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April 15, 2019

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ARBITRATION

First a lawsuit, then an agreement to arbitrate: Which trumps?

by Judith Droz Keyes
Davis Wright Tremaine LLP

Arbitration is not a panacea. That's especially true in California, where, for example, employers are required to pay almost all the costs of arbitration and courts scrutinize arbitration agreements for two types of fairness: procedural (i.e., whether the employee had a reasonable opportunity to consider the agreement before signing it) and substantive (i.e., whether the terms comply with California law). In addition, in the wake of #MeToo, mandating the arbitration of harassment claims has become especially controversial. Nonetheless, requiring employees to agree to resolve their disputes in arbitration rather than in court does have advantages, so many employers choose to go that route.

But when an arbitration agreement is signed by an employee who already works for the employer, does the agreement cover claims that arose before it was signed? And does it matter if the employee was represented by an attorney on a claim against the employer that existed at the time she signed the agreement? Those questions were recently addressed by the court of appeal.

The case of the newly signed agreement

Maureen Salgado had worked for Carrows Restaurants in Ventura for more than 30 years when she sued Carrows for discrimination and violation of her civil rights on November 22, 2016. Five months after she filed the lawsuit, she amended it to add corporate entities related to the originally named company. More than four months after that, on September 5, 2017, Carrows filed a motion to force the lawsuit into arbitration.

The motion to require arbitration relied on an arbitration agreement that Salgado signed on December 7, 2016, two weeks *after* she filed the lawsuit. Salgado opposed the motion, arguing the arbitration agreement shouldn't apply to her preexisting lawsuit and the agreement was unconscionable. The trial court agreed with her and declined to refer her lawsuit to arbitration. Carrows appealed.

'Or' means 'or'

The court of appeal first addressed whether, by its terms, the arbitration agreement applied to disputes that arose before the agreement was signed. The agreement stated it would apply to "all disputes which [1] may arise out of or [2] may be related in any way to . . . my employment." The court parsed that wording in a way that would warm the heart of any high-school English teacher.

Salgado argued that "may arise" meant the dispute had to arise in the future. Carrows pointed out that there was another phrase in the same sentence,

CALIFORNIA
EMPLOYMENT LAW LETTER

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CALIFORNIA EMPLOYMENT LAW LETTER (ISSN 1531-6599) is published biweekly for $547 per year by **BLR®—Business & Legal Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094.

"may be related in any way to . . . my employment," and that the two phrases were linked by the conjunction "or." The court observed that "'or' shows that there is an alternative." Quoting another appellate court's decision, the court noted, "The plain and ordinary meaning of the word 'or' is to mark an alternative such as 'either this or that.'"

Based on that interpretation, as well as on a provision elsewhere in the agreement in which Salgado agreed to submit "any claim, dispute, and/or controversy" to arbitration, the court of appeal concluded the plain wording of the arbitration agreement contemplated its application to preexisting disputes.

Retro is cool

Salgado then argued that fundamental employment principles precluded giving the arbitration agreement retroactive effect. The court gave short shrift to that argument, noting that in other contexts—for example, in commercial contracts—arbitration agreements have routinely been interpreted to apply to disputes that existed before they were signed. Without much discussion, the court rejected Salgado's no-retroactivity argument as "misplaced."

At that point, Carrows no doubt thought it had won the day. But the court of appeal wasn't finished. In addition to challenging the application of the arbitration agreement to her previously filed dispute, Salgado had challenged the agreement as both procedurally and substantively unconscionable. On the procedural aspect, she contended that she was confronted with the agreement at work and was forced to sign it and that Carrows' manager was aware of her lawsuit at the time. Carrows disputed her version of events. Salgado's attorney also argued that he didn't have the chance to consult with her before she signed it.

Because the trial court hadn't considered those issues or issues of substantive unconscionability, the appellate court sent the case back to the lower court for further consideration. The court of appeal instructed the trial court to consider the issues Salgado raised, especially "whether Carrows knew or should have known [that she] was represented by counsel when she signed the arbitration agreement," and then determine whether "these or other facts support a claim that the arbitration agreement is unenforceable."

So, whether Salgado's claims will proceed in court or be sent to arbitration remains to be decided. *Salgado v. Carrows Restaurants, Inc., et al.* (California Court of Appeal, 2nd Appellate District, 2/26/19; modified and certified for publication 3/25/19).

Bottom line

Although this case involves unusual facts, it nonetheless provides some helpful reminders. First, words matter. The outcome of cases involving arbitration agreements or other employment documents (contracts, policies, performance evaluations) is sometimes determined by the choice of words—even two-letter words. We know that "or" doesn't mean the same thing as "and." But does "shall" mean the same thing as "will," especially when both words are used in the same document? Don't count on it!

Second, in addition to its wording, how the arbitration agreement is presented to employees matters. Although an employer is generally permitted to require, as a condition of employment, that new hires and existing employees accept arbitration as the exclusive forum for resolving disputes, that doesn't mean employees can be confronted with an arbitration agreement in an abrupt or heavy-handed way. There should be ample

opportunity for employees to ask questions and a reasonable amount of time for them to sign the agreement—and fair warning of the consequences of failing to do so.

