CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

BULLETIN

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RECENT EMPLOYMENT LAW DECISIONS

CALIFORNIA SUPREME COURT

Court May Use Percentage Method to Calculate Common Fund Fee Award

Laffitte v. Robert Half International Inc.

"A class action employment lawsuit settled before trial for $19 million, with the agreement that no more than a third of that recovery would go to class counsel as attorney fees. In seeking the trial court's approval of the settlement, class counsel sought the maximum fee amount, $6,333,333.33. After

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MESSAGE FROM THE CHAIR

By Jean Hyams, CELA Chair

Jean Hyams, CELA Chair

On behalf of the CELA Board, I invite everyone to join us in Costa Mesa later this month for our 29th annual conference. For educational value and incomparable community, the CELA Conference is not to be missed! This year, we are honored to welcome Senator Hannah-Beth Jackson, the author of California's Fair Pay Act, as our luncheon keynote on Friday, September 23rd. That same day, the Joe Posner Award will be presented to Bernard Alexander for his many contributions to CELA as a colleague, board member, past President and the driving force behind the CELA Trial College. Saturday, September 24th, will bring us

(Cont'd on Page 3, **FROM THE CHAIR**)

LEGISLATIVE UPDATE

By Mariko Yoshihara

CELA-Backed Bills Advance to Governor's Desk

August is always the most active month of the year as legislators vote on hundreds of bills, rushing to meet the August 31st deadline to send all bills to the Governor for final approval. The Legislature sent nearly 800 measures to the Governor in just the last few weeks. The Governor will have until September 30th to sign or veto all bills passed by the Legislature this year.

Worker rights advocates scored several major victories this month, including the Legislature's approval of SB 1066, which would extend greater overtime protections to farm workers, and SB 654, one of CELA's co-sponsored bills that would provide six weeks of job-protected parental leave for up to 2.7 million workers who are not covered under the California

(Cont'd on Page 4, **LEGISLATIVE**)

DECISIONS (From Page 1)

considering information from class counsel on the hours they had worked on the case, applicable hourly fees, the course of the pretrial litigation, and the potential recovery and litigation risks involved in the case, the trial court—over the objection of one class member—approved the settlement and awarded counsel the requested fee.

The objecting class member contends the trial court's award of an attorney fee calculated as a percentage of the settlement amount violates a holding of this court in *Serrano v. Priest* (1977) 20 Cal.3d 25, 141 Cal.Rptr. 315, 569 P.2d 1303 (*Serrano III*), to the effect that every fee award must be calculated on the basis of time spent by the attorney or attorneys on the case. (See *Serrano III,* at p. 48, fn. 23, 141 Cal.Rptr. 315, 569 P.2d 1303.) We disagree. Our discussion in *Serrano III* of how a reasonable attorney fee is calculated was made in connection with an award under the "private attorney general" doctrine. (See id. at pp. 43–47, 141 Cal.Rptr. 315, 569 P.2d 1303.) We clarify today that when an attorney fee is awarded out of a common fund preserved or recovered by means of litigation (see *Serrano III*, *supra*, at p. 35, 141 Cal.Rptr. 315, 569 P.2d 1303), the award is not per se unreasonable merely because it is calculated as a percentage of the common fund."

The Court disapproved *Jutkowitz v. Bourns* (1981) 118 Cal.App.3d 102, 173 Cal.Rptr. 248.

Law Office of Lawrence W. Schonbrun and Lawrence W. Schonbrun, for Plaintiff and Appellant.

Law Offices of Kevin T. Barnes, Kevin T. Barnes, Gregg Lander, Los Angeles; Law Offices of Joseph Antonelli, Joseph Antonelli, Janelle Carney, Chino Hills; Hilaire McGriff and Mika M. Hilaire, Los Angeles, for Plaintiffs and Respondents.

Paul Hastings, Judith M. Kline, Los Angeles, and M. Kirby C. Wilcox, San Francisco, for Defendants and Respondents.

Cal. 8/11/16 opinion by Werdegar, Cantil-Sakauye, Chin, Corrigan, Liu, Cuéllar, and Kruger concurring; concurring opinion by Liu; ___ P.3d ___, 205 Cal.Rptr.3d 555, 2016 WL 4238619.

Employers Must Pay Wages Promptly to Employees Who Quit or Retire

McLEAN v. STATE of CAL.

"Under Labor Code sections 202 and 203, an employer must make prompt payment of the final wages owed to an employee who "quits" his or her employment, or else pay statutory penalties. In this case, plaintiff Janis S. McLean, a retired deputy attorney general, filed suit against the State of California on behalf of herself and a class of former state employees who, having resigned or retired, did not receive their final wages within the time periods set out in the statute. We consider two questions arising from McLean's suit. First, do sections 202 and 203 apply when employees retire? Second, is McLean's suit subject to dismissal on the ground that it was filed against the State

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FROM THE CHAIR (From Page 1)

together to hear words of wisdom and encouragement from José Padilla, Executive Director of California Rural Legal Assistance, which celebrates its 75th anniversary this year. Registration is still open for the conference and the full day Wage and Hour Boot Camp on Thursday, September 22nd.

While most of this message will focus on lessons from 19th century workers' rights history, it is wonderful to note that CELA has stepped firmly into the 21st Century with this edition of the Bulletin. Our new look and features come thanks to the creativity and vision of our Administrative Director, Christina Krasomil, staffer Alexandra Menna, Board member Laura Horton, and Bulletin Editor Joan Herrington. Thank you!

Auspiciously, this edition of the CELA Bulletin will arrive soon after Labor Day. As we return to work reinvigorated by the long weekend and ready to redouble our efforts to protect and advance the rights of workers, it's good to remember that the origin story of this holiday is not written in dainty proclamations, but in blood and struggle.

Strikers Achieved a Complete Blockade of Freight and Passenger Cars

In the year 1894, George Pullman, owner of the Pullman Company, maker of railway sleeping cars slashed salaries for many of his workers by as much as forty percent. As workers suffered cuts, salaries for management remained stable. Indeed, according to a contemporaneous account by local minister and activist Rev. William Carwardine, the company was actually increasing its workforce to handle new orders at the time workers' wages were gutted. From his vantage point, the company was using a recent recession to squeeze out more in profit.

The pressure on workers did not come only in the form of lowered wages. George Pullman was the architect of the most famous, if not infamous, "company town" named, not surprisingly, Pullman, Illinois. In Pullman's town, the company controlled not just employee wages, but also collected their rent and utilities. It was commonplace for the factory workers who built the famous Pullman cars to live in a continuous state of indebtedness to the company that employed them.

The breaking point came on May 11, 1894, when 4,000 American Railway Union workers began a strike and boycott that triggered a nationwide transportation nightmare for freight and passenger traffic. At its peak, the strike involved about 250,000 workers in more than 25 states. Workers rose up defiantly in many cities; President Grover Cleveland called in army troops to break the strike, and more than a dozen people were killed in the struggle. This is just one of hundreds of times that union workers have paid for rights in blood. Six weeks later, on June 28, Congress, at the urging of Cleveland and in an overture to the labor movement, named the first Monday in September "Labor Day."

Deputies Trying to Move an Engine and Car During the Pullman Strike

When I first thought to focus this column on Labor Day, I had planned to highlight the huge role that organized labor has played and continues to play in securing rights and benefits for workers. Like the 40-hour workweek, the end to child labor, and the weekend, Labor Day was brought to us by the organized effort of union workers.

