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## U.S. Supreme Court Issues Decision In Employee "Sexting" Case

In a widely-anticipated decision involving a public employee's expectation of privacy in the workplace, the United States Supreme Court held that a city police department did not violate the Fourth Amendment rights of an employee by searching text messages sent on his employer-issued pager. The Court found that the police department's search was motivated by a legitimate work-related purpose and was limited in scope, and as such, was reasonable within the meaning of the Fourth Amendment.

In *City of Ontario v. Quon*, defendant City issued pagers to officers of its police department to use for work-related purposes. While the City's policies made it clear that employees should have no expectation of confidentiality and that the department could monitor digital

communications, this issue became disputed after the employee's direct supervisor verbally assured the employee that he could use the pager for personal communications. During an audit conducted to determine whether the monthly text message limit was appropriate under the department's wireless plan, the department discovered that the employee used the pager to send numerous sexually explicit text messages. As a result, the department disciplined the employee, who brought suit alleging a violation of his Fourth Amendment rights.

The *Quon* Court took great pains to limit the reach of its ruling, declining to define the existence and extent of privacy expectations enjoyed by employees when using employer-provided communication devices. Instead, it decided the case on the far more narrow ground of reasonable searches and seizures under the Fourth Amendment. In doing so, the *Quon* Court assumed, for the purposes of argument, that the employee did

have an expectation of privacy. Yet notwithstanding such an expectation, the Court held the employer's search was still reasonable within the meaning of the Fourth Amendment. According to the Court, the search itself was non-investigatory in nature, not excessively intrusive, and employed measures reasonably related to the objective of the search, which was to evaluate the sufficiency of the employer's wireless contract.

Interestingly, the Court noted that the search would have been regarded as reasonable and normal in the private-employer context. Nevertheless, extrapolating this decision to the private arena is difficult because the Court's ruling rested on constitutional rights not applicable to communication devices issued by a private employer.

Nevertheless, there are some lessons for private employers in the *Quon* case. Employers should implement policies to educate employees regarding the appropriate use of

This occasional newsletter is published by Hill, Farrer & Burrill LLP as a service to clients, friends and colleagues.

Each publication summarizes recent developments in state and federal law affecting employers, but should not be relied upon as an opinion or advice of the Firm regarding any specific matter.

employer-provided communication devices. Such policies should advise employees that their communications on these devices are not private and may be monitored. Also, an employer's policies should be clear that they are not subject to verbal modifications to avoid a situation like the one faced in *Quon* where an individual supervisor is alleged to have made verbal statements at odds with the employer's written policy.

## U.S. Supreme Court: No Class Actions In Arbitration Absent Contractual Agreement

The United States Supreme Court has ruled that under the Federal Arbitration Act ("FAA"), parties to an arbitration agreement may not be compelled to arbitrate claims on a class basis unless there is an express agreement to utilize such a procedure.

In *Stolt-Nielson v. AnimalFeeds International Corp.*, the Court considered the issue of class arbitration in the context of an antitrust dispute. But the case is nonetheless relevant to employment law because it severely limits when class arbitration will be available under the FAA.

In *Stolt-Nielson*, plaintiff, a shipper, alleged that defendant shipping companies were engaging in an illegal price-fixing conspiracy and brought a putative class action against them asserting antitrust claims. Plaintiff demanded class arbitration and the parties entered into an agreement that allowed a panel of three arbitrators to decide whether the arbitration clause in plaintiff's contract permitted the arbitration to proceed on behalf of a class. The parties stipulated that the arbitration clause was silent with respect to class arbitration. The arbitrators ruled that the arbitration clause allowed for class arbitration. Defendants filed an application to vacate the arbitrators' award in federal District Court. The District Court disagreed with the arbitrators and vacated the award.

On appeal, the Second Circuit Court of Appeals reversed and upheld the arbitrators' award. In a 5-3 ruling, the United States Supreme Court reversed again and vacated the arbitrators' award.

The Supreme Court ruled "that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." (Emphasis in original). The Court clarified that "[a]n implicit agreement to authorize class-action arbitration ... is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." The Court's rationale was that arbitration was a matter of consent.

In light of this decision, in order to have a class action arbitration, an agreement under the FAA must expressly state that the parties agree not only to arbitrate, but to submit to class arbitration.