Finally, it's worth noting how long employment disputes can drag on. The court of appeal issued the *Salgado* decision on February 26, 2019—27 months after the lawsuit was filed. And Salgado and Carrows don't yet know the forum in which the dispute will be addressed, let alone when it will be resolved and who will prevail. The court of appeal's opinion doesn't mention whether Salgado is still working at Carrows, but we know she was employed when she filed the lawsuit and she continued working at Carrows at least for a while after that. Memories fade, witnesses move on, and evidence has a way of getting lost. And although the passage of time matters, a retaliation claim based on the "protected activity" of suing for discrimination never entirely goes away. For those of us in the business of addressing employee complaints, those realities should be a powerful impetus to act sooner rather than later.

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ARBITRATION

Splitting the baby? Employee's single PAGA claim can't be split in half

by Shaudee Navid
Duane Morris LLP

Generally, courts won't enforce arbitration agreements purporting to waive representative claims for civil penalties under California's Private Attorneys General Act of 2004 (PAGA). But if an employee has agreed to arbitration, can his employer compel him to individually arbitrate the portion of his PAGA claim that covers unpaid wages? A California Court of Appeal recently held that when an employee files a solitary PAGA claim, the courts can't split the claim by sending the employee to arbitration to recover his unpaid wages but retaining jurisdiction to award the statutory penalties.

Men's Wearhouse's arbitration agreements

Arthur Zakaryan began working as a store manager at The Men's Wearhouse in 2002. Several years later, he was given the option of accepting a demotion or resigning because his job performance had declined. He decided to resign in November 2016.

During the course of his employment, Zakaryan signed two different arbitration agreements with The Men's Wearhouse, first in 2006 and then in 2015. Under the terms of the 2006 agreement, he agreed to arbitrate "any and all claims, disputes and controversies . . . includ[ing] . . . any [c]laim arising from [his] employment . . . or its termination"; however, the agreement expressly excluded "collective" or "representative" actions. Under the 2015 agreement, he agreed to arbitrate "all claims or controversies . . . whether or not arising out of [his] employment (or its termination)" and to "waive any right to bring . . . any class, collective, or representative action." The 2015 agreement expressly excluded any PAGA claims "otherwise covered by this Agreement."

Former employee files representative action under PAGA

In 2017, Zakaryan filed a representative action against The Men's Wearhouse on behalf of all current and former store managers in which he alleged the retailer misclassified its managers as exempt from overtime pay and meal and rest breaks, resulting in inaccurate wage statements and waiting time penalties under California Labor Code Section 203. In his action, which consisted of a single claim under the PAGA, he sought unpaid and underpaid wages for all aggrieved employees as well as the additional statutory penalties under the Act.

PAGA claims are a popular choice for employees who contend their employer engaged in California Labor Code violations. Under the PAGA, an individual employee is authorized to file an action against his employer for violations of the California Labor Code on behalf of the state's labor enforcement agencies. When a PAGA claim is premised on overtime violations and missed meal and rest periods, like Zakaryan's claims were, California Labor Code Section 558 specifies the penalties that can be recovered: underpaid wages and a per-pay-period penalty for $50 or $100. The PAGA mandates that aggrieved employees will receive a 25% share of any civil penalties recovered, with the state receiving 75%.

Nearly six months after being sued, The Men's Wearhouse filed a motion with the trial court requesting that Zakaryan be compelled, pursuant to the arbitration agreements he had signed, to arbitrate the portion of his PAGA claim seeking reimbursement of underpaid wages. Siding with Zakaryan, the trial court rejected the retailer's contention that his PAGA claim could be split in order to send the underpaid wages portion to arbitration.

Solitary PAGA claim can't be split and sent to two different forums

On appeal, The Men's Wearhouse argued that the trial court should have ordered Zakaryan to arbitrate

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MARK'S IN-BOX

The multiple facets of sexual touching complaints

by Mark I. Schickman
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The #MeToo movement has been selective about the degree to which the men accused of sexual harassment are punished. Kevin Spacey and Matt Lauer seem to have been abducted by aliens. And there was something about being a stodgy-looking comedian with a perpetual five o'clock shadow that prompted his allies to summarily execute the political career of Al Franken. Et tu, Kirsten? On the other hand, James Franco had eight active projects going in the past year, even after he was accused of sexual misconduct toward women he worked with, and Bill Clinton remains a high-profile senior statesman, even though he had sex with a low-level employee barely out of her teens when he occupied the highest office in the land, the worst context for a workplace sexual harassment claim to arise.

But none of those examples compares to common employment circumstances more than everybody's favorite embarrassing uncle, former Vice President Joe Biden. Long before comedy news anchors seized on President Donald Trump's every awkward moment, the peccadilloes of the "gaffable" Joe Biden often provided our nightly entertainment. Politics has shifted, though, and Biden's unpredictable outbursts are as statesmanlike as we get today.