Then (in the surprising context of Sunday service at my local Unitarian Universalist congregation) I learned that woven into the history of the Pullman Strike is a story about the supporting role lawyers can play to advance the cause of workers. It seems that, as the strike went on, the railroad companies arranged to attach mail cars to every train with a Pullman car, so they could call in the federal troops when the strikers "impeded the U.S. mail" by blocking the trains. This ultimately served as justification to imprison the union leader, Eugene V. Debs, on a conspiracy charge.

Watching this chicanery in action was a young lawyer who worked in the general counsel's office of the Chicago & Northwestern Railway Company. Appalled by what he saw and moved by the resolve of the workers, the lawyer quit his job and marched over to the prison to offer his services to Debs. The lawyer's name was Clarence Darrow, who later in his life became even more famous for his defense of the teaching of evolution in the Scopes trial. But in 1894, the Railway Strike changed the trajectory of Darrow's early career and he remained involved in workers' rights during the critical period of labor history that saw the end of child labor and the beginning of occupational safety standards and a regulated work week.

Though many of us represent clients whose legal claims and work lives seem far removed from the world of strikes, collective bargaining and organized workforces, I hope that every CELA member can embrace Darrow and Debs as our activist ancestors. We are also lucky to count as CELA members

(Cont'd on Page 4, **FROM THE CHAIR**)

LEGISLATIVE (From Page 1)

Family Rights Act (you can read my Sac Bee op-ed on parental leave here). SB 654 would extend job-protected parental leave to employees like Charles Anderson (see photo) who work at smaller workplaces with 20-49 employees.

Charles Anderson Was Denied Paternity Leave After The Birth Of His Baby Girl Because His Employer Was Too Small To Be Covered By The California Family Rights Act. Sb 654 Would Extend Job-Protected Parental Leave To Employees At Smaller Workplaces With 20-49 Employees.

Other CELA-backed bills that were approved this month were:

SB 1241, which would allow the employee to void any choice-of-venue or choice-of-law provision in an employment agreement that would force the employee to resolve a dispute outside of California or under another state's laws;

SB 1078, which would limit the ability of arbitrators to take multiple cases from one party during the pendency of an arbitration and would require disclosures of solicitations by private arbitration companies; and

AB 1676, which would which would clarify that an employee's prior salary cannot be the basis for any disparity in compensation when compared to a co-worker of the opposite sex who is doing substantially similar work.

CELA also supported several other measures that are now heading to the governor's desk for approval:

SB 1015 – would make overtime protections permanent for domestic workers in California.

AB 1843 – would prohibit an employer from asking an applicant for employment to disclose, or from utilizing as a factor in determining any condition of employment, information concerning juvenile criminal records.

SB 1063 – would prohibit an employer from paying any of its employees at wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work.

AB 1978 – would establish various requirements for the janitorial industry, including a registration requirement and protections against workplace sexual violence and harassment.

CELA Chair, Jean Hyams and CELA Policy Director, Mariko Yoshihara, presenting the Stronger California Women's Economic Security Agenda on Women's Equality Day.

AB 2025 – would help increase education and awareness of basic labor laws for nail salon licensees and establishment owners.

SB 1001 – would prohibit an employer from requesting more or different employment authorization documents than are required under federal law, refusing to honor documents tendered, or reinvestigating or reverifying an incumbent employee's authorization to work. The bill would establish a civil penalty of not more than $10,000.

Thank you to all the CELA members who helped with our legislative efforts this year! To read more about our legislative agenda and to see a complete list of bills we are tracking, visit www.cela.org/legislative or email mariko@cela.org.

Mariko Yoshihara, CELA Legislative Counsel & Policy Director

♦ ♦ ♦

FROM THE CHAIR (From Page 3)

many union lawyers who can claim a direct line of descent as they work day in and day out to safeguard the collective rights of workers.

This year, the CELA Board chartered a task force to look closely at how a deeper and stronger relationship with labor and union attorneys can advance CELA's mission to protect and expand the legal rights of working women and men through litigation, education and advocacy. The task force, which held its first meeting in August, includes board members, CELA members who represent unions, CELA's Administrative Director Christina Krasomil, and CELA's Legislative Counsel & Political Director Mariko Yoshihara. Our work on the task force is just beginning and anyone who has ideas to contribute is welcome to contact me.

As we move past Labor Day, let us all remember that we stand on the shoulders of union workers and labor unions in the struggle for the rights of workers. Within CELA, let us make sure that solidarity is written in the present tense.

of California, rather than the state agency for which she had worked?

We conclude, as the Court of Appeal had held, that Labor Code sections 202 and 203 (section 202 & section 203) apply when employees retire from their employment. We also conclude that McLean's decision to name the State of California as a defendant rather than the Department of Justice is not a basis for dismissing her suit. We accordingly affirm the judgment of the Court of Appeal."

Kershaw, Cutter & Ratinoff, William A. Kershaw, Lyle W. Cook, Stuart C. Talley and Ian J. Barlow for Plaintiff and Appellant. Kamala D. Harris, Attorney General, Susan Slager, Acting Assistant Attorney General, Alicia Fowler and Chris Knudsen, Assistant Attorneys General, Fiel D. Tigno, William T. Darden and Aimee Feinberg, Deputy Attorneys General, for Defendants and Respondents.

Cal. 8/18/16 opinion by Kruger, Cantil-Sakauye, Werdegar, Chin, Corrigan, Liu, and Cuéllar concurring; ___ P.3d ___, 2016 WL 4395672.

CALIFORNIA COURTS OF APPEAL

Employer May Owe Duty to Accommodate Employee Associated with Disabled Person

CASTRO-RAMIREZ v. DEPENDABLE HIGHWAY EXPRESS, INC.

"Plaintiff Luis Castro-Ramirez sued his former employer, Dependable Highway Express, Inc. (DHE), alleging causes of action for disability discrimination, failure to prevent discrimination, and retaliation under the Fair Employment and Housing Act (FEHA or the Act) (Gov. Code, § 12900 et seq.), as well as wrongful termination in violation of public policy. (He alleged other claims not pursued on appeal.) Plaintiff's son requires daily dialysis, and according to the evidence, plaintiff must be the one to administer the dialysis. For several years, plaintiff's supervisors scheduled him so that he could be home at night for his son's dialysis. That schedule changed when a new supervisor took over and ultimately terminated plaintiff for refusing to work a shift that did not permit him to be home in time for his son's dialysis. The trial court granted defendant's motion for summary judgment and denied plaintiff's motion to tax costs.

We reverse the judgment and the order denying the motion to tax costs. Plaintiff has demonstrated triable issues of material fact on his causes of action for associational disability discrimination, failure to prevent discrimination, retaliation, and wrongful termination in violation of public policy."

The court reasoned that even though Plaintiff had abandoned his failure to accommodate claim, "[W]e find accommodation relevant as to plaintiff's discrimination cause of action. … Association with a physically disabled person appears to be itself a disability under FEHA. Like the many other definitions set forth in section 12926, this definition of a physical disability applies "in connection with unlawful practices [under FEHA], unless a different meaning clearly appears from the context." (§ 12926.) Accordingly, when section 12940, subdivision (m) requires employers to reasonably accommodate "the known physical … disability of an applicant or employee," read in conjunction with other relevant provisions, subdivision (m) may reasonably be interpreted to require accommodation based on the employee's association with a physically disabled person."

Employees' Legal Advocates and A. Jacob Nalbandyan for Plaintiff and Appellant.

Gordon & Rees, Don Willenburg, Mark S. Posard and Jennifer M. Lynch for Defendant and Respondent.