## California High Court Overturns Arbitration Award In Favor Of Employer

The California Supreme Court recently weighed in on the issue of whether an arbitration award can be vacated in court if an arbitrator's error of law deprives an employee of a hearing on the merits. For the most part, arbitration awards are subject to very limited review and cases have rejected challenges to arbitration awards based on pure errors of law by the arbitrator.

In *Pearson Dental Supplies, Inc. v. Superior Court*, plaintiff brought a complaint alleging age discrimination in violation of the Fair Employment and Housing Act ("FEHA"). Defendant successfully brought a motion to compel arbitration pursuant to a dispute resolution agreement. The agreement required all claims to be brought within one year. Defendant then filed a motion for summary judgment with the arbitrator

contending that plaintiff's claims were time barred because they were submitted to the arbitrator more than one year after plaintiff's termination. Although plaintiff argued that the statute of limitations was tolled by the filing of a civil action, the arbitrator disagreed and granted defendant's summary judgment motion. Thereafter, plaintiff sought to vacate the decision in court.

The trial court agreed with plaintiff that the statute of limitations was tolled by the filing of a civil action and vacated the arbitrator's award. On appeal, however, the Court of Appeal reversed the trial court's decision. Although the Court of Appeal agreed that the arbitrator had made a clear error of law, it applied the longstanding rule that an arbitrator's error of law "is insulated from judicial review."

The California Supreme Court, reversed the Court of Appeal and vacated the arbitrator's award. The Court acknowledged that "generally speaking, a court is not permitted to vacate an arbitration award when the award is based on errors of law." But the Court concluded that "an arbitrator whose legal error has barred an employee subject to a mandatory arbitration agreement from obtaining a hearing on the merits of a claim based on [a right under FEHA] has exceeded his or her powers." In other words, the Court found that by denying plaintiff a hearing on the merits, an arbitrator does not merely commit legal error but exceeds his or her powers, which is a valid basis upon which to vacate an arbitration award.

In addition to addressing the grounds for vacating an arbitration award, the Court also addressed the issue of whether a mandatory arbitration agreement can restrict an employee from seeking administrative remedies for FEHA violations. The arbitration agreement stated that the parties intended "to avoid the inconvenience, cost, and risk that accompany formal *administrative* or judicial proceedings." The Court concluded that the inclusion of a provision limiting resort to an

administrative forum does not necessarily render the arbitration agreement unconscionable or unenforceable.

## Ninth Circuit Rejects Arbitration Agreement As Unconscionable Under California Law

The federal Ninth Circuit Court of Appeals recently refused to enforce an arbitration agreement, finding that it was unconscionable under California law.

In *Pokorny v. Quixtar, Inc.*, various individual distributors, known as "Independent Business Owners" ("IBOs"), brought a class action against Quixtar Inc., which sells a variety of products and services through IBOs. The IBOs accused Quixtar of unfair business practices and false advertising, alleging that Quixtar charged the IBOs so much for its products that it was virtually impossible to make a profit. The IBOs also claimed that Quixtar fraudulently induced the IBOs to purchase worthless business support materials.

Pursuant to their individual business relationships with Quixtar, the IBOs were required to enter into, and then annually renew, a registration agreement mandating a three-step Alternative Dispute Resolution ("ADR") process, culminating in an arbitration hearing. Pursuant to the terms of the registration agreement, the demand for binding arbitration could not be made before the completion of the first two non-binding stages of the ADR process, and not earlier than 90 days after the IBO first reported the claim.

Based on these agreements, Quixtar filed a motion to compel arbitration, requiring the IBOs to pursue their claims in arbitration instead of court. In denying Quixtar's motion, the district court applied California law and found the ADR agreement to be both procedurally and substantively unconscionable.

The Ninth Circuit affirmed the decision, holding that the agreements were procedurally unconscionable because plaintiffs did not individually participate in the negotiation of the terms of the ADR agreements; the agreements were presented to plaintiffs on a take-it-or-leave-it basis; and because Quixtar failed to attach the full description of the ADR process to its agreements or otherwise allow plaintiffs a fair opportunity to review the process.