But not when it comes to sexual touching claims. In anticipation of Biden's entry into the presidential nomination sweepstakes, seven women have come forward to accuse him of violating their personal space (and there surely will be more). None of the women are certain the contact was overtly sexual, but they all say they were left feeling uncomfortable.

Say it ain't so, Joe

Lucy Flores recalls that when Biden spoke in support of her 2014 candidacy for lieutenant governor in Nevada, he approached her from behind, smelled her hair, and kissed the back of her head. White House intern Vail Kohnert-Yount and congressional aide Amy Lappos both report he got too close to them, rubbing noses with one and bumping foreheads with the other, while two other women report that he gave them hugs that lasted too long. Biden has long been an advocate for domestic violence legislation, so the most tone-deaf examples of his behavior were the public physical displays of solidarity with domestic violence survivors—who, not unexpectedly, disapproved of being touched without permission.

Biden still hasn't officially joined the race, and he's already backpedaling furiously. In his initial self-defense, he referred to the "countless handshakes, hugs, expressions of affection, support and comfort" he extended during "many years on the campaign trail and in public life." Almost unheard of was him touting his political work to "end violence against women and ensure women are treated with the equality they deserve."

When that explanation fell flat, Biden issued a crudely produced home video admitting that "I shake hands, I hug people, I grab men and women by the shoulders" but promising to "be more mindful and respectful of people's personal space." In an appearance before a friendly union crowd the next day, he gave some union officials and children on the dais his usual touchy-feely welcome, joking after each hug that he had permission to do so.

To those offended by Biden's conduct, that joke was improper. Flores complained about the fact that he would "make light of something as serious as consent." Lappos added that "a joke about consent from a child adds a new level of creepy and gross." Biden found himself backpedaling again, denying any "intent to make light of anyone's discomfort."

Sexual harassment complaints coming to a workplace near you

We can derive a couple of lessons from Biden's problems. Sexual touching incidents have varied gradients, including who the actor is, how the victim responds, and the type of conduct that's alleged. People look at those issues subjectively, regardless of whether they should. Your colleagues react differently to a clueless veteran who doesn't know any better and to a sexual predator who's constantly on the prowl. Sometimes, there is no rational basis for that distinction. It may be hard to understand why Biden may get a slap on the wrist while Al Franken is exiled to Siberia (or Minnesota—I get confused between the two).

The second takeaway is that men accused of improper behavior must learn how to respond. Bill Clinton received absolution for having sex with a young employee after he gave an unqualified apology to clergy at a prayer breakfast. Biden is releasing qualified apologies in dribs and drabs and is being battered

for each one. Joking about his behavior, claiming that times have changed, and defending himself as a naturally huggy guy is turning out not to be a great defense.

Situations like Biden's will continue to arise at your workplace, early and often. The accused harassers, their accusers, and HR managers are all still learning the best responses to work through these varied, subjective, and difficult situations.

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the portion of his PAGA claim for unpaid wages because Section 558 creates two separate penalties: an unpaid wages penalty and a per-pay-period penalty. The court of appeal disagreed with the retailer's argument and affirmed the trial court's decision in favor of Zakaryan, finding that splitting a PAGA claim is not only impermissible but also inconsistent with applicable labor and arbitration law.

As a threshold matter, the court of appeal noted that splitting a PAGA claim into two claims—one for underpaid wages and another for the per-pay-period penalties the Act incorporates under Section 558—contravenes the long-standing principle that one injury gives rise to only one claim for relief. (This is commonly referred to as the "primary rights" doctrine.) The court explained that when an individual employee brings a single PAGA claim, he is seeking relief for only one injury—the injury to the public that the labor law enforcement agencies are charged to protect.

Next, the court found that splitting a PAGA claim and sending the part seeking underpaid wages to arbitration runs afoul of both labor law and arbitration law. The court presented three reasons why splitting an individual PAGA claim into a claim for unpaid wages and a claim for civil penalties contradicts the very purpose the Act is intended to protect.

First, the PAGA awards the employee a single indivisible penalty that is set to be split between the agency, which receives 75%, and the employee, who receives 25%. Section 558, which defines the civil penalty for violations of the overtime and meal and rest period laws, provides for a per-pay-period penalty of $50 or $100 "in addition to an amount sufficient to recover unpaid wages." Thus, splitting a PAGA claim into a claim for underpaid wages and a claim for the additional per-pay-period penalty is inconsistent with the Act's mandate that the "civil penalty" be allocated between the agency and the employee.

Second, a PAGA claim is, by nature, a representative action in which the employee filing the claim is representing the agency and all other aggrieved employees. As a result, singling out the portion that seeks unpaid wages based on the characterization of those wages as victim-specific relief directly ignores the representative nature of PAGA claims.

Third, the court reasoned that when an employee elects to file a solitary PAGA claim, splitting that claim in two so the individual claim for underpaid wages is sent to arbitration while the remaining claim for civil penalties stays in court renders the employee's initial choice to assert a PAGA claim meaningless.