Second District, Division 8, 8/29/16 decision by Flier, Rubin concurring, Grimes dissenting based on ADA case law which the majority found inapplicable; ___ Cal.Rptr.3d ___; 2016 WL 4506089.

Arbitration Provision in Handbook Was Unenforceable Where Handbook Expressly Stated It Did Not Form A Contract

ESPARZA v. SAND & SEA, INC.

"The question in this case is whether an arbitration provision in an employee handbook is legally enforceable. The employee handbook containing the arbitration provision included a welcome letter as the first page, which stated, "[T]his handbook is not intended to be a contract (express or implied), nor is it intended to otherwise create any legally enforceable obligations on the part of the Company or its employees." The employee signed a form acknowledging she had received the handbook, which mentioned the arbitration provision as one of the "policies, practices, and procedures" of the company. The acknowledgement form did not state that the employee agreed to the arbitration provision, and expressly recognized that the employee had not read the handbook at the time she signed the form. Under these circumstances, we find that the arbitration provision in the employee handbook did not create an enforceable agreement to arbitrate. We therefore affirm the trial court's denial of the employer's petition to compel arbitration."

Telep Law, Desiree Telep, Irvine, Tina Dao for Plaintiff and Respondent.
Greenberg Traurig, Mark D. Kemple, Karin L. Bohmholdt and Nicholas A. Insogna, Los Angeles, for Defendants and Appel-

(Cont'd on Page 6, **DECISIONS**)

lants.

Second District, Division 4, 8/22/16 decision by Collins, Epstein and Willhite concurring; ___ Cal. Rptr. 3d ___, 2016 WL 4434737.

Statutory Amendment Limiting Public Employee Pension Spiking Is Constitutional

MARIN ASSN. OF PUB. EMP. v. MARIN CO. EMP. RETIREMENT ASSN.

"The practice known as "pension spiking," by which public employees use various stratagems and ploys to inflate their income and retirement benefits, has long drawn public ire and legislative chagrin. Effective January 1, 2013, the Legislature amended Government Code section 31461, a provision of the County Employees Retirement Law, with the aim of curtailing pension spiking by excluding specified items from the calculation of retirement income. A number of individuals currently employed by various governmental entities in the County of Marin, together with a number of organizations representing current county employees, brought suit to halt implementation of the revised formula. The trial court concluded application of the new formula to current employees did not amount to an unconstitutional impairment of the employees' contracts, and sustained the pension authority's general demurrer without leave to amend.

After an extensive independent review, we reach the same conclusion and affirm, holding that the Legislature did not act impermissibly by amending section 31461 to exclude specified items and categories of compensation from the calculation of pensions for current employees. As will be shown, while a public employee does have a "vested right" to a pension, that right is only to a "reasonable" pension—not an immutable entitlement to the most optimal formula of calculating the pension. And the Legislature may, prior to the employee's retirement, alter the formula, thereby reducing the anticipated pension. So long as the Legislature's modifications do not deprive the employee of a "reasonable" pension, there is no constitutional violation. Here, the Legislature did not forbid the employer from providing the specified items to an employee as compensation, only the purely prospective inclusion of those items in the computation of the employee's pension. Neither the statutory change, nor the implementation of that change by the county pension agency, amounts to an impairment of the employee's receipt of a "reasonable" pension upon retirement."

Attorneys for Plaintiffs and Appellants Marin Association of Public Employees; Catherine Hall: Leonard Carder, Peter Warren Saltzman, Arthur Wei–Wei Liou; Attorneys for Plaintiff and Appellant Service Employees International Union Local 1021: Weinberg, Roger & Rosenfeld, Vincent A. Harrington, Jr., Kerianne Ruth Steele, Anne I. Yen, Alameda, Sean Daniel Graham, Caren Pamela Spencer, Alameda; Attorneys for Plaintiffs and Appellants Marin County Fire Department Firefighters' Association; Marin County Management Employees Association; Joel Chandler; and Angelo Sacheli: Carroll, Burdick & McDonough, Gregg McLean Adam, Amber Lynn Griffiths; Messing Adam & Jasmine, Gregg McLean Adam, Jonathan Dennis Yank; Attorneys for Defendants and Respondents Marin County Employees' Retirement Association; Board of Retirement of the Marin County Employees' Retirement Association: Manatt, Phelps & Phillips, Ashley Kathleen Dunning, Kelly L. Knudson, San Francisco, Benjamin G. Shatz, Michael V. Toumanoff, Los Angeles; Nossaman, Ashley Kathleen Dunning, San Francisco, Michael V. Toumanoff, Los Angeles; Attorneys for Intervenor and Respondent: Kamala D. Harris, Attorney General, Douglas J. Woods, Assistant Attorney General, Constance L. LeLouis, Rei R. Onishi, Anthony P. O'Brien, Deputy Attorneys General.

First District, Division 2, 8/17/16 decision by Richman, Kline and Miller concurring; ___ Cal. Rptr.3d ___, 2016 WL 4379316.

ERISA Did Not Preempt Health Care Provider's Action Against Employee Welfare Benefit Plan

MORRIS B. SILVER M.D., INC. v. INTERNAT. LONGSHORE ETC.

"Morris B. Silver M.D., Inc. (Silver) sued the International Longshore and Warehouse Union—Pacific Maritime Association Welfare Plan (Plan) to recover payment for health care services provided to Plan policyholders. Silver's action was dismissed on the ground all of his state law causes of action were preempted by the federal Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.) (ERISA). We reverse the order dismissing the lawsuit and remand for further proceedings as set forth in this opinion."

The court reasoned, "The gravamen of Silver's causes of action for breach of oral contract, quantum meruit and promissory estoppel is that the Plan orally agreed to pay Silver for health care services in the specified amounts, authorized the provision of those services and then failed to pay as agreed. Although Silver has not asserted a cause of action for negligent misrepresentation, its claims are indistinguishable from those found not to be preempted by *Memorial Hospital* [*Memorial Hosp. System v. Northbrook Life Ins. Co.* (5th Cir. 1990) 904 F.2d 236] and those courts that have applied the two-part *Memorial Hospital* test. Like those cases, Silver's three contract/quasi-contract causes of action do not address an area of exclusive federal concern. Silver is not, as the Plan argues, seeking compensation for the Plan's decisions to deny coverage under the terms of an ERISA plan; his alleged right to reimbursement does not depend on the Plan's terms.

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Rather, the claims are predicated on a garden-variety failure to make payment as promised for services rendered. To be sure, the claims would not exist but for an ERISA plan and are predicated on somebody's interpretation of the plan. But the fact an ERISA plan is an initial step in the causation chain, without more, is too remote of a relationship with the covered plan to support a finding of preemption. (Cf. D*ishman v. UNUM Life Ins. Co. of America, supra,* 269 F.3d at p. 984 ["Obviously, at some level Dishman's tort claim relates to the plan. That cannot be denied. But that cannot be the end of the analysis, either, for as we know, 'pre-emption does not occur … if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability.' "].)"

" … Silver's claim for interference with contractual relations is predicated on the EOB the Plan sent to policyholders stating the "Total Patient Responsibility" for the amount charged by Silver was zero. … Although Silver acknowledges the Plan sent policyholders EOBs in conformity with its obligations under ERISA, it argues its claim is based upon the Plan's extraneous tortious conduct of improperly directing policyholders in the EOB to disregard their financial obligations to Silver.