The court also found that the ADR agreements were substantively unconscionable for several reasons. The agreements imposed a shortened statute of limitations and strict confidentiality requirements favoring Quixtar. Quixtar had a unilateral and unchecked right to amend the agreements and modify the results of hearings. The agreements imposed obligations on the IBOs that were not imposed upon Quixtar. Finally, the agreements contained a fee-shifting provision, requiring the IBOs to pay costs if they lost. In the court's view, the agreements were unconscionable because "the ADR deck could not possibly [have been] stacked more in Quixtar's favor."

The court further determined that Quixtar's ADR process was "so permeated with unconscionable provisions" that it was "simply too tainted to be saved through minor adjustments." As a result, the court found that it would have been impossible to enforce the agreements by severing the unconscionable provisions from the remaining provisions of the agreements.

## U.S. Supreme Court Expected To Resolve Lower-Court Split On "Cat's Paw" Theory

In the 17th century fable "The Monkey and the Cat" by Jean de La Fontaine, a clever monkey persuades an unsuspecting cat to snatch chestnuts from a fire so the cat burns her paw and the monkey gets to eat the

chestnuts. Hence, a "cat's paw" is a person used by another to accomplish a goal.

In employment law, the term "cat's paw" is applied to scenarios where an intermediate supervisor allegedly harbors discriminatory animus against an employee and influences a decisionmaker to discipline the employee or subject the employee to an adverse employment decision under seemingly legitimate pretenses. The end result is that the decisionmaker is the cat's paw for the discriminating supervisor. The issue, however, is whether the supervisor's discriminatory animus will be imputed to the decisionmaker, subjecting the employer to liability for discrimination.

Currently, there is a split among different federal circuit courts as to how much influence the biased supervisor must exert on the decisionmaker to hold the employer liable. The Ninth Circuit Court of Appeals (which includes California) and some other federal circuit courts require plaintiffs to show the supervisor "caused" the decisionmaker's action. Other courts merely require plaintiffs to demonstrate the biased supervisor "influenced" the decision-making process. Yet other circuits have employed the most stringent standard of requiring the biased supervisor to "singularly motivate" the challenged employment decision.

On April 19, 2010, the United States Supreme Court agreed to hear the case of *Staub v. Proctor Hospital*, which involves the cat's paw theory of liability. In *Staub*, plaintiff was terminated for insubordination but claimed that the decision was influenced by his supervisor who supposedly disliked plaintiff because of his membership in the Army Reserve.

After his termination, plaintiff sued his former employer under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). USERRA prohibits employers from imposing adverse action based on an employee's military status.

At trial, plaintiff was awarded \$57,640 in damages. On appeal, however, the Seventh Circuit Court of Appeals reversed and held that the supervisor's animus could not be imputed onto the decisionmaker because he did not exert a "singular influence" over the termination decision.

Until the cat's paw issue is resolved by *Staub*, it remains unclear when the actions of a biased intermediate supervisor may be imputed to a decisionmaker. It is therefore prudent for employers to ensure that decisionmakers conduct and document independent investigations before imposing discipline or other adverse employment actions. If an employer can show that an adverse employment action was based on an independent investigation, the employer can argue that it should not be liable based on the alleged discriminatory animus of those who did not make the decision.

## DLSE Issues Opinion Letter Regarding Unpaid Interns

On April 7, 2010, the California Division of Labor Standards Enforcement ("DLSE") issued an opinion letter addressing whether California law requires unpaid interns to be treated as employees subject to California's wage and hour laws. In its letter, the DLSE clarified the criteria it uses to determine whether a specific internship program is exempt from minimum wage law, confirming the use of a six-factor test articulated by the United States Department of Labor ("DOL").

The DLSE's opinion letter was written in response to a request from an attorney representing Year Up, Inc., which administers an internship program "aimed at developing fundamental job skills and technical skills in information technology for 18-24 year olds primarily in underserved communities." The attorney sought clarification of DLSE criteria and an opinion as to whether its internship

program was exempt from wage and hour laws.

The DLSE noted that no state statute or regulation exists expressly exempting individuals participating in an internship program from minimum wage and overtime requirements, but that both federal and state case law recognize the existence of such an exception. The DLSE confirmed that the six-factor test set forth by the DOL would constitute the criteria used to determine whether a particular trainee or intern is an employee or exempt from coverage. The six criteria identified by the DLSE are whether:

- The training, even though it includes actual operation of the employer's facilities, is similar to that which would be given in a vocational school;
- The training is for the benefit of the trainees or students;
- The trainees or students do not displace regular employees, but work under their close observation;
- The employer derives no immediate advantage from the activities of trainees or students, and on occasion the employer's operations may be actually impeded;
- The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
- The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

The DLSE stressed that these criteria must be applied on a case-by-case basis in view of all the circumstances surrounding an intern's activities.