Lastly, the court of appeal emphasized that splitting an individual PAGA claim into a claim for unpaid wages and a claim for civil penalties expressly contradicts the well-established principle that the arbitration of a PAGA claim is contrary to public policy and that agreements requiring arbitration of PAGA claims are unenforceable. *Arthur Zakaryan v. The Men's Wearhouse, Inc., et al.* (California Court of Appeal, 2nd Appellate District, 3/28/19).

Bottom line

If they're enforceable, arbitration agreements can serve as powerful and efficient dispute resolution tools in the employment context. Employers are continually trying to find ways to force claims to arbitration rather than dealing with costlier and riskier court proceedings. However, as this decision demonstrates, virtually all PAGA claims remain off-limits for inclusion in mandatory arbitration agreements with employees. For all practical purposes, PAGA claims will continue to be exempt from arbitration agreements, and employers will continue to face the risk of such claims in court until there is a legislative change to the PAGA.

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PREEMPTION

When can transportation workers drive away from arbitration?

by Matthew Goodin
Seyfarth Shaw

Labor Code Section 229 provides that wage and hour claims can be brought in court despite an agreement to arbitrate such claims. When it's applicable, the Federal Arbitration Act (FAA) preempts state laws like Section 229 that impose roadblocks to arbitration. In the following case, the employer sought to compel arbitration of the employee's claims by introducing evidence that it was involved in interstate commerce, meaning the FAA applied and the employee should be compelled to arbitrate his wage claims. But that evidence had an unintended effect in the case.

Intrastate or interstate? That is the question

Daniel Nieto was employed for many years as a delivery driver for Fresno Beverage Company, Inc., doing business as Valley Wide Beverage (VWB). After being terminated from his employment, Nieto filed a class action lawsuit against VWB alleging various wage and hour violations under California labor law. VWB responded by filing a petition to compel arbitration, noting Nieto had signed a written arbitration agreement when he was hired. The company argued that he should be ordered to arbitrate the dispute in accordance with the terms of the arbitration agreement because the FAA preempts Labor Code Section 229.

VWB pointed out that the FAA applies to contracts involving "interstate commerce" that contain arbitration clauses. In support of its petition, it offered evidence that as beverage distributor, it contracts with other companies nationally and internationally, buying beer, wine, and other beverages manufactured in other states and countries and delivering those beverages to its customers in California after they are transported to its warehouse.

Nieto opposed the petition, arguing that because he was a delivery truck driver, he was engaged in interstate commerce, and his employment was excluded from the FAA's coverage based on the statutory exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." VWB argued the FAA exemption didn't apply to Nieto because he delivered products only in California and didn't cross state lines.

The trial court found that Nieto's employment involved transporting goods received by VWB from out of state and it therefore involved interstate commerce. The court concluded that because the FAA didn't apply, Labor Code Section 229, which bars arbitration of wage and hour claims, wasn't preempted by the FAA. VWB appealed.

Employer's evidence helps employee dodge arbitration

The court of appeal began by noting that the FAA was enacted to remedy American courts' general hostility toward the enforcement of arbitration agreements. Congress intended the Act to extend to the full reach of its Commerce Clause power. But the FAA does contain an exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The U.S. Supreme Court has interpreted that exception to apply to contracts with workers who are actually engaged in the movement of goods in interstate commerce.

The court of appeal pointed out that a truck driver who is involved in the interstate transportation of physical goods clearly comes within the "transportation worker" exemption. On the other hand, it's equally clear that merely being a delivery driver isn't sufficient on its own because the worker must be engaged in the movement of goods in interstate commerce. So the court had to determine whether Nieto was engaged in interstate commerce despite VWB's contention that he never crossed interstate lines.

Finding no clear precedent, the court of appeal turned to a similar exemption under the Fair Labor Standards Act (FLSA) for workers engaged in interstate commerce. Interpreting that exemption, several courts have concluded that intrastate deliveries of goods are considered part of interstate commerce if they are a continuation of an interstate journey. The court of appeal relied on the very same evidence VWB submitted to establish that the FAA applied to its arbitration provision: It sells beverages manufactured outside California, which are delivered to its warehouses, stored for a short period of time, and then delivered to its customers in California.

The court concluded that evidence established Nieto was engaged in interstate commerce through his participation in the continuation of the movement of interstate goods to their destinations. Because the FAA didn't apply, Labor Code Section 229 governed, and Nieto's wage and hour claims could proceed in court despite the parties' agreement to arbitrate. *Nieto v. Fresno Beverage Co.* (California Court of Appeal, 5th Appellate District, 3/22/19).

Bottom line

Arbitration of employment claims continues to be one of the most hotly contested issues in California. Lawmakers have enacted and continue to try to enact many statutes that are clearly hostile to arbitration. Labor Code Section 229 is clearly such a statute.

If the FAA applies, it preempts state laws like Section 229 that seek to limit or prohibit arbitration of employment claims. Ironically, the employer in this case argued the FAA applied because the arbitration contract involved interstate commerce, but the same evidence established that the employee fell within the "transportation worker" exemption to the FAA.

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DISABILITY DISCRIMINATION

$1.2M jury verdict reversed, but employee's disability discrimination claim revived

by Cathleen S. Yonahara
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A Los Angeles County jury awarded an Albertson's produce clerk $1,241,524 in damages for failure to engage in the interactive process, retaliation, and intentional infliction of emotional distress, and the trial court awarded him $843,333 in attorneys' fees and costs. An appellate court reversed the jury verdict and the award of fees and costs. However, the appellate court also reversed the trial court's dismissal of the produce clerk's disability discrimination claim, which may now proceed to trial.

Facts

David Rubalcaba worked as a produce clerk at Albertson's for 33 years. In October 1992, he took a six-month leave of absence to undergo treatment for a pituitary adenoma, a benign tumor on his pituitary gland. In 2001, he gave his supervisor two doctor's notes stating the tumor would occasionally cause headaches and he shouldn't be required to wear a hat at work.

Rubalcaba testified that his tumor affected his memory and balance, and he claimed he told the store managers about the tumor. His coworkers, supervisors, and managers testified that they didn't notice him having difficulties with either memory or balance. There was no dispute he was an excellent employee.

In June 2013, the produce supervisor, Tavis Grim, instructed Rubalcaba to remove any unauthorized alcohol displays, put the beer in the back room, and "dump the boxes." He specifically told Rubalcaba to remove a Shock Top display made up of three wood crates and several six-packs of beer. Because he was planning to move soon, Rubalcaba decided to take the wood crates home instead of throwing them away. When his shift ended, he added three cardboard boxes to the cart with the wood crates and wheeled the cart out the front door.

B.J. Loyd, a security employee, asked Rubalcaba if he had received permission to take the crates from the store. Rubalcaba explained that he had been told to break down the display and throw out the crates, so he was taking the crates home to use for his upcoming move. He asked whether Loyd wanted the crates back or wanted him to pay for them. Loyd said no, but he asked Rubalcaba to write out a statement and then suspended him pending further investigation.

Loyd interviewed Grim, who denied giving Rubalcaba permission to take the crates home. Grim stated that he instructed Rubalcaba to remove any side stacks that weren't supposed to be in the produce department. He wasn't asked whether he told Rubalcaba to throw away the crates.

Associate relations representative Carol Hansen talked to Loyd about his investigation and recommended to the store manager that Rubalcaba be terminated. On July 6, 2013, Albertson's terminated him.

Appellate court reverses jury verdict and fees award

Rubalcaba filed a lawsuit against Albertson's for disability discrimination in violation of the Fair Employment and Housing Act (FEHA), failure to accommodate his disability, failure to engage in the interactive process, retaliation, and intentional infliction of emotional distress. He sought compensatory damages, punitive damages, and attorneys' fees.

At Albertson's request, the trial court dismissed Rubalcaba's claims for disability discrimination, failure to accommodate, and punitive damages. The remaining claims for failure to engage in the interactive process, retaliation, and intentional infliction of emotional distress were tried by a jury, which returned a verdict of $1,241,524 in damages for Rubalcaba. The court then awarded him $843,333 in attorneys' fees and costs. Albertson's appealed the jury verdict and the award of attorneys' fees, and Rubalcaba appealed the dismissal of three of his claims.

The appellate court reversed the jury verdict against Albertson's for failure to engage in the interactive process, retaliation, and intentional infliction of emotional distress because Rubalcaba failed to identify an accommodation it should have provided, his retaliation claim wasn't supported by substantial evidence, and his emotional distress claim was based on the two failed claims. Because it reversed the jury verdict, the appellate court also reversed the award of attorneys' fees.

Court gives employee second chance at disability discrimination claim

However, Alberston's wasn't handed a complete victory by the appellate court, which found that the trial court erred in dismissing Rubalcaba's disability discrimination claim.

According to Albertson's, Rubalcaba's tumor wasn't a disability within the meaning of the FEHA because it didn't prevent him from performing his job duties or caring for himself. The appellate court disagreed, holding that an employee's ability to perform his job duties without accommodation is *not* a defense to a disability discrimination claim.

Albertson's offered evidence that it terminated Rubalcaba because he took three vendor crates home without permission. But the appellate court found that the following circumstantial evidence was sufficient to permit a jury to reasonably infer the company's asserted reason for the termination was false:

- Rubalcaba believed his manager had instructed him to take down the Shock Top display and throw away the wood crates.
- He reasonably believed the Shock Top crates had little or no value.
- He removed the crates through the front door, in plain sight of the store's security cameras.
- There was no evidence that Albertson's had a policy of terminating employees who took display items they had been instructed to throw away.
- Albertson's didn't conduct a thorough investigation, and the investigator failed to ask Grim whether he had instructed Rubalcaba to discard the crates.
- Hansen, who recommended that Rubalcaba be terminated, couldn't identify any other employee who was terminated for taking something he had been told to discard. She was aware that Rubalcaba has a pituitary tumor.

The appellate court found that based on that evidence, a jury could conclude Albertson's proffered reason for terminating Rubalcaba was false because a rational employer wouldn't terminate a well-regarded long-term employee for taking home three used wood crates, particularly when he had been told to throw the crates away. *Rubalcaba v. Albertson's LLC* (California Court of Appeal, 2nd Appellate District, 3/29/19, unpublished).