Silver's argument to the contrary notwithstanding, the Plan's allegedly tortious conduct cannot be separated from the Plan's discharge of its obligations to notify participants of an adverse determination under ERISA. … Whether use of the form essentially constituted a tort—a question with wide-ranging implications for any plan using a similar form—is precisely the kind of decision that conflict preemption is intended to eliminate: one that could result in inconsistent directives among states and increased administrative and financial costs of complying with ERISA. Applying *Memorial Hospital*, the cause of action addresses an area of exclusive federal concern —the manner in which adverse determinations are communicated to plan participants—and directly affects the relationship between the plan and participants. Accordingly, the cause of action is preempted. On remand the trial court should enter a new order sustaining the Plan's demurrer to Silver's first cause of action as preempted by ERISA."

Law Offices of Jonathan A. Stieglitz and Jonathan A. Stieglitz, Poway, for Plaintiff and Appellant.

Seyfarth Shaw, D. Ward Kallstrom, Kevin J. Lesinski, Jonathan A. Braunstein and Eden Anderson, San Francisco; Leonard Carder, Christine S. Hwang and Andrew J. Ziaja, San Francisco, for Defendant and Respondent.

Second District, Division 7, 8/22/16 decision by Perluss, Zelon and Segal concurring; ___ Cal. Rptr. 3d ___, 2016 WL 4434735.

Sheriff's Deputies Exempt from Need for Permit to Carry Concealed Gun While Off-Duty

STANISLAUS COUNTY DEPUTY SHERIFFS' ASSN. v. COUNTY OF STANISLAUS

"The Stanislaus County Deputy Sheriffs' Association (appellant), on behalf of certain custodial deputies designated as a "peace officer" by Penal Code section 830.1, subdivision (c) (custodial deputies), filed this action in the trial court seeking, among other relief, a judicial declaration that such custodial deputies may lawfully carry concealed firearms while off duty without the necessity of obtaining a permit to carry a concealed weapon. The current practice of Stanislaus County, Stanislaus County Sheriff's Department, the Chief Executive Officer of Stanislaus County and the Stanislaus County Sheriff (collectively respondents) is to recognize that a custodial deputy may carry a concealed firearm while off duty only if that deputy has first obtained a license or a permit to carry a concealed weapon. Appellant maintains that respondents' practice does not comport with section 25450, which categorically exempts all peace officers listed in section 830.1 from the prohibition against carrying a concealed weapon. As we explain below, appellant is correct. Accordingly, we reverse the contrary conclusion and judgment of the trial court and remand the matter back to the trial court with instructions to enter declaratory relief in appellant's favor consistent with this opinion."

Goyette & Associates and Richard P. Fisher for Petitioner and Appellant.

Jones & Mayer, Martin J. Mayer and James R. Touchstone, Fullerton, for Respondents.

Fifth District, 8/11/16 decision by Kane; ___ Cal. Rptr.3d ___, 2016 WL 4249730.

"Death-Knell" Doctrine Did Not Apply to Private and PAGA Wage Claims

YOUNG v. REMX, INC.

"In this wage and hour lawsuit, plaintiff Vanessa Young appeals from the trial court's order compelling arbitration of her individual claims, dismissing her class claims, bifurcating her representative claim pursuant to the Labor Code Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.), and staying the PAGA claim pending completion of the arbitration on her individual claims. We conclude the order is nonappealable because we reject appellant's argument that the "death knell" doctrine applies in these circumstances. The appeal is dismissed."

" … This doctrine provides that an "order which allows a plain-

(Cont'd on Page 8, **DECISIONS**)

tiff to pursue individual claims, but prevents the plaintiff from maintaining the claims as a class action, … is immediately appealable because it effectively r[ings] the death knell for the class claims."

We conclude plaintiff's appeal does not fall within the death knell doctrine. As an initial matter, in light of the remaining representative PAGA claim, it appears the order does not "amount[ ] to a de facto final judgment for absent plaintiffs." (*Miranda, supra*, 241 Cal.App.4th at p. 200.) Our Supreme Court has "emphasized that orders that only limit the scope of a class or the number of claims available to it are not similarly tantamount to dismissal and do not qualify for immediate appeal under the death knell doctrine; only an order that entirely terminates class claims is appealable." (I*n re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757–758 (*In re Baycol Cases*).) Although the only class claim has been dismissed, the representative PAGA claim remains and plaintiff does not contend there are any putative class members who are not also aggrieved employees for purposes of the PAGA claim. Accordingly, the order does not appear to constitute a de facto final judgment for absent plaintiffs—the putative class members/aggrieved employees under PAGA—because their PAGA claims remain pending.

In any event, because of the remaining PAGA claim, plaintiff has not established the second rationale for the death knell doctrine: that "the persistence of viable but perhaps *de minimis* individual plaintiff claims creates a risk no formal final judgment will ever be entered." (*Miranda, supra*, at p. 200.)"

" … The focus of the death knell doctrine is whether plaintiff has a sufficient incentive to proceed and here, as in *Munoz*, the PAGA claim provides that incentive. Plaintiff contends the arbitrator may rule against her on her individual claim and her "incentive to pursue PAGA claims [will be] exterminated if the arbitrator decides that [plaintiff's] individual claims have no merit" in light of the narrow scope of review for an arbitration award. Our inquiry, however, looks at the impact of the appealed-from interlocutory order. That a *possible* outcome in a *subsequent* order might eliminate plaintiff's incentive to pursue the PAGA claim does not render the current order appealable." (Emphasis in original.)

Setareh Law Group, Shaun Setareh, Tuvia Korobkin, and Farrah Grant, for Plaintiff and Appellant.

Seyfarth Shaw, Timothy L. Hix, Andrew M. McNaught, Daniel C. Whang, and Tamara Fisher, for Defendant and Respondent.

First District, Division 5, 8/17/16 decision by Simons, Jones and Needham concurring; ___ Cal. Rptr. 3d ___, 2016 WL 4386166.

NINTH CIRCUIT

Act of Removal Does Not Waive Tribal Immunity

BODI v. SHINGLE SPRINGS BAND OF MIWOK

"This appeal requires us to decide whether a federally recognized Indian tribe waives its sovereign immunity from suit by exercising its right to remove to federal court a case filed against it in state court. This question has divided the district courts, and it has been reached by only one of our sister circuits, which held that removal does not, standing alone, waive tribal immunity. See *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1206–08 (11th Cir. 2012). We now follow the lead of the Eleventh Circuit and hold that the act of removal does not express the clear and unequivocal waiver that is required for a tribe to relinquish its immunity from suit. Because the district court held otherwise, we reverse."

Christopher F. Wohl (argued), Palmer Kazanjian Wohl Hodson LLP, Sacramento, California; Paula Yost, Sandra R. McCandless and Ian Barker, Dentons US LLP, San Francisco, California; for Defendants-Appellants.

David Nied (argued) and Wendy L. Hillger, Ad Astra Law Group, LLP, San Francisco, California, for Plaintiff-Appellee.

Ninth Cir. 8/8/16 decision by Friedland, McKeown and Sack concurring; ___ F.3d. ___ (2016); 2016 WL 4183518.

Alleged Retaliation Did Not Convert Action into a "Major Dispute" Under the RLA.

BROTHERHOOD OF MAINT. OF WAY EMPLOYEES DIV. v. BNSF RAILWAY, INC.

"In this appeal, we decide whether the test for distinguishing between major and minor labor disputes pursuant to the Railway Labor Act (RLA), 45 U.S.C. §§ 151–188, applies when a labor union alleges that an employer illegally retaliated against an employee attempting to file grievances. We hold that the test does apply, and that the district court correctly categorized the dispute in this case as minor, and subject to mandatory arbitration."