On the heels of the DLSE's opinion letter, the United States Department of Labor ("DOL") issued a new fact sheet on internship programs within the private sector, reiterating the six-factor

test above. However, the DOL also stated that unless a particular internship program in the for-profit private sector features an exclusively educational purpose, it would most often be viewed as an employment relationship.

## FMLA Military Leave Provisions Expanded

On October 28, 2009, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2010. Among its provisions, the Act modifies the military leave requirements under the Family and Medical Leave Act ("FMLA"). As these changes are now in effect, employers should review their FMLA and/or military leave policies to ensure that they are compliant.

Specifically, the 2010 Act expands military leave to cover exigencies created when active members of the Armed Forces are called for deployment to a foreign country. Previously, "exigency" leave was only available to family of National Guard or Reserve members. The 2010 Act also includes leave taken to care for veterans of the Armed Forces, National Guard or Reserve who are undergoing treatment, recuperation, or therapy for serious injury or illness that occurred during active duty any time in the five years preceding the date of treatment. It also includes leave taken to care for injuries that are aggravated in the line of duty.

In addition to reviewing company policies, employers should confirm that their FMLA posters are up to date and reflect the changes in the law noted above.

## California Court Rejects Sexual Harassment Claim

In *Haberman v. Cengage, Inc.*, the California Court of Appeal reiterated the limits of a sexual harassment claim based on the Fair Employment and Housing Act ("FEHA"). Under the FEHA,

a sexual harassment claim alleging hostile work environment is only actionable when the alleged harassment is "severe and pervasive." To meet that threshold, the alleged conduct must have the effect of altering the terms and conditions of employment. Harassment that is "occasional, isolated, sporadic, or trivial" will not suffice to create an actionable claim.

The *Haberman* decision illustrates the limits of a hostile work environment claim. In *Haberman*, plaintiff worked as a sales representative for a textbook publishing company. She sued her employer and two male managers, alleging that the managers had sexually harassed and retaliated against her by placing her on a performance improvement plan. Notably, the purported acts of harassment were all verbal and occurred at disparate points in time. The alleged verbal comments included an inquiry by one manager as to how plaintiff looked "so pretty so early in the morning," a comment that a school administrator was "hot for being an older woman," and a comment that a customer had the "hots" for plaintiff and wanted to date her.

After the trial court rejected plaintiff's claims, the Court of Appeal affirmed the decision and found that the alleged incidents of sexual harassment were insufficiently severe or pervasive. While the court found that the comments were not appropriate in the workplace, they were brief and isolated. Given the lack of any physical contact and the sporadic nature of the verbal comments, the court concluded that there was no basis for finding sexual harassment.

## Employer Beware: Lawfully Obtained Sex Offender Information Poses Risks

Background checks for applicants are a frequent and often vital part of the

hiring process. But a recent decision by the California Court of Appeal demonstrates the risks of basing employment decisions on the results of background checks depending on how and where applicant information is obtained.

In *Mendoza v. ADP Screening and Selection Services, Inc.*, a company hired defendant, an outside screening company, to conduct a pre-employment background check on an applicant for employment. The results of the background check included information about the applicant that was lawfully obtained from the Megan's Law Website ("MLW"). When the applicant was not hired, he sued the screening company, alleging they violated a statute regulating how information on the MLW can be used.

In its defense, the screening company argued it was not unlawfully "using" the information from the MLW because it was only republishing that information to one of its clients, which is lawfully permitted. The trial court and the Court of Appeal agreed with the screening company and dismissed the applicant's lawsuit.

Because *Mendoza* involved a claim against an outside screening company, and not an employer, the case leaves open the question of an employer's potential liability for decisions based on information obtained from the MLW. Yet some language from the court's opinion did suggest that a claim might exist against an employer that improperly utilizes information from the MLW. The court stated, "[t]he statutory liability created by the MLW statute should be limited to employers who 'use' information disclosed on the MLW as a basis for an employment decision." On the other hand, the court acknowledged that employers may have a defense to such claims where the information is used to protect other employees. As the court observed, "a strong argument might be made that employees are persons at risk whom an employer has a duty to protect from a sexually violent predator."

Given the court's recognition that a claim might exist against an employer that improperly utilizes information obtained from the MLW, employers are reminded to exercise caution with respect to hiring decisions made as a result of information learned during background checks. Employers must be mindful that there are risks associated with background checks depending on what information is obtained and from what source. Employers with any questions about such issues are advised to seek legal counsel for expert guidance.

## Employers May Face Liability For Use Of Illegal Non-Compete Agreements

In the wake of three recent decisions, employers in California are advised to reconsider non-solicitation clauses contained in their employment agreements to avoid potential liability for violations of unfair competition law.

In 2008, the Supreme Court of California held in *Edwards v. Arthur Andersen, LLP* that employee non-competition covenants are prohibited, even if narrowly drawn. In *Edwards*, the employee signed a non-solicitation agreement prohibiting him from soliciting away from the employer any clients to which he was assigned during the eighteen months after release or resignation. The Court declared the agreement invalid because it prevented the employee from performing work for a subset of the employer's clients, thus restraining his ability to practice his profession.

In *The Retirement Group v. Galante*, the Court of Appeal followed *Edwards*, invalidating a similar non-solicitation covenant in an employment agreement. It also held that an injunction against solicitation would be upheld only as a remedy for misappropriation of trade secrets. Thus, the prophylactic use of such a contractual clause, while possibly maintaining its efficacy as a scare tactic against employees turned

would-be competitors, no longer has the backing of judicial enforceability. The *Galante* court attempted to ease the "tension" between trade secret law and non-competition agreements by highlighting the distinction that a former employee may be barred from soliciting existing customers only if the employee is utilizing trade secret information to solicit those customers. As such, the court may not specifically enforce the non-solicitation provision, but instead may enjoin tortious conduct as violative of either the Uniform Trade Secrets Act or unfair competition law.

In *Dowell v. Biosense Webster, Inc.*, the Court of Appeal held that an employer's use of an illegal non-compete agreement itself can be a form of unfair competition in violation of Bus. & Prof. Code § 17200, thereby subjecting the employer to liability. The *Dowell* court also questioned the continued viability of the trade secret exception to covenants not to compete, but declined to categorically resolve the issue.

Based on these cases, employers should be aware of the potential claims that may exist based on the use of non-compete and non-solicitation agreements. Employers with questions about such agreements are therefore urged to contact their attorney at Hill, Farrer & Burrill LLP for guidance.

## Positions Filled By Temporary Workers Not "Vacant" Under ADA

The Tenth Circuit Court of Appeals recently defined the meaning of the term "vacant" under the Americans with Disabilities Act ("ADA") as the statute relates to an employer's duty to reassign a disabled employee to a vacant position to accommodate the employee's disability.

The court in *Duvall v. Georgia-Pacific Consumer Products, LP* affirmed the dismissal of a lawsuit by a paper mill worker with cystic fibrosis who became unable to work in his particular

department because of airborne paper dust. The employee alleged that his employer violated its duty to reassign disabled employees to vacant positions by refusing to transfer him to the plant's shipping department, and instead reassigning him to a lower-paying position in the storeroom. The employer countered that there were no positions available in the shipping department because it was staffed with temporary workers by a third-party temporary staffing agency as part of the employer's shift towards permanent outsourcing of its shipping operations.

The *Duvall* court agreed with the employer, finding that the employee could not show that such reassignment was *reasonable*, a prerequisite for liability under the ADA's reassignment provisions. Courts have historically refused to force employers to create new jobs to accommodate a disabled employee for the purposes of ADA compliance, or to promote a disabled employee where no promotion was warranted, as such reassignments are not deemed to be a reasonable accommodation within the meaning of the statute. The job to which a disabled employee seeks reassignment must, per the text of the statute, be vacant.

Here, non-disabled employees in the company would not have been able to apply for and obtain positions in the shipping department. Accordingly, those positions were not "vacant" within the meaning of the ADA, and mandatory reassignment for the employee would have been unreasonable.

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If you have any questions about these issues or any other labor matters, please contact any member of the Labor & Employment Department at Hill, Farrer & Burrill LLP.

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