Bottom line

This case highlights a few key points for employers. First, California juries tend to be generous in awarding employees large verdicts if they believe an employee was treated unfairly. Second, you should have a good reason for terminating someone, even if he is an at-will employee. You won't be able to defend yourself against a discrimination claim unless you can show you had a legitimate nondiscriminatory business reason for the adverse action. In this case, a well-regarded long-term employee's disability discrimination claim will proceed to trial because the employer's explanation for terminating him simply wasn't credible.

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EMPLOYER LIABILITY

ADA claims don't have a prayer without documentation of need for extended leave

The 9th Circuit Court of Appeal (whose rulings apply to all California employers) recently explained the scope of the "religious organization exception" to the prohibition on religious discrimination under Title VII of the Civil Rights Act of 1964. The court also addressed the limits of the duty to accommodate under the Americans with Disabilities Act (ADA). Let's take a look.

Facts

Ann Garcia began attending religious services at the Estrella Mountain Corps of the Salvation Army in 1999. Three years later, she was hired to work as an assistant to the pastor of the corps. After a change of pastors, she became a social services coordinator, reporting to Pastor Arlene Torres.

In late 2011, Garcia "left the church" but continued to work as a social services coordinator. However, her relationship with Torres began to deteriorate, and in July 2013, a client filed a written complaint against her. When Torres informed her of the complaint, Garcia demanded to see it. Torres refused on the basis that it was confidential.

Three days later, Garcia filed an internal grievance against Torres, claiming she had felt "discriminated against and excluded and isolated" at work ever since she left the church. The undisclosed client complaint continued to bother her, leading her to file religious discrimination and retaliation charges with the Equal Employment Opportunity Commission (EEOC) and the corresponding state antidiscrimination agency.

In October 2013, Garcia went on leave under the Family and Medical Leave Act (FMLA). When her 12 weeks of FMLA leave expired, she requested additional personal leave, explaining she had been advised not to return to a stressful working environment for health reasons. The Salvation Army asked for medical information outlining her work restrictions and an estimated date for her return to work. Garcia provided that information, and her requested leave was granted.

The Salvation Army repeatedly extended Garcia's leave through May 5, 2014. On that date, Garcia informed the Salvation Army that her doctor had cleared her to

return to work without restrictions on May 26. Rather than stating her intention to go back to work, however, she said she wasn't ready to return to the working environment that her doctors had earlier advised against (an environment that had justified her need for personal leave), and she renewed her demand to see the client complaint, asking for it as an "accommodation." The Salvation Army declined to give her the complaint and requested medical documentation justifying her failure to return to work.

When Garcia didn't provide the requested information, the Salvation Army informed her that her continued absence was unexcused and her job was in jeopardy. On June 17, the Salvation Army informed her that it needed medical information to justify her continued leave and her accommodation request. Garcia still didn't provide the requested information or return to work. Eventually, on July 10, 2014, the Salvation Army terminated her employment because of her unexcused absence.

Perhaps not surprisingly, Garcia then filed new charges with the EEOC and the state agency, this time contending the Salvation Army's refusal to disclose the client complaint was an unlawful failure to accommodate her disability.

After she obtained right-to-sue letters from the EEOC, Garcia filed two lawsuits against the Salvation Army: one under Title VII alleging a hostile work environment based on religious discrimination and retaliation against her for filing the internal grievance, and a second under the ADA alleging the discrimination she experienced caused her stress and the Salvation Army failed to accommodate that disability. After

CALIFORNIA NEWS IN BRIEF

San Jose restaurant chain agrees to $1 million wage settlement. The California Labor Commissioner's Office announced in March it had obtained a $1 million settlement from the owners of San Jose restaurant chain Burrito Factory to recover unpaid wages for 239 workers. The settlement is secured by the owners' property assets.

The owners operated the chain of Mexican restaurants at four locations in San Jose. In October 2017, the Labor Commissioner's Office opened an investigation following a Private Attorneys General Act (PAGA) complaint. Investigators found the employer failed to pay workers properly for overtime and split shifts, which resulted in them receiving less than the minimum wage for their work. The chain also failed to provide workers meal breaks as required by law, often paid workers in cash, and didn't keep accurate payroll records.

Employer cited more than $250,000 after worker killed by machine. The California Division of Occupational Safety and Health (Cal/OSHA) has issued more than $250,000 in citations to Aardvark Clay & Supplies, Inc., for its willful failure to properly guard equipment after an employee was fatally entangled in a clay manufacturing machine called a pug mill. Safety guards had been removed from the industrial mixer, and the worker hadn't received training on the machine before the accident.

On September 20, 2018, an employee of the Santa Ana company became caught in the unguarded mixing blades of the machine when he tried to identify why the clay had stopped traveling through the extruder. Cal/OSHA's investigation found that all four of the shop's pug mills had unguarded openings, exposing employees to the moving parts.

Cal/OSHA cites contractor after fatal accident. Cal/OSHA announced in March that it had cited Bay Area contractor West Coast Land and Development, Inc., for serious safety violations after a worker was fatally crushed at a San Rafael construction site on September 18, 2018. Investigators determined the contractor didn't follow regulations when it stacked plywood vertically without securing it.

The accident occurred when two employees of the Concord company were framing and installing a shear wall on the third floor of a house that was under construction. One worker went to get a sheet of plywood from a stack of 26 panels that were leaning vertically against a wall. A foreman found the worker's body 20 minutes later with the stack of plywood on top of him.

DOL cites residential care company for overtime violations. The U.S. Department of Labor (DOL) announced on April 8 that in-home nursing care service employer N Your Home, based in El Centro, will pay $144,080 to 36 employees for violations of the Fair Labor Standards Act's (FLSA) overtime and recordkeeping provisions.

DOL investigators found that N Your Home failed to pay employees overtime when they worked more than 40 hours in a workweek, instead paying them flat day rates ranging from $100 to $115 for each 24-hour shift. In addition, the company failed to keep accurate records of the number of hours employees worked and failed to maintain other payroll records required under the FLSA. ✤

consolidating the two cases, the trial court dismissed them both. Garcia appealed to the 9th Circuit.

Questions on appeal

Two basic questions were presented to the 9th Circuit: Could the Salvation Army be liable for religious discrimination and retaliation under Title VII, and did it unlawfully fail to accommodate Garcia's disability by refusing to give her a copy of the client complaint? The court answered "no" to both questions.

Title VII's religious organization exemption. Title VII generally prohibits employment discrimination based on religion. However, that prohibition doesn't apply to "a religious corporation, association, educational institution, or society." To claim the benefit of the exemption, an organization must establish that its purpose and character are primarily religious.

Applying that test, the court concluded the Salvation Army is clearly a religious organization. Not only is it recognized by the IRS as a "church," but its mission statement is expressly religious, it holds regular religious services, and it offers social services to clients regardless of their religion "to reach new populations and spread the gospel."

Garcia argued the religious organization exemption extends only to hiring and firing decisions, not to her claims of a hostile work environment and retaliation. The court rejected that argument, noting that other courts that have considered it have also rejected it because the religious organization exemption was broadly intended to cover all aspects of employment.

What about the ADA? In contrast to Title VII, the ADA doesn't contain an exemption for religious organizations, so the Salvation Army has the same duty to accommodate an employee's disability as other employers do.

As we noted above, when Garcia was released by her doctor to return to work without restrictions, she told the Salvation Army that she wasn't ready to come back, and she requested the client complaint as an accommodation. The Salvation Army refused to give her the complaint and asked for medical documentation supporting her disability and her requested accommodation. When she didn't provide that information, the Salvation Army terminated her employment. Garcia contended those actions violated its obligation to accommodate her disability under the ADA.

The court began its analysis of Garcia's failure-to-accommodate claim by recounting the well-established case law that an employer has a duty under the ADA to reasonably accommodate an employee's disability unless doing so would impose an undue hardship and that once an accommodation request is made, the employer is required to engage in an "interactive process" with the employee to see if there is a reasonable accommodation for her condition. However, the court explained, those obligations exist only when the employee has a disability.

In this case, Garcia was released to return to work without restrictions, which meant she no longer had a disability and the Salvation Army had no duty to accommodate her. And in the absence of the requested medical information, the employer had no duty to engage in any interactive process with her. Consequently, the court concluded, the Salvation Army didn't violate the ADA when it refused to give her the client complaint or when it discharged her for her unexcused absence. *Garcia v. Salvation Army*, Case No. 16-16827 (9th Circuit, March 18, 2019).

Lessons learned

The court's discussion of Title VII's religious organization exemption is helpful for those organizations, but it's of only academic interest to other employers. The ADA explanation, by contrast, is helpful to all employers because it confirms that the Act's accommodation/interactive process obligation comes to an end when an employee is released to return to work without restrictions even if she wants some further accommodation, unless she provides medical information substantiating her need for the accommodation.

The decision is also instructive because of how the Salvation Army handled what must have been a difficult situation after the employee claimed its leadership discriminated and retaliated against her. Employers sometimes become frustrated when dealing with employees who claim to have a disability and want an accommodation. That frustration may lead them to act improperly. In this case, however, the Salvation Army granted Garcia FMLA leave and her requests for continued personal leave as long as they were supported by her doctors.

Even when Garcia refused to return to work after being released without restrictions and asked for the client complaint as an accommodation, the Salvation Army was careful to request medical information supporting her continued leave and her requested accommodation. The organization also informed her that her ongoing absence was unexcused and that her job was in jeopardy if she didn't provide the requested information. It was only after she continued to refuse to return to work and didn't supply the requested information that the Salvation Army terminated her employment. Its success in defending against her claims demonstrates that patience, clear communication, and thoughtful decision making are a prudent approach to such problems. ✤

DATA BREACHES

Cyberwarfare in the workplace: HR on the front lines

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If you thought cybersecurity was only IT's responsibility, think again. Some of the biggest security threats are from hackers who purposefully target a company's employees and trick them into divulging information or granting access to confidential information. Other threats result from employees' careless mistakes, such as logging on to an unsecured public Wi-Fi hotspot.

When you think about your company's cybersecurity strategy, it is important to remember the human element. More than 50% of all security incidents—i.e., events that compromise the confidentiality, integrity, or availability of an information asset—are caused by people inside the organization. Therefore, HR professionals can play a critical role in thwarting and responding to cybersecurity threats.

Protect your data

Here are helpful measures you can implement to protect your company:

(1) Conduct proper background screening of employees.

(2) Add cybersecurity training to your onboarding process. Educate each new hire about the company's policies regarding the protection of confidential information and the consequences of failing to comply.

(3) Require employees with access to confidential information to sign restrictive covenants (i.e., nondisclosure, nonsolicitation, and noncompetition agreements). Restrict access to confidential information to employees on an "as-needed" basis, and keep records of which employees have access to the data.

(4) Create an inventory of data, and determine proper protections, access, and controls. Data reside not only on servers and at workstations but also on mobile devices, thumb drives, backup systems, and clouds. If you don't know where your information resides, you can't protect it.

(5) Delete data your organization no longer needs to maintain in accordance with applicable data retention laws and regulations.

(6) Work with IT to install encryption and wiping software on all mobile devices, removable media, and electronic devices containing company information that will be used by employees. This step cannot be overlooked since it is likely that an employee will lose a laptop, leave his iPhone on a table, or have his tablet stolen.

(7) Consider instituting a formal system of monitoring the daily activities of employees who have access to data that can be monetized (e.g., financial accounts, health information, and Social Security, driver's license, credit card, and bank account numbers).

(8) Hold third parties, vendors, and contractors to the same strict data privacy controls you implement in your organization. Contractors are often targeted by cybercriminals, and their data can be used to infiltrate the target's system. Ensure vendor agreements include language that requires vendors to report potential incidents, cooperate in investigating and resolving security incidents, preserve relevant evidence, allow periodic audits, and maintain relevant insurance.

(9) Adopt security policies that address the Health Insurance Portability and Accountability Act (HIPAA) and comply with national standards. Ensure that your employee handbook has policies that address the following issues:

- The duty of confidentiality;
- Acceptable social media use;
- The duty to report theft or loss of data;
- Ethical conduct;
- An employee bringing his own device;
- Remote access;
- Privacy;
- Wearable technology;
- E-mail, Internet, and computer use;
- Document retention;
- The return of corporate property;
- The obligation to protect third-party (e.g., customer) information; and
- Security measures (e.g., encryption, access limits, and physical locks).

(10) Require complex passwords—meaning at least eight characters with uppercase and lowercase letters, numbers, and special characters. According to a 2016 study by Experian, 63% of confirmed data breaches involve weak, default, or stolen passwords. Work with IT to ensure that employees change their passwords at least four times per year and are not able to use previous passwords.

(11) Establish a mandatory cybersecurity training program to educate your employees on current cybersecurity attack methods, proper handling and protection of company and third-party data, and the consequences of violating company security policies. For example, train employees on how to recognize "phishing" and other forms of social engineering. Social engineering is designed to trick someone into doing something they would not otherwise do. The most successful phishing attempts involve a form of social engineering in which a message

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(typically an e-mail) with a malicious attachment or link is sent to a victim with the intent of tricking the recipient into opening an attachment or divulging his password. Generally, the user clicks, malware loads, a foothold is gained, and the phisher dictates what happens next. Phishing shows the importance of mandatory, frequent, and repeated training.

(12) Reward employees for spotting intrusion attempts and immediately notifying IT. Encourage self-reporting of breaches.

(13) Create a cybersecurity incident response plan that includes an incident response team. The team should be composed of individuals from key departments, including IT, legal and compliance, HR, risk management, communications/public relations, security, operations, finance, relevant executives, outside legal counsel, and cybersecurity vendors.

(14) Review state and industry regulations on data security and the protection of customers' financial, medical, and personal data.

(15) Use offboarding procedures to minimize the risk of data leakage (e.g., immediately cut off access to your system and change passwords before an employee is notified of his dismissal). Utilize exit interviews with departing employees to retrieve company data from electronic devices, remind them of their contractual obligations, and deter wrongdoing.

(16) Consider investing in cyber liability insurance. Evaluate first-party insurance to cover the company's direct losses from a data breach and third-party insurance to cover certain damages suffered by customers.

(17) Treat employees with dignity and respect. Studies show that nearly 60% of fired employees steal important corporate data on their way out the door. A disgruntled employee can be the most serious vulnerability in your data protection program.

(18) Hold everyone in the organization accountable for cybersecurity compliance. After all, it takes only one untrained person to cause a breach!

Bottom line

An effective cybersecurity program requires participation and buy-in from various departments in an organization, and HR is a critical component of that effort. It's no longer a matter of fearing "if" your organization will experience a data breach, but "when." ✤