" … Minor disputes are those "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153(i); see *ConRail*, 491 U.S. at 303, 109 S.Ct. 2477. They are "attempts to enforce existing contractual obligations and rights." *Ass'n of Flight Attendants*, 567 F.3d at 1047. "Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employer's claims are frivolous or

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obviously insubstantial, the dispute is major." *ConRail,* 491 U.S. at 307, 109 S.Ct. 2477. The *ConRail* test "looks to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action. The distinguishing feature of such a case is that the dispute may be conclusively resolved by interpreting the existing agreement." Id. at 305, 109 S.Ct. 2477. The burden on the employer to show that its position is "arguably justified" by the agreement is "relatively light." Id. at 306–07, 109 S.Ct. 2477. "When in doubt, courts construe disputes as minor." A*ss'n of Flight Attendants*, 567 F.3d at 1047.

BMWED attempts to sidestep the *ConRail* framework entirely by claiming that the distinction between minor and major disputes does not apply to the case before us. We disagree. The union's contention is that the dispute is neither a dispute over the enforcement of the CBA nor the negotiation of new rights, but is instead a dispute over whether BNSF's alleged retaliation against Tindell undermines the purpose of the RLA and the grievance process. This is a distinction without a difference. BNSF has asserted a "contractual right to take the contested action." *ConRail*, 491 U.S. at 307, 109 S.Ct. 2477. BMWED, in response, contends that BNSF's reliance on the contract is a pretext for illegal retaliation. This is a dispute that fits squarely within the major/minor framework from the RLA and *ConRail*. BMWED's defense to the contractual language is tantamount to an argument that BNSF's contractual position is "frivolous" or in "bad faith," a concept incorporated into the *ConRail* test. At bottom, BMWED's claim is that BNSF's contractual position is not "arguably justified" because it is really a cover for illegal retaliation. BMWED cannot merely invoke the general concept of retaliation or corporate action that discourages the filing of grievances in order to evade mandatory arbitration."

Richard S. Edelman (argued) and Matthew D. Watts, Mooney, Green, Saindon, Murphy & Welch, P.C., Washington, D.C., for Plaintiff–Appellant.

David M. Pryor (argued) and Andrea L. Hyatt, BNSF Railway Company, Forth Worth, Texas; Donald J. Munro, Jones Day, Washington, D.C.; for Defendant–Appellee.

Ninth Cir., 8/24/16 decision by Smith; Nguyen and Wilken concurring; ___ F.3d. ___ (2016); 2016 WL 4446116.

Summary Judgment for ERISA Plan Administrator on Claim for Denial of Long Term Disability Benefits Reversed

DEMER v. IBM CORP. LTD PLAN

"Plaintiff-Appellant Daniel G. Demer filed suit, pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), against Defendants-Appellees IBM Corporation LTD Plan (the "Plan") and Metropolitan Life Insurance Company ("MetLife"). Mr. Demer claimed that MetLife, the claim administrator and insurer for the Plan, improperly denied his claim for long-term disability ("LTD") benefits. See 29 U.S.C. § 1132(a)(1)(B) (providing that "[a] civil action may be brought … by a participant or beneficiary … to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan"). The district court denied Mr. Demer's motion for summary judgment, granted Defendants' cross-motion, and entered judgment in favor of Defendants.

We reverse the district court's entry of judgment in Defendants' favor and remand to the district court with instructions to remand this case to MetLife to re-evaluate the merits of Mr. Demer's LTD claim."

The decision viewed with skepticism the Plan's structural conflict of interest as both evaluator and funder and the financial conflict of interest of the Plan's retained medical experts. The decision noted, "Here, MetLife could have maintained records of its reviewers' findings on claims to show their neutrality in practice, but it did not. While MetLife therefore missed an opportunity to negate any inference of a financial conflict of interest, Mr. Demer failed as well to develop more powerful evidence that could have established enhanced skepticism in reviewing MetLife's decision. Thus, we find there is neither a lack of conflict of interest (justifying no skepticism) nor a substantial conflict of interest (warranting enhanced skepticism). Instead, the financial conflict – modest but extant – warrants some, but not substantial, weight under *Abatie* and *Montour*."

" … The dissent mistakenly equates outside experts with independent experts, but the former does not guarantee the latter. We do not quarrel with the notion that using outside medical evaluators can be an important step toward the goal of obtaining neutral assessments, but it is not hard to imagine an outside medical examiner who does not engage in a neutral, independent review, such as where the examiner receives hundreds of thousands of dollars from a single source and performs hundreds of reviews for that source every year. … Despite the dissent's suggestion that the majority disapproves of outside reviewers, we imply no such disapproval; we simply apply the unremarkable proposition that the number of examinations referred and the size of the professional fees paid to a reviewer may compromise the neutrality of an expert. See *Montour*, 588 F.3d at 634; *Nolan*, 551 F.3d at 1152, n.3."

" … Taking into account the totality of the circumstances – i.e., the financial conflict of interest of the IPCs on whom MetLife relied (which warrants some skepticism in reviewing the IPCs' conclusions), the substantial evidence of Mr. Demer's mental limitations due to pain medication and physical limitations, and the IPCs' reviews of Mr. Demer's condition, without having examined him and without explaining why they rejected his

(Cont'd on Page 11, **DECISIONS**)

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credibility, particularly in light of evidence corroborating his credibility (both medical and nonmedical) – MetLife abused its discretion in denying Mr. Demer's claim for LTD benefits."

Michelle L. Roberts (argued), Roberts Bartolic LLP, Alameda, California; Barry Kirschner (argued), Waterfall, Economidis, Caldwell, Hanshaw & Villamana, P.C., Tucson, Arizona; for Plaintiff-Appellant.

Michelle McAloon Constandse (argued), Metropolitan Life Insurance Company, Irvine, California; James K. Mackie, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Tucson, Arizona, for Defendants-Appellees.

Ninth Cir. 8/26/16 decision by Chin, Christen concurring, and Bybee dissenting in part but concurring in the judgment; ___ F.3d ___; 2016 WL 4488006.

LMRA Preemption and Failure to Exhaust Grievances: Cautionary Lessons on Why Unions Should Never Agree to Arbitration Provisions in Collective Bargaining Agreements

KOBOLD v. GOOD SAMARITAN REG'L MED. CTR.

The three cases in this consolidated appeal—*Kobold v. Good Samaritan Regional Medical Center*, *Barr v. Ross Island Sand & Gravel Co.*, and *Allen v. Northwest Permanente*—involve different parties and facts, but are similar in important ways. All three involve employees represented by labor unions who seek remedies under state law against their employers. In all three, there is a collective bargaining agreement ("CBA") between the union and the employer setting out a grievance and arbitration procedure to govern disputes arising under the agreement. And in all three, a grievance was filed but did not provide full relief, prompting the employee to turn to the courts. All the employees initially filed their cases in state court, but the cases were removed to federal court on the basis of preemption under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a). In all the cases, the district court denied a motion to remand and held the state law claims preempted. We consider the § 301 preemption questions on appeal.

As this court has observed more than once, although § 301 preemption questions arise fairly frequently, "[f]amiliarity … has not bred facility." *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 689 (9th Cir. 2001) (en banc) (alteration in original) (quoting *Galvez v. Kuhn*, 933 F.2d 773, 774 (9th Cir. 1991)). In the hope that doing so will illuminate the parameters of § 301 preemption analysis, and so help "[breed] facility," id. we have consolidated the three cases for consideration and resolve them in this single opinion. We begin with a review of § 301 preemption doctrine and then proceed to discuss each case."

In Kobold's case, the CBA provided that nurses were to be paid one and one-half times their regular pay rate for all hours worked above their regularly scheduled full-time equivalent shifts "except when there is a change of schedule agreed upon by the Medical Center and nurse." The decision concluded that the LMRA preempted Kobold's wage claims because, although her right to overtime premium was statutory, interpretation of the CBA was required to resolve the dispute over how a change of schedule agreement was reached in order to determine how many of the overtime hours Kobold worked were subject to such an agreement.

In Barr's case, the CBA provided that Ross Island Sand & Gravel Co. ("RISG") and Barr would each contribute to the cost of Barr's health and welfare benefits. RISG was to pay 90% of the cost of benefits, and would deduct the other 10% from employees' paychecks. RISG was to remit its contributions and the employees' paycheck deductions to the Oregon Teamsters Employers Trust Fund ("OTET"), which managed the health insurance plan. The decision concluded that Barr's rights and interpretations of issues regarding those rights were statutory and independent of his rights under the CBA. The decision similarly concluded that Barr's breach of fiduciary duty claim was not preempted. "A court need only determine whether RISG kept the health insurance funds in a separate account, promptly turned them over, and did not keep them for its own use or benefit; such a determination does not require a court to do any more than look at or refer to the RISG CBA, if that. See *Balcorta*, 208 F.3d at 1108."

However, the decision found that Barr's "had and received" claim was preempted. "RISG's authority to deduct funds from Barr's paychecks and Barr's right to have those funds applied toward his health insurance premiums are purely contractual entitlements. Without those provisions in the RISG CBA, Barr would have no basis upon which to bring the money had and received claim. … Barr therefore can only maintain a claim under § 301 if he can demonstrate that his remedies under the RISG CBA were exhausted. The Teamsters settled or abandoned all grievances related to RISG's failure to remit paycheck deductions to OTET; the grievances were never submitted to an arbitrator. Because the contractual remedies were not exhausted, and Barr does not allege that Teamsters breached its duty of fair representation, he cannot pursue his money had and received claim as a § 301 claim."

"…All three of Barr's claims "have 'a common nucleus of operative fact.' " *Osborn v. Haley*, 549 U.S. 225, 245, 127 S.Ct. 881, 166 L.Ed.2d 819 (2007) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)); see 28 U.S.C. § 1367(a). The district court therefore should decide on remand whether to exercise supplemental jurisdiction over Barr's Or. Rev. Stat. § 652.610(4) and breach of fiduciary duty claims." In a footnote, the decision also instructed the trial court to address RISG's defense that Barr's action was preempted by ERISA.

(Cont'd on Page 12, **DECISIONS**)

In Allen's case, her employment as a nurse practitioner was conditioned on being re-credentialed every two years. While on leave, Allen learned renewal of her credential was conditioned upon her agreeing to a Work Improvement Plan. When Allen did not sign a proposed agreement, the Credentials Committee denied her application. Pursuant to the CBA, the union grieved Allen's denial through binding arbitration. The arbitrator ultimately found that the Committee did not have just cause to essentially fire Allen. "Having so concluded, the arbitrator vacated the Committee's decision, remanded Allen's credentialing application for further proceedings by the Committee, and placed Allen on paid administrative leave for 60 days, but declined to award back pay."

Unhappy with the arbitration award, Allen sued in state court. The case was removed to federal court based on LMRA preemption. "In response, Allen filed a motion to remand, contending that NWP's credentialing process was not governed by the Nurses' CBA and that none of her claims required interpretation of the Nurses' CBA.

A magistrate judge concluded otherwise. She recommended that the motion to remand be denied, holding that "most of [Allen's] claims substantially depend on an analysis of the CBA, and, thus, are preempted." Alternatively, the magistrate judge decided, Allen was "taking the opposite position now than she took in the arbitration" regarding whether the Committee's actions were governed by the Nurses' CBA's substantive standards, and was therefore judicially estopped from arguing that they were not."

The decision found that the union not Allen had taken an opposite position during the arbitration. "Because Allen herself took no position at all during the arbitration, her litigating position cannot be "clearly inconsistent" with a nonexistent earlier position." However, the decision agreed that Allen's intentional interference claim was preempted because, "the arbitrator *decided* the question raised under the first *Burnside* factor—whether Allen's claims arise out of the Nurses' CBA or, rather, "exist independently" of it. In asking us to conclude that her claims are independent of the Nurses' CBA, Allen is, in effect, asking us to overturn the arbitrator's interpretation of the contract. That we cannot do." (Emphasis in original.)

" … Because those claims were preempted at the time of removal, the district court properly denied Allen's motion to remand and retained jurisdiction over her remaining claims." The decision then agreed that Allen's remaining claims were time-barred.

Thomas K. Doyle (argued), Bennett, Hartman, Morris & Kaplan, Portland, Oregon, for Plaintiff–Appellant Susan Kobold.
Kirk Peterson (argued), Bullard Law, Portland, Oregon, for Defendant–Appellee Good Samaritan Regional Medical Center.
Elizabeth Farrell (argued), Portland, Oregon; Benjamin Rosenthal, Portland, Oregon; for Plaintiffs–Appellants Larry Barr, et al.
Ankur H. Doshi (argued) and Kamyavathana Sivanesan, Portland, Oregon; Sheeba Suhaskumar, law student; Northwestern School of Law of Lewis & Clark College, Portland, Oregon; for Defendant–Third–Party–Plaintiff–Appellee Ross Island Sand & Gravel Co.
Matthew Caruso Ellis (argued), Portland, Oregon; George P. Fisher, Portland, Oregon; for Plaintiff–Appellant Ona C. Allen.
Chris Kitchel (argued), James N. Westwood, and Brenda K. Baumgart; Stoel Rives LLP, Portland, Oregon; for Defendant–Appellee Northwest Permanente, P.C.

Ninth Cir. decision by Berson, Watford and Soto concurring; ___ F.3d __, 2016 WL 4191521, 207 L.R.R.M. (BNA) 3030, 26 Wage & Hour Cas.2d (BNA) 1345.

Class Action Waiver in Forced Arbitration Provision Violates the NLRA, So Is Void

MORRIS v. ERNST & YOUNG

"In this case, we consider whether an employer violates the National Labor Relations Act by requiring employees to sign an agreement precluding them from bringing, in any forum, a concerted legal claim regarding wages, hours, and terms and conditions of employment. We conclude that it does, and vacate the order of the district court compelling individual arbitration."

As a condition of employment, Morris was forced to waive any class action claim. Nonetheless, Morris brought a class action claim alleging that the firm relied on the misclassification to deny overtime wages in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C.A. § 201 et seq., and California labor laws.

Relying on *Horton I*, the decision reasoned, "This case turns on a well-established principle: employees have the right to pursue work-related legal claims together. 29 U.S.C. § 157; *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566, 98 S.Ct. 2505, 57 L.Ed.2d 428 (1978). Concerted activity—the right of employees to act together—is the essential, substantive right established by the NLRA. 29 U.S.C. § 157. Ernst & Young interfered with that right by requiring its employees to resolve all of their legal claims in "separate proceedings." Accordingly, the concerted action waiver violates the NLRA and cannot be enforced." D.*R. Horton*, 357 NLRB No. 184 (2012) ("*Horton I*"), slip op. at 1, *enf. denied* 737 F.3d 344 (5th Cir. 2013) ("*Horton II*").

Max Folkenflik (argued), Folkenflik & McGerity, New York, New York; H. Tim Hoffman, H. Tim Hoffman Law, Oakland, California; Ross L. Libenson, Libenson Law, Oakland, California; for Plaintiffs-Appellants.
Rex S. Heinke (argued) and Gregory W. Knopp, Akin Gump

(Cont'd on Page 13, **DECISIONS**)

Strauss Hauer & Feld, Los Angeles, California; Daniel L. Nash, Akin Gump Strauss Hauer & Feld, Washington, D.C.; for Defendants-Appellees.

Ninth Cir. 8/22/16 decision by Thomas, Hurwitz concurring, Ikuta dissenting; ___ F.3d ___, 2016 WL 4433080.

ADEA Retaliation Provision Does Not Preclude § 1983 Free Speech Claim

STILWELL v. CITY OF WILLIAMS

"Plaintiff-Appellant Ronnie Stilwell sued his city employer for retaliation, alleging that he was fired for planning to testify against the City in a lawsuit relating to age discrimination. Stilwell asserted that his termination violated both the First Amendment and the retaliation provision of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(d). The question we must answer is whether the retaliation provision of the ADEA precludes a plaintiff such as Stilwell from bringing a First Amendment retaliation claim under 42 U.S.C. § 1983. We hold that it does not."

As a threshold matter, the decision found that the speech in Stilwell's declaration was protected by the First Amendment. *Lane v. Franks*, ––– U.S. ––––, 134 S.Ct. 2369, 2378, 189 L.Ed.2d 312 (2014); *Alpha Energy Savers, Inc. v. Hansen,* 381 F.3d 917, 927 (9th Cir. 2004).

Relying primarily F*itzgerald v. Barnstable School Commit-tee*, 555 U.S. 246, 129 S.Ct. 788, 172 L.Ed.2d 582 (2009), the decision analyzed whether Congress intended the ADEA to preclude use of § 1983 to enforce constitutional rights.

"Like the disparities identified in *Fitzgerald*, our examination of the ADEA's retaliation provision and First Amendment retaliation claims brought under § 1983 reveals differences in who may sue and be sued. First, the ADEA does not allow for suit against individuals, whereas § 1983 does. … Second, state employees, in practice, cannot sue under the ADEA but can sue under § 1983. … Third, the ADEA is generally applicable to private and public (but not state) employers with twenty or more employees. … Finally, the Supreme Court has held that independent contractors may sue under § 1983 for First Amendment retaliation."

" … Also similar to the differences identified in *Fitzgerald*, there is a difference between ADEA retaliation suits and § 1983 First Amendment retaliation suits in how liability is established under each. See *Fitzgerald*, 555 U.S. at 257, 129 S.Ct. 788 (examining different standards of liability for Title IX and § 1983 claims). … First, an ADEA plaintiff bears a greater burden of proof as to causation than a plaintiff bringing a First Amendment retaliation claim. … Second, exactly as in *Fitzgerald*, 555 U.S. at 257, 129 S.Ct. 788, there is a difference in the requirements for establishing liability between the ADEA retaliation clause and § 1983 when the defendant is a municipality. … Finally, the remedies available to those individuals bringing suit under the ADEA's retaliation provision and § 1983 are different."

The decision found, "The result that the retaliation provision of the ADEA does not preclude § 1983 First Amendment retaliation suits makes sense in light of the heightened level of protection that the Constitution affords First Amendment rights. Rights subject to heightened scrutiny are much more likely to be the basis of a successful constitutional claim than are those subject to rational basis review. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (explaining the greater difficulty in prevailing on an equal protection claim subject to rational basis review than on one subject to heightened scrutiny)."

The decision concluded, "Because the ADEA's retaliation provision is critically different from the ADEA's discrimination provision at issue in *Ahlmeyer*, that opinion is not controlling here. As explained above, the ADEA's retaliation protections are narrower than the First Amendment's in some important respects, whereas the ADEA discrimination provision provides more protection against age discrimination than does the Equal Protection Clause. Cf. *Kimel,* 528 U.S. at 86, 120 S.Ct. 631 ("Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.' " (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997))).

Given the substantial difference between the level of scrutiny afforded age discrimination equal protection claims and First Amendment retaliation claims, we cannot assume that Congress intended the ADEA to affect the availability of § 1983 claims in the same manner in both subject areas."

Charles Anthony Shaw (argued), Law Offices of Charles Anthony Shaw, PLLC, Prescott, Arizona, for Plaintiffs–Appellants.

Kenneth H. Brendel (argued), Mangum, Wall, Stoops & Warden, PLLC, Flagstaff, Arizona, for Defendants–Appellees.

Ninth Cir. 8/5/16 decision by Friedland, Gould concurring, Fernandez dissenting; ___ F.3d ___, 2016 WL 4151221.

Over Strong Opposition in Concurring Opinion, Front Pay Award in Retaliatory Discharge Case Precluded Right to Reinstatement with Front Pay in ERISA Claim

TEUTSCHER v. WOODSON

(Cont'd on Page 14, **DECISIONS**)

This appeal requires us to examine the limits on a district court's authority to award front pay and reinstatement as equitable remedies for a retaliatory discharge after a plaintiff has already sought and been awarded by a jury front pay damages to compensate for the same harm. Plaintiff-Appellee Scott Teutscher went to trial against his former employer, Riverside Sheriffs' Association ("RSA"), on retaliatory discharge claims under both state law and the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 ("ERISA"). A jury awarded him lump-sum damages on his state law claims, and the district court then entered judgment in his favor on his ERISA claim. Even though, at Teutscher's request, the jury had been instructed to include front pay in its damages award, the district court granted Teutscher additional equitable remedies consisting of reinstatement as well as front pay until reinstatement occurred. RSA appeals these equitable remedies, arguing that they conflict with the jury's front pay award in violation of the Seventh Amendment and improperly duplicate Teutscher's recovery from the jury.

Given the way in which the jury was instructed and the evidence presented at trial, the jury's verdict encompassed an implicit factual determination as to the entire amount of front pay to which Teutscher was entitled on account of his retaliatory discharge. We hold that the district court's grant of an additional front pay remedy for the same harm disregarded that determination in violation of the Seventh Amendment right to a jury trial. In addition, although the reinstatement remedy does not necessarily conflict with factual findings implicit in the jury's verdict, we hold that it is nevertheless improper because Teutscher waived that relief when he elected to seek the duplicative front pay remedy from the jury. We accordingly reverse the district court's equitable awards."

Smith's concurring opinion reasoned, "Although front pay may look very similar to compensatory damages for future lost earnings, it is a distinct remedy. The Seventh Circuit has upheld an award of both future lost earnings and front pay, and concluded that such an award does not necessarily constitute a double recovery. *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 953 (7th Cir. 1998). … The *Williams* court also noted that a jury award for future compensatory damages was not necessarily factually inconsistent with an equitable front pay award because the awards can "compensate the plaintiff for different injuries." *Williams*, 137 F.3d at 953. Reinstatement (and front pay) puts the plaintiff back in his job, or at least pays him as if he had been reinstated. Future compensatory damages can be significantly broader than that, and encompass reputa-tional harms, loss of experience, and other "forward-looking aspects of the injury caused by the discriminatory conduct." Id. Similarly, a compensatory damages award that only gives the plaintiff the cash value of reasonably-certain future earn-ings at a particular place of employment might still leave the plaintiff suffering harms that might be appropriately remedied with reinstatement, such as a restored track record and job history, which could assist the plaintiff in future employment searches.

In this way, each remedy can have some unique benefits, even though the core of the harm (a lost paycheck) can be remedied by either. In addition to this practical distinction, the Supreme Court in *Pollard* made clear that there is a technical distinction between compensatory damages for future lost earnings and equitable front pay in lieu of reinstatement. 532 U.S. at 852. For the two awards to be a violation of the Seventh Amendment, moreover, the issues underlying each must be "common to both the legal and equitable claims." *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472 (1962). Again, although there is significant overlap between the compensatory and equitable inquiries, they are not identical."

Smith concluded, "I concur in the judgment, however, because I believe the district court abused its discretion in granting reinstatement in this context. As the majority observes, the jury had been asked to compensate Teutscher for the cash value of his future paychecks with RSA. The district court's analysis on reinstatement is only a paragraph, and appears to assume that additional equitable relief was "appropriate" to redress the ERISA violation over and above the jury verdict. If the district court had provided reasoning to explain why it believed reinstatement was appropriate to redress non-monetary wrongs inflicted on Teutscher, it might have articulated a basis for reinstatement that was in harmony with the damages award. On this thin record, however, it is not apparent that is what happened. Therefore, I would reverse the equitable award as an abuse of discretion."

Daniel P. Stevens (argued) and Heather K. McMillan, Stevens & McMillan, Tustin, California, for Plaintiff-Appellee.

Jon R. Williams (argued), Williams Iagmin LLP, San Diego, California, for Defendant-Appellee.

William N. Woodson, III (argued), Law Offices of Wm. N. Woodson, III APC, Fallbrook, California, pro se Intervenor-Appellant.

Ninth Cir. 8/26/16 decision by Friedland, Watford concurring, and concurring opinion by Smith; ___ F.3d. ___, 2016 WL 4488008.

Class Certification of Domestic Farm Workers Alleging Violations of the Agricultural Workers' Protection Act and Washington Law Was Proper

TORRES v. MERCER CANYONS, INC.

"Defendant Mercer Canyons, Inc. (Mercer) appeals the district court's order certifying a class of domestic farm workers,

(Cont'd on Page 18, **DECISIONS**)

PRACTICE GUIDE – ERISA ISSUE SPOTTING: HOW TO AVOID MALPRACTICE

By Cassie Springer Ayeni, Esq.

Cassie Springer Ayeni, Esq.

ERISA. The acronym strikes terror in the heart of many a lawyer. Fuzzy notions of fiduciary duties, equitable remedies in the days of a divided bench, and preemption can cause even the most erudite of attorneys to break into a cold sweat. My friends: speaking as someone who has handled ERISA claims, litigation, and appeals for 15 years, I'm here to tell you that it is really not that bad! Allow me to walk you through some ERISA basics so that you can issue spot and avoid malpractice.

ERISA Fundamentals

The Employee Retirement Income Security Act of 1974 (ERISA) provides minimum standards for voluntarily established benefit plans in the private industry. In addition to pension plans, ERISA governs health and welfare benefit plans, including employer-sponsored disability and life insurance plans. ERISA does not cover benefit plans established or maintained by governmental entities, churches for their employees, or plans which are maintained solely to comply with applicable workers compensation, unemployment, or disability laws. This means that UC plans are non-ERISA (government) plans, but an employer's benefit plans are governed by ERISA.

ERISA requires plans to provide participants with plan information. ERISA § 104(b)(4). Those who manage and control plan assets must act as fiduciaries. ERISA § 404. ERISA plans must have a grievance and appeals process for benefit claims. ERISA § 503. The process of appealing a denied benefit claim is also called a "request for review," and is crucial to achieving success on a denied benefit claim, either with the administrator or before a federal court. **TIP: There is a 180-day deadline for submitting ERISA appeals that CANNOT be missed.** Finally, ERISA gives participants and beneficiaries the right to sue for benefits and breaches of fiduciary duty. ERISA § 502(a). Lawsuits related to or remedied by ERISA are brought in federal district court. Statutes of limitations are often identified in the ERISA plans themselves and must be adhered to.

ERISA Preemption

ERISA has broad preemption provisions. ERISA § 514. If a remedy is available under ERISA, the claim will be preempted. If a case "relates to" an ERISA plan because there is a "connection with or reference to" a plan, the case will be preempted. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739. For example, in *Ingersoll-Rand Co. v McClendon*, the Supreme Court held that a wrongful discharge action was preempted by ERISA because the plaintiff alleged that the wrongful termination was primarily because of the employer's desire "to avoid contributing to, or paying benefits under, the employee's pension fund." 498 U.S. 478, 483 (1990). However, in another case, the Supreme Court determined that California's prevailing wage law is not preempted by ERISA because the law does not "make reference to" ERISA plans, nor does it have a connection to an ERISA plan because "[t]he prevailing wage statute alters the incentives, but does not dictate the choices, facing ERISA plans." *California Div. of Labor Standards Enf't v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 328, 334 (1997).

As a general rule, if the alleged harm is that the unlawful conduct interfered with a right to receive, vest in, or accrue an employee benefit, then the claim will be preempted. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (preempting a common law wrongful discharge claim where the claim was that the employer retaliated to prevent vesting in an ERISA plan). **TIP: If you are concerned that your case will be pre-empted by ERISA, avoid alleging that any remedies are available under any kind of employee benefit plan or that any claims bear a connection to an employee benefit plan. Do NOT allege that the bad behavior caused a loss of employee benefits. Do NOT allege that the bad behavior should result in payment of disability or other ERISA benefits.** These allegations will cause you to be removed to the federal courts that have exclusive jurisdiction over ERISA claims. And, if the claim is properly an ERISA claim for benefits, then there will be no consequential or punitive damages available, nor will there be a jury trial.

(Cont'd on Page 16, **PRACTICE GUIDE**)

However, ERISA's "savings clause" provision saves from preemption any law that regulates insurance, banking, or securities. ERISA § 514(b)(2)(A). An example of the application of the savings clause is in California's "notice prejudice" rule, which provides that claims can proceed even where there is late notice unless the insurer is prejudiced by the late notice. Because this is a law that regulates insurance and does not provide a remedy that conflicts with ERISA, the law is not preempted. *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 373, 119 S. Ct. 1380, 1389, 143 L. Ed. 2d 462 (1999).

ERISA Long-Term Disability Cases

While most people are familiar with ERISA governing pension plans, 80% of all ERISA litigation is actually over denied long-term disability (LTD) benefits.

What is the LTD benefit?

Employer-sponsored LTD plans, also known as "group" disability insurance plans, generally provide benefits after 6 months of disability until retirement age. The benefit is typically 2/3 of pre-disability earnings. Unlike private disability plans, almost all ERISA LTD plans will offset other income or benefits including severance, workers' compensation, Social Security Disability, state disability, and even retirement benefits received. **TIP: if you are negotiating a settlement for your client, be sure that it cannot be characterized as an off-settable source of income to the ERISA LTD benefits, or the client will essentially have to hand over the settlement funds to the ERISA LTD insurer.**

Example of a severance that will likely be offset 100%: "After the Separation Date, EMPLOYEE will receive payments from EMPLOYER totaling $65,000, constituting salary continuation, accumulated sick leave, lost wages, and severance pay."

Example of a severance that will not likely be offset: "After the Separation Date, EMPLOYEE will receive payments from EMPLOYER totaling $65,000 as consideration for waiving the claims specified herein. This amount does not constitute salary continuation, accumulated sick leave, lost wages, or severance pay."
If it is impossible to avoid the triggering language, just leave out the description as a last resort.

When Is Someone Disabled?

Many ERