clearance. Even had the employee been approved for more leave, her total FMLA leave would have expired on August 4. However, she did not return to work after her approved leave expired in late June, or any time after that. In late July, and again in early August, the third-party administrator that processed Lowe's FMLA leave requests advised her to contact HR to verify her return date.

However, the employee did not provide medical clearance as required to return to work before August 20. Her doctor provided her with a clearance letter on August 20, seven weeks after her approved FMLA leave expired, but she never submitted the letter to Lowe's or the third-party administrator.

In early September, the third-party provider again requested medical clearance documentation so that the employee could return to work, even though by this time, her approved FMLA had expired two months before. The employee never responded.

Termination and lawsuit. In May 2015, Lowe's terminated the employee. The employee sued, asserting that Lowe's refused to give her a return-to-work schedule and prevented her from returning to her job, in violation of the FMLA, ERISA, the ADA, the Michigan Persons with Disabilities Civil Rights Act, and the Michigan Bullard-Plawecki Employee Right to Know Act.

FMLA interference. The court granted summary judgment on the employee's FMLA interference claim, finding that Lowe's did not deny her any benefit to which she was entitled under the FMLA because she failed to promptly submit return-to-work clearance. Although the employee alleged that Lowe's interfered with her FMLA rights by refusing to provide her with a return-to-work date, she did not provide a return-to-work clearance from her doctor before her FMLA leave expired in late June.

Rather, the employee admitted she was not medically cleared to return to work until August 4. The physician's letter indicated he did not assess her ability to return until August 20. Although the employee insisted that she sent HR two letters releasing her to return as of August 4, the third-party administrator's records showed it still had not received any clearance by early September, and she could not show she sent the alleged letters before her leave expired in June.

FMLA retaliation. The court also dismissed the employee's FMLA retaliation claim because she could not show any causal connection between her decision to take FMLA leave and Lowe's decision not to issue her a return-to-work schedule, and ultimately terminate her. The employee could not point to any evidence showing Lowe's was unhappy with her decision to take FMLA leave, except for her vague hearsay recollection of hearing about some members of management having issues with her leave, which was insufficient to establish a causal connection.

The evidence showed instead that Lowe's did not give the employee a return-to-work schedule because she never provided return-to-work clearance when her FMLA leave expired, nor the required medical documentation to extend her leave until August 4. The employee maintained she was first cleared to return on August 4, over a month after her leave ended, and the third-party provider had yet to receive any clearance even by September.

ADA and ERISA. The employee's ADA and Michigan Persons with Disabilities Civil Right Act claims failed because there was no evidence that any adverse employment action was taken against her because of her disability. Rather, she was terminated because she did not return to work after her FMLA leave expired.

Her ERISA claim also failed. The employee admitted that Lowe's provided her with all of her entitled insurance and disability coverage, and no Lowe's employee objected to her receiving pension or healthcare benefits.

Bullard-Plawecki Employee Right to Know Act. The court granted summary judgment on the employee's claim under Michigan's Employee Right to Know Act. It was undisputed that Lowe's permitted her access to her personnel folder shortly after she requested it in November 2014. Although the employee alleged that Lowe's either failed to accurately maintain her personnel file, or purposely deleted positive reviews, the statute did not permit relief on that basis.

The case is [No. 4:17-cv-11709](#).

Attorneys: Robert C. Davis (Davis, Listman, Brennan) for Constance Shimko. Nhan Thi Ngoc Ho (Miller, Canfield, Paddock and Stone) for Lowe's Home Centers, LLC and Lowe's Companies, Inc.

Companies: Lowe's Home Centers, LLC; Lowe's Companies, Inc.

Cases: Discharge DisabilityDiscrimination EmployeeLeave PensionBenefitPlans Retaliation
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PRIVACY—3d Cir.: Employer's Facebook access didn't warrant unclean hands bar to preliminary injunction against former employees

By Cheryl Beise, J.D.

An antenna design firm's monitoring of a former employee's personal Facebook messenger account for one month after his departure was not related to the firm's breach of loyalty claim, so the unclean hands doctrine did not apply.

A federal district court did not abuse its discretion in declining to apply unclean hands to deny an antenna design firm's request for a preliminary injunction to prevent former employees from contacting the firm's clients and destroying information allegedly taken from the firm, ruled the Third Circuit in an unpublished decision. Even if the firm's monitoring of a former employee's Facebook messenger account could be considered "unconscionable," the district court did not err in finding that the firm's conduct was not related to the claim upon which equitable relief was sought. In a dissenting opinion, Circuit Judge Thomas Ambro argued that the firm's conduct was an unlawful intrusion upon the former employee's privacy. He would remand the case for the district court to consider equitable relief in light of the correct privacy analysis ([Scherer Design Group, LLC v. Ahead Engineering LLC](#), February 25, 2019, Shwartz, P., unpublished).

Plaintiff Scherer Design Group, LLC ("SDG") is an engineering firm specializing in antenna design. SDG provides consulting services for wireless carriers and other vendors in the telecommunications business. In December 2017, SDG's director of engineering resigned and formed two competing consulting engineering firms, defendants Ahead Engineering LLC and Far Field Telecom LLC. In January 2018, three other employees left their positions at SDG and joined the former director's new firms.

Injunction against employees. SDG filed suit in New Jersey state court, asserting claims for breach of the duty of loyalty, tortious interference with prospective business relationships, and misappropriation of trade secrets against the defendants. The defendants removed the case to federal court and the district court [determined](#) that SDG was entitled to a preliminary injunction barring the defendants from soliciting SDG's clients and destroying information taken from SDG. The district court found that SDG established that it was likely to succeed on its claim for breach of the duty of loyalty against the former employees, but

it did not establish a likelihood of success on its trade secret misappropriation or tortious interference claims.

The district court rejected the defendants' argument that SDG's own unclean hands foreclosed it from seeking equitable relief. According to the defendants, SDG violated their privacy rights by using a password recovery tool to access one of the former employee's personal accounts. The defendants appealed the district court's denial of its unclean hands defense.

Unclean hands. SDG did not dispute that its head of information technology reviewed the browser history from the former employee's old SDG laptop computer and successfully bypassed the log-in requirements for his personal PNC Bank Account, his Dropbox account (associated with his SDG email), and his Facebook Messenger account. For one month, the head of IT and SDG's founder monitored the former employee's Facebook Messenger activity, which was both password-protected and end-to-end encrypted. SDG had no computer-use policies disclosing that the company might monitor employee activity on its computers or access personal accounts of employees after they left the company.

A defendant seeking to invoke the unclean hands doctrine must show: (1) the party seeking equitable relief committed an unconscionable act; and (2) the act is related to the claim upon which equitable relief is sought. As to the relation element, the appeals court explained that "the doctrine 'only applies when there is a direct nexus between the bad conduct and the activities sought to be enjoined.'" Also, a court retains the discretion to grant equitable relief even where the elements of the unclean hands doctrine are met.

Facebook access not related to claim. The Third Circuit found that even if SDG's monitoring of the former employee's Facebook account could be considered "unconscionable," the district court did not err in finding that SDG's conduct was not related to the claim upon which equitable relief was sought.

The court cited reasons to support this conclusion. First, SDG did not monitor his Facebook account for the purpose of obtaining a right it did not otherwise have. "Defendants owed a duty of loyalty to SDG long before the Facebook monitoring occurred," the court said. Second, while SDG's conduct led it to proof of its duty of loyalty claim, this conduct did not give rise to the claim. Third, SDG's breach of loyalty claim and the defendants' alleged privacy violations were "governed by distinct bodies of law that provide their own separate remedies for misconduct."

In sum, the district court did not abuse its discretion declining to apply unclean hands to deny SDG's request for equitable relief.

Dissenting opinion. In a dissenting opinion, Circuit Judge Thomas L. Ambro agreed with the majority that a preliminary injunction preventing SDG's former employees from communicating with SDG clients or using SDG documents might be the correct outcome in this case, but he would find that the district court erred in its privacy analysis and would remand for it to reconsider unclean hands with the correct understanding.

According to Judge Ambrose, SDG's conduct in accessing the former employee's private accounts was "unlawful and offensive." The district court cited [Stengart v. Loving Care Agency, Inc.](#), 990 A.2d 650 (N.J. 2010), to support its view that SDG's conduct "may be reasonable and does not necessarily amount to an intrusion upon seclusion." *Stengart* held that an employer may not view password-protected attorney-client emails that an employee sent from a company computer and which it subsequently recovered. SDG's conduct in this case—accessing private password-protected accounts hosted on third-party servers and networks without any authorization—"surely is beyond the scope of permissible conduct that *Stengart* recognizes," Judge Ambro said.

Judge Ambro additionally noted that there was no authority suggesting that under New Jersey law "a mere computer-use policy may permit a company to acquire password-protected information not already stored on a company computer."

Judge Ambrose also opined that SDG violated the former employee's privacy rights. SDG's conduct satisfied all three requirements of a claim of tortious intrusion upon seclusion under New Jersey law: (1) intentional conduct that (2) intrudes into a private space and (3) is "highly offensive" to a reasonable person. The head of IT surreptitiously monitored the former employee's private Facebook messages many times a day for a month. He installed the application "fbunseen," which permitted SDG to review the former employee's Facebook Messenger conversations without his knowledge.

SDG also did not dispute that SDG reviewed and downloaded privileged attorney communications from the account. "This monitoring is offensive to anyone's reasonable expectation of privacy," Judge Ambro said.

Lastly, in Judge Ambro's view. The district court's decision regarding relatedness was not definitive. The district court said only that SDG's conduct was "arguably not related," that, "[o]n balance," unclean hands should not apply to bar a preliminary injunction. Because the district court erred in its privacy analysis, Judge Ambro would not affirm its decision.

The case is [No. 18-2835](#).

Attorneys: Ronald D. Coleman (Mandelbaum Salsburg) for Scherer Design Group, LLC. David Kistler and Michael A. Iannucci (Blank Rome) for Ahead Engineering LLC and Far Field Telecom LLC.

Companies: Scherer Design Group, LLC; Ahead Engineering LLC; Far Field Telecom LLC

Cases: Privacy ComputerFraudPrivacy TortClaims RemediesDamages DelawareNews NewJerseyNews PennsylvaniaNews

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TORT CLAIMS—S.D.N.Y.: Discharged JPMorgan director's suicide simply not foreseeable; no wrongful death claim

By [Joy P. Waltemath, J.D.](#)

Although JPMorgan knew of a director's long history of depression, the nexus between its actions following his attempt to return to work after more than two years of long-term disability leave and his suicide was simply too tenuous.

Dismissing a wrongful death claim filed by the estate of a former senior managing director, a federal district court in New York found that his suicide, after he learned JPMorgan already considered him no longer its employee, and he was facing significantly diminished career prospects following more than two years of long-term disability leave, was not foreseeable ([Mullaugh v. J.P. Morgan Chase & Co.](#), February 26, 2019, Keenan, J.).

Depression returns. The deceased had taken two prior six-month disability leaves, in 1989 and 2001, for anxiety and depression, after which he successfully returned to his career. He joined JPMorgan as a senior managing director in 2008 following its acquisition of and merger with the deceased's previous employer. His depression returned in February 2014 and he began another short-term disability leave during which, his complaint alleged, he consistently and repeatedly expressed his intent to return to work.

Long-term disability leave. In June 2014, his boss suggested he retire and transfer his business to a younger JPMorgan employee and, if he did, the employer would forgive his debt on a loan he had taken out. The director declined, still intending to return when he was able, but by August he took long-term disability leave although he continued to tell his employer he fully intended to return to work.

Why don't you just retire? His boss unilaterally cancelled the director's commission splits (which had already been reduced), permanently transferred his accounts to other brokers, and informed the director that JPMorgan would terminate his professional licenses. He also required that the director meet with him and again pressured him to voluntarily retire under terms that, the complaint alleged, would "have eliminated the standard retirement packages JPMorgan offered to employees similarly situated to" him, including the ability to transfer their book of business to a JPMorgan broker of their choice and, in exchange, receive between 30 and 60 percent trailing commissions for three years. The director again declined to retire.

Attempted return to work. It wasn't until nearly two years later, August 8, 2016, that the director was released to return to work with no restrictions. But JPMorgan called the director that same day, telling him he could not return because there was no "business for him to return to [and] his employment had been terminated following the conclusion" of what the employer characterized as his FMLA leave. After an exchange in which the director "disputed these characterizations," the employer allegedly conceded that until an agreement between them could be reached, he would officially remain an employee, although his "professional licenses had been terminated in September 2014," and it refused his request to reactivate his licenses while his return to work was discussed.

Suicide. "Despondent over the prospect of watching his career prospects and personal self-worth evaporate, and facing the daunting task of finding work as a 66-year old with a history of mental illness and expired professional licenses," the director took his own life, the complaint alleged. It also alleged that JPMorgan knew of the director's prior suicidal thoughts, that it systematically and intentionally discriminated against him based on his disability and age, pressured him to retire, failed to provide FMLA notice, wrongfully terminated his securities licenses in a host of ways, and wrongfully terminated him—and all these facts made it "eminently foreseeable that he would take his own life." JPMorgan moved to dismiss his single-count claim for wrongful death, and the court agreed.

Wrongful death claim. Under New York law, to recover damages for wrongful death, a plaintiff must prove among other things, a 'wrongful act, neglect or default of the defendant' that caused the decedent's death. The JPMorgan defendants argued that the complaint failed to allege a claim on which relief could be granted because it failed to allege their actions proximately caused the director's suicide and the claim was barred by the New York Workers' Compensation Law.

Foreseeability. Tragically, said the court, "it is rather obvious[] that there never can be a sole cause for suicide," and for there to be liability, suicide must be "a foreseeable risk associated with the [defendant's] alleged wrongful acts." Although typically proximate causation is a fact issue for the jury, a causal nexus can be "too tenuous to permit a jury to 'speculate' as to the proximate cause" of suicide.

Only actions after attempted return to work could show causation. The complaint spelled out 12 different acts or omissions that allegedly caused the director's suicide by destroying his career prospects and self-worth and making it difficult for him to find new employment. Most of those predated July 26, 2016, when the director first made JPMorgan aware of his imminent medical release from disability, and he still believed he could simply return to his old position at JPMorgan, not knowing his licenses had lapsed in a way that would complicate a future job hunt.

He didn't learn until the August 8 conversation that JPMorgan officially opposed his return and the complications with his licenses. In the court's view, only the actions the company took after August 8, 2016, could be said to have caused the director's suicide under the complaint's own theory. By that time, even granting the director every favorable reasonable inference, it had been nearly two years since the director's medical team had last advised JPMorgan that he was suicidal. Under these circumstances, it simply was not reasonably foreseeable that JPMorgan's actions would result in the director's suicide.

As such, the complaint failed to sufficiently plead the causation element of a wrongful death claim. Further, the court said it "cannot imagine a set of circumstances that would allow Plaintiff to adequately plead the causal element of a wrongful death claim in this case," and it dismissed the complaint with prejudice, finding it unnecessary to address the worker's compensation defense.

The case is [No. 18 Civ. 2908 \(JFK\)](#).

Attorneys: Keith Martin Fleischman (The Fleischman Law Firm) for Michael Mullaugh, Personal Representative of the Estate of Michael A. Lorig. Lloyd Blades Chinn (Proskauer Rose) for J.P. Morgan Chase & Co., J.P. Morgan Chase Bank, N.A., and J.P. Morgan Securities LLC.

Companies: J.P. Morgan Chase & Co., J.P.; Morgan Chase Bank, N.A.; J.P. Morgan Securities LLC

Cases: TortClaims StateLawClaims Discharge EmployeeLeave CoverageLiability NewYorkNews

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WAGE-HOUR—MINIMUM WAGE—Cal. App.: California minimum wage law applies to employees of charter cities

By Brandi O. Brown, J.D.

In a class action minimum wage lawsuit that set two provisions of the California Constitution against one another (home rule versus legislative authority to set the minimum wage), a California appeals court ruled that the minimum wage trumped the reservation of authority in charter cities.

Two employees appealed from the dismissal of their class action after a trial court sustained, without leave to amend, a demurrer filed by the City of Long Beach, finding that the authority to determine employee compensation was reserved to city as a charter city under the California Constitution article XI, section 5, and that the state could not impose a minimum wage for city employees. However, a California Court of Appeals reversed the judgment of the trial court. The appeals court explained that the state minimum wage law had been designed to address a statewide concern and the law was reasonably related to its purpose ([Marquez v. City of Long Beach](#), February 25, 2019, Feuer, G.).

Paid less than minimum wage. In 2016, Long Beach employees employed by the city's Library Services Department and the Parks, Recreation, and Marine Department, filed a putative class action asserting causes of action under the California Labor Code and IWC Wage Orders. They alleged that the city failed to pay the state's hourly minimum wage to nonexempt, hourly workers. The city filed a demurrer, arguing that the claims were barred by the home rule doctrine, that charter cities did not fall within the statutory definition of employers, and that the wages of employees such as the named employees (a page and a recreation leadership specialist) was set by a MOU between the union and the city, as well as relevant city council resolutions. The trial court sustained the demurrer without leave to amend and entered judgment dismissing the action with prejudice. The employees appealed.

Reviewing the complaint *de novo* and noting that the judicial branch was the proper body to answer the legal question presented, the appeals court reversed. Briefly tracing the history of the minimum wage laws in the state, the court highlighted the fact that the purpose of the minimum wage law, and the constitutional amendment, was to maintain the health and welfare of workers. This was born out both by the statutory and constitutional law, as well as the wage orders of the former Industrial Welfare Commission (IWC). However, the City of Long Beach contended that the minimum wage did not apply to charter cities, which are specifically authorized by the state constitution to govern themselves with regards to municipal affairs.

Legislature can infringe in certain circumstances. The appeals court reviewed cases from the state appellate courts that had considered the home rule doctrine and the question of state regulation of public employee wages and its takeaway from those cases was that the home rule doctrine does, in fact, impose limits on the legislature's authority with regards to the wages of charter city employees. However, where the legislature's infringement reasonably relates to "an important statewide concern" the legislature MAY enact laws of general, broad application impacting that compensation. Thus, in *Healy v. Industrial Acc. Com.*, the California Supreme Court had held that a statewide system of workers' compensation involved

a subject of statewide concern and, therefore, that a city charter provision requiring offset of that award by the worker's pension was superseded.

Conflict exists. Referring to the four-part analysis articulated most recently in *State Building & Construction Trades Council of California v. City of Vista*, the court concluded that the state law in question passed muster. The court concluded that there was a conflict between the state legislative enactments and, more specifically, IWC Wage Orders, in force during the relevant period including IWC Wage Order Nos. 4-2001 (section 1(B)) and 10-2001 (section 1(C)), and the City's resolution and the MOU in place regarding the applicability of minimum wage requirements to charter cities. Those minimum wage requirements could not be reconciled with the city charter or the enactments by the city council that set subminimum wages.

Statewide concern addressed. In this case, the appeals court explained, the state minimum wage law had been designed to address a statewide concern—the health and welfare of workers—and the law was reasonably related to its purpose. The minimum wage requirements represented the legislature and IWC's best estimation of the minimum wage an employee working a full-time job needs to be paid in order to cover life's necessities. Legislative reports have consistently noted that the purpose of the increases is provide California workers with a living wage and to address poverty. That concern also implicates the state's financial wellbeing, the court explained, because employees who receive substandard wages are more likely to require state-funded public assistance. The views of the legislature were entitled to "great weight."

Moreover, a law of broad application, such as the state minimum wage requirement, is more likely to address a statewide concern. Thus, this case was comparable to *Healy*—it involved a substantive regulation directly implicating municipal interests in employee compensation, but the state requirement served the fundamental purpose of protecting employee health and welfare. And the court noted, with some finality, that any doubt must be resolved in the favor of the state's legislative authority.

Minimum wage legislation sets a floor. Finally, the court explained that the minimum wage laws were appropriate tailored to address the statewide concern involved. The imposition of a minimum wage reasonably relates to the statewide concern in worker health and welfare, but it only sets a floor that is based on the legislature's assessment of the minimum income needed for a living wage. It does not deprive the city completely of authority to determine wages. Moreover, the court rejected the idea that application of a minimum wage requirement constitutionally impairs the MOU between the employees and the city. In fact, no contract was in place at the time of the minimum wage was set—the MOU was enacted by resolution the following year.

The case is [No. B282270](#).

Attorneys: David A. Rosenfeld (Weinberg, Roger & Rosenfeld) for Wendy Marquez. George W. Shaeffer, Jr. (Rutan & Tucker) for City of Long Beach.

Companies: City of Long Beach

Cases: WageHour ClassActions MinimumWage StateLawClaims PublicEmployees CaliforniaNews

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WHISTLEBLOWERS—9th Cir.: FCPA violation report not protected under SOX as 'SEC rules or regulations,' but state public policy verdict stands

By [Amy Leisinger, J.D.](#)

It was error to instruct the jury that statutory provisions of the FCPA constitute rules or regulations of the SEC for purposes of whether a whistleblower engaged in protected activity under Sarbanes-Oxley Act Section 806.

A Ninth Circuit panel has vacated in part a verdict in favor of a whistleblower claiming retaliation for an internal report that he believed the company had engaged in violations of the Foreign Corrupt Practices Act in China. According to the appeals court, the district court erred by instructing the jury that statutory provisions of the FCPA constitute "rules or regulations" of the SEC for the purpose of determining whether the whistleblower engaged in "protected activity" under SOX. As such, the court vacated the SOX verdict and remanded for a determination of whether a new trial is warranted; it would not, however, enter judgment in favor of the employer because a properly instructed jury could have found the whistleblower reasonably believed there might have been a violation. Further, the SOX instructional error was harmless with respect to the whistleblower's California public policy wrongful discharge claim, and the court affirmed the verdict and corresponding damages ([Wadler v. Bio-Rad Laboratories, Inc.](#), February 26, 2019, Bennett, M.).

Potential violation. In February 2013, Wadler, the former general counsel for Bio-Rad Laboratories, delivered a memo to the company's audit committee reporting his belief that there were serious and prolonged FCPA violations in the company's business in China. The audit committee authorized Wadler to hire outside counsel to investigate; the firm found no evidence of any FCPA violation in China, and Wadler was fired shortly thereafter. Bio-Rad later resolved a government investigation into FCPA issues in Vietnam, Thailand, and Russia, but *not China*.

Jury award. Wadler's claims [survived](#) a motion to dismiss and netted some interesting [evidentiary rulings](#) with respect to privileged communications. In February 2017, a jury [awarded](#) Wadler \$2.96 million in past economic loss damages and \$5,000,000 in punitive damages in his whistleblower action against Bio-Rad and its CEO. The jury found the defendants liable on all three of Wadler's claims: a SOX violation, a Dodd-Frank violation, and wrongful termination in violation of public policy under California law.

SOX protected activity. At the close of trial, the judge had given several jury instructions concerning when an employee engages in "protected activity." For each of the three claims, the instructions stated that Wadler had to prove he engaged in protected activity under SOX, which depended on whether he disclosed conduct that he reasonably believed violated a "rule or regulation" of the SEC.

The defendants challenged the jury's findings, arguing that Wadler's disclosure of alleged FCPA violations was not protected activity under SOX because FCPA *statutory* provisions do not constitute SEC *rules or regulations*. The court [found](#) that Wadler presented sufficient evidence supporting the jury's finding as to his subjective and objective belief of the company's wrongdoing. Because there is an SEC rule regarding the subject of Wadler's report, his reporting a violation could support a SOX claim, the court stated.

"Rule or regulation" of the SEC. On appeal, Bio-Rad and its CEO reiterated their argument that the district court erred in instructing the jury that statutory provisions of the FCPA constitute SEC rules or regulations for the purposes of SOX. The Ninth Circuit noted that courts presume that Congress acts intentionally when using particular word choices in one part of a statute but not in another. As such, the court explained, the text of SOX Section 806 is clear: an FCPA provision is not a "rule or regulation of the [SEC]."

Notably, said the court, Congress uses the phrase "any rule or regulation of the [SEC]" in the same list in which it uses "any provision of Federal law," which "strongly suggests" a difference between the meanings of "rule or regulation" and "law." "The most obvious explanation is that 'law' encompasses statutes, like the FCPA, whereas 'rule or regulation' does not," the appeals court reasoned.

New trial? However, the court continued, if properly instructed, a jury could permissibly find sufficient evidence to support the objective reasonableness of Wadler's belief that a violation had occurred. Accordingly, it vacated the SOX verdict against Bio-Rad and its CEO and remanded for the district court to consider whether a new trial is warranted.

California public policy. With respect to the California public policy claim, the appeals court found that the jury instruction referred to protected activity under SOX simply to present the jury with a single factual theory of liability. Under California law, a public policy "*Tameny*" claim must rely on a "fundamental public policy" that is "tethered to" a constitutional or statutory provision, but the California Supreme Court has not decided whether SOX or the relevant FCPA provisions are tethered to a fundamental public policy, and neither would the Ninth Circuit.

Instead, the court assumed without deciding that a plaintiff may state a *Tameny* claim by alleging that he was retaliated against (1) for engaging in SOX-protected activity or (2) for reporting conduct that he reasonably believed violated the FCPA's bribery or books-and-records provisions, regardless of whether that report is protected by SOX. As such, the Ninth Circuit concluded that any instructional error with regard to the state claim was harmless and it affirmed the verdict and the damages as to that claim. In light of this, the panel directed the district court to consider whether any retrial would result in an impermissible double recovery.

The panel also vacated the Dodd-Frank verdict with instructions to enter judgment in favor of Bio-Rad in light of *Digital Realty Trust, Inc. v. Somers*, which held that Dodd-Frank does not apply to purely internal reports.

The case is [No. 17-16193](#).

Attorneys: Kenneth P. Nabity (Kerr & Wagstaffe) for Sanford S. Wadler. John M. Potter (Quinn Emanuel Urquhart & Sullivan) for Bio-Rad Laboratories, Inc.

Companies: Bio-Rad Laboratories, Inc.

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NEWS

DOL NEWS—WHD recovers \$1.5M in back wages and damages for 1,745 employees

By [Pamela Wolf, J.D.](#)

WHD investigations led to the recovery of \$1,552,219 for reported minimum wage, overtime, working time, misclassification, and other FLSA violations.

In separate developments, the DOL's Wage and Hour Division on February 26 announced the recovery of \$1,552,219 in unpaid wages and damages to approximately 1,745 employees to resolve reported FLSA violations.

[Best One Tire Group](#). After several WHD investigations, Monroe, Indiana-based Best One Tire Group has agreed to pay \$1,023,808 in overtime back wages and liquidated damages for 1,056 employees nationwide.

The WHD investigated 203 tire stores operating under the Best One Tire Group in 24 states and found 835 employees were due \$622,142 in overtime back wages. Wage violations occurred when the employer failed to include bonuses, commissions, incentive pay, and shift differentials in its calculations when determining overtime pay rates. Excluding these amounts from worker's total straight time rates resulted in the employers paying overtime at rates lower than those legally required.

Repeat violator. Thirteen prior investigations conducted in 2017 and 2018 at various tire stores under the Best One Tire Group found \$218,486 in overtime back wages and \$183,180 in liquidated damages due to 221 employees for similar violations.

Other relief. In an effort to educate others in the industry, Best One Tire Group agreed to write a compliance article for a tire industry trade magazine and to conduct an FLSA audit of any new companies wishing to join the Best One Group to ensure compliance with wage laws. The tire group will also require any new companies to pay any back wages found due in the audits prior to admitting them into the organization.

Check Smart Financial LLC. The Dublin, Ohio-based company that operated 530 CheckCashing USA locations in 12 states will pay \$80,593 in unpaid wages to 474 current and former employees.

A WHD investigation of five local branches of the company revealed that Check Smart Financial violated overtime requirements by making deductions from employees' pay to recover cash shortages in the stores. This practice resulted in violations during workweeks when employees worked over 40 hours.

Expanded relief. Based upon the findings in Ohio, the employer cooperated in expanding the review to all CheckCashing USA locations, and will pay back wages to employees affected by the illegal deduction issue companywide.

Kani House restaurants. Under a consent judgment entered by a federal court in the Northern District of Georgia, five Kani House restaurants operating in the Atlanta, Georgia, area will pay \$361,288 in back wages and liquidated damages to approximately 190 employees for minimum wage, overtime, and recordkeeping violations.

Flat rates. The court action followed a WHD investigation finding that the restaurants, all owned by the same person, paid non-exempt employees flat weekly salaries, resulting in minimum wage violations when their average hourly wages fell below the federal minimum wage. Kani House also deducted a portion of the employees' salaries for uniforms, which resulted in additional minimum wage violations when the deductions caused workers' hourly wages to dip below the federal minimum wage.

Tipped workers. Investigators further determined that Kani House paid straight-time rates to tipped employees for hours they worked beyond 40 in a workweek, instead of paying them overtime at time-and-a-half for those hours, as legally required. The employer also failed to keep accurate records of the number of hours worked by employees, resulting in a recordkeeping violation.

J & J Inc. dba Eagle Painting. The Sunrise, Florida-based painting and water-proofing company will pay \$86,530 in back wages to 25 employees for violating overtime and recordkeeping requirements.

Misclassification. WHD investigators determined that J & J incorrectly classified the majority of its employees as independent contractors, paying them a straight-time rate for all hours worked, which resulted in overtime violations when the employees worked more than 40 hours in a workweek.

Pre-shift work. The employer also directed employees to begin workdays by loading equipment into company vehicles before traveling to work sites. WHD found that J & J did not start recording work hours until the employees arrived at the work site and failed to pay the employees for any of their pre-shift work loading vehicles, or for their travel time to and from the job sites. This practice resulted in FLSA overtime violations when the pre-shift hours and work site hours combined to exceed 40 hours in a workweek.

In addition, WHD found that J & J failed to maintain accurate records that included employees' travel time to and from work sites and did not include staff incorrectly classified as independent contractors.

Companies: Best One Tire Group; Check Smart Financial LLC; 530 CheckCashing USA; Kani House; J & J Inc.; Eagle Painting

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EEOC NEWS—Employer will pay \$150K to end suit for allegedly refusing to hire deaf applicant

By [Pamela Wolf, J.D.](#)

The applicant had sought a job as a valet parking attendant; USA Parking Services also agreed recruit deaf and hearing-impaired applicants and provide other relief.

USA Parking Services, Inc., has agreed to pay \$150,000 and provide other relief, including to recruit deaf and hearing-impaired applicants, to settle allegations that the hospitality industry-focused valet and parking company violated the ADA when it rejected a deaf applicant for a valet attendant job due to disability discrimination.

The employer refused to hire a deaf applicant for a valet attendant position based on the assumption that a deaf person could not perform the essential functions of the job, rather than conduct an individualized assessment of his abilities, according to the EEOC.

Other relief. In addition to the monetary relief, the consent decree resolving the lawsuit requires that USA Parking Services affirmatively recruit applicants who are deaf and hearing-impaired and to add TTY capability to its discrimination hotline for the use of deaf and hearing-impaired applicants and employees.

Under the decree, the company also must: change the essential qualifications of the valet attendant position to clarify that the job can be performed by anyone who can communicate effectively with customers, whether verbal or written; prevent similar discrimination against future deaf or hearing-impaired applicants; educate its workforce on disability discrimination through annual management and employee training across all of its locations in Miami-Dade and Broward counties; and report to the EEOC about any complaints of disability discrimination made by employees or job applicants.

"The EEOC will continue to fight for deaf job applicants' rights under the ADA to be provided an interpreter when they are interviewed for employment," said EEOC Regional Attorney Robert E. Weisberg. "Deaf individuals too often face discrimination at the interview stage, which denies them even the opportunity to be considered for employment."

Companies: USA Parking Services, Inc.

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FEDERAL LEGISLATION—House clears bill to keep MSPB up and running

By [Pamela Wolf, J.D.](#)

The bill would extend the holdover term of the sole MSPB member by a year to permit confirmation of new board nominees.

On February 25, the House passed by voice vote the Merit Systems Protection Board (MSPB) Temporary Term Extension Act, [H.R. 1235](#), legislation intended to prevent the MSPB from having no members when the current and sole Board member's term expires on March 1, 2019.

Crisis at the MSPB. The MSPB is an independent agency, led by three presidentially appointed Board members, which serves as the guardian of the federal merit system. At present, the sole Board member is Mark Robbins, a Republican confirmed by the Senate in 2012. Robbins' seven-year term expired on March 1, 2018, but he continues to serve in a holdover capacity that is currently limited by statute to one year.

In 2018, President Trump nominated three candidates for the MSPB, two Republicans and one Democrat, but they were not confirmed by the Senate before the end of the last Congress.

In January 2019, President Trump re-nominated the three candidates, and the Senate Homeland Security and Governmental Affairs Committee recently cleared two of them. The third withdrew his name from consideration. However, these two nominations will not be considered until the White House names another Republican nominee.

Proposed extension. As amended, [H.R. 1235](#) would provide a one-time, one-year extension of the current member's term. The bill now moves to the Senate where its consideration remains uncertain.

"The House voted to keep the lights on and a senior official in charge at MSPB, the agency that ensures a professional, non-partisan civil service," House Oversight and Reform Committee Rep. Elijah E. Cummings (D-Md.) said in a [press release](#).

"Now the ball is in the Senate's court to show the same commitment," said Rep. Gerry Connolly, Chairman of the Subcommittee on Government Operations, who added that the bill is intended to prevent a potential crisis at the Merit Systems Protection Board. He noted that the MSPB "protects whistleblowers from retaliation, veterans from job discrimination, and federal employees from prohibited personnel practices, and Congress must ensure that MSPB can continue operations."

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IMMIGRATION NEWS—DOL is updating its H-2B application processing procedures

By [Pamela Wolf, J.D.](#)

Under the updated process, H-2B applications will be randomly ordered for processing based on the *date of filing* and the *start date of work* requested.

The Department of Labor is updating its procedures for processing H-2B applications. The move was prompted by the intense competition for H-2B visas in recent years, which has resulted in challenges to handle the increasingly large volume of H-2B applications filed on January 1 of each year.

Volume skyrocketing. Notably, after having modified its processing procedures due to unprecedented increases in volume, in January 2019, the DOL's Office of Foreign Labor Certification (OFLC) received about 5,276 applications covering more than 96,400 worker positions for start dates of work on April 1, exceeding the semi-annual visa allotment by nearly *300 percent*, according to the agency's [update announcement](#).

Within the first five minutes of opening the semi-annual H-2B certification process on January 1, 2019, the DOL's network infrastructure supporting the OFLC's electronic filing system experienced more than 22,900 server login attempts, in contrast with only 721 attempts in about the same time period for the 2018 filing season. This unprecedented volume of simultaneous system users, which was *30 times* the number of users in the previous year, ultimately caused the electronic filing system to become unresponsive and prevented almost all employers from filing H-2B applications. Although the DOL was able to restore the

OFLC's electronic filing system by January 7, 2019, some employers continued to report technical difficulties with accessing the electronic filing system.

For these and other reasons, OFLC has reassessed its procedures for processing H-2B applications.

Processing changes. Announcing the new updates on February 26, the OFLC said that all H-2B applications filed on or after July 3, 2019, will be randomly ordered for processing based on the *date of filing* and the *start date of work* requested. The OFLC will randomly order and assign for processing all of the H-2B applications requesting the earliest start date of work permitted under the semi-annual visa allocation (i.e., October 1 or April 1) and filed during the *first three calendar days* of the regulatory time period for filing H-2B applications.

Once first actions are issued, the OFLC will randomly assign for processing all other H-2B applications filed on a single calendar day.

Comments. The OFLC is seeking comments on this procedural change for a period of 30 calendar days from the date that the notice is published in the *Federal Register*. Interested stakeholders may submit comments to H2BReform.Comments@dol.gov or Thomas M. Dowd, Deputy Assistant Secretary, Employment and Training Administration, U.S. Department of Labor, Box PPII 12-200, 200 Constitution Avenue, NW, Washington, DC 20210.

The OFLC said that it will review all of the comments received, make any changes it determines are appropriate, and issue a final announcement prior to July 3, 2019.

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INDUSTRY NEWS, TRENDS—Littler adds systemic discrimination, affirmative action consultant

By [Pamela Wolf, J.D.](#)

The firm's new non-attorney consultant can address all phases of the OFCCP compliance review process.

Littler Mendelson, P.C., has added Chris Gokturk as a principal in the firm's Tysons Corner, Virginia, office. Gokturk has more than 20 years of experience in compliance, enterprise risk management, and statistical analyses. She is a non-attorney consultant who specializes in helping employers understand and mitigate their systemic discrimination risks, and also in the development, implementation, and defense of compliant and data-driven affirmative action programs.

Gokturk is capable of consulting on all phases of the OFCCP compliance review process. She is also knowledgeable about implementation of applicant tracking and HR information systems and can provide guidance to clients on issues related to talent acquisition, analyses of compensation data, performance management, diversity and inclusion metrics, workforce planning and restructuring, as well as the systems utilized to manage these functions.

With a deep background in analyzing compensation and employment transactions data, as well as extensive experience on pay equity issues, Gokturk will work closely with Littler's data capabilities team, as well as play an integral role in the analyses conducted through the [Littler Pay Equity Assessment™](#).

"Chris brings a unique skillset in conducting risk assessments, analyzing employment data, and advising on compliance with requirements enforced by the OFCCP," Michael McIntosh, Littler's office managing shareholder in Tysons Corner said in a [firm announcement](#). "Her experience and insights will be

invaluable for our clients, including those pursuing government contracts as they navigate an ever-evolving landscape of affirmative action regulations and anti-discrimination laws."

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SENATE NEWS—HELP Committee again approves OSHA, WHD, and EEOC nominees

By [Pamela Wolf, J.D.](#)

The HELP Committee has once again cleared the nominations of Scott Mungno, Cheryl Stanton, and Janet Dhillon.

On February 27, the Senate Health, Education, Labor and Pensions (HELP) Committee gave a green light to 11 of President Trump's nominees, including those for top jobs at OSHA, the DOL's Wage and Hour Division (WHD), and the EEOC:

- **Scott Mungno**, who was previously approved by the HELP Committee on December 13, 2017, and again on January 16, 2018, was nominated and re-nominated by President Trump to serve as Secretary of Labor—Occupational Safety, replacing David Morris Michaels, if confirmed. At the time of his initial nomination, Mungno was Vice President for Safety, Sustainability, and Vehicle Maintenance at FedEx Ground in Pittsburgh, Pennsylvania. He is currently retired, according to his [LinkedIn profile](#).
- **Cheryl Stanton**, another nominee previously approved by the HELP Committee on January 18, 2018, was nominated and then re-nominated by Trump to be Administrator of the Wage and Hour Division at the DOL. She currently serves as the Executive Director for the South Carolina Department of Employment and Workforce, a position to which she was appointed in 2013 by then-Governor Nikki R. Haley. Before that Stanton worked as a labor and employment attorney in both the public and private sectors. She served as Associate White House Counsel for President George W. Bush, acting as the administration's principal liaison to the DOL, NLRB, and EEOC. Stanton also served as a law clerk to the Honorable Samuel A. Alito, Jr., U.S. Court of Appeals for the Third Circuit.
- **Other DOL nominees**, including William Beach to be Commissioner of Labor Statistics; John P. Pallasch to be Assistant Secretary of Labor for Employment and Training; and John Lowry III to be the Assistant Secretary of Labor for Veterans' Employment and Training.
- **Janet Dhillon**, previously approved by the HELP Committee in 2017 and 2018, was nominated and re-nominated by President Trump to be a member of the Equal Employment Opportunity Commission. She most recently served as General Counsel of Burlington Stores, Inc., until July 2017, according to her [LinkedIn profile](#). Dhillon has served in a similar role at three Fortune 500 companies and practiced law at Skadden, Arps, Slate, Meagher & Flom LLP for 13 years.

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STATE REGULATIONS—CALIFORNIA—Cal/OSHA reminds employers to electronically submit Form 300A by March 2

WK Editorial Staff

March 2 is the deadline for California employers to submit Form 300A injury and illness data for calendar year 2018.

Cal/OSHA is reminding employers in California of the requirement to electronically submit by March 2 their Form 300A injury and illness data for calendar year 2018.

Employers in California with establishments meeting one of the requirements below are required to electronically submit Form 300A data for those establishments:

- All establishments with 250 or more employees, unless specifically exempted by [section 14300.2](#) of title 8 of the California Code of Regulations.
- Establishments with 20 to 249 employees in the specific industries listed in Appendix H of Cal/OSHA's [emergency regulations](#).

For instructions on how to submit data, the Department of Industrial Relations refers employers to follow the guidance on the federal OSHA's [Injury Tracking Application website](#).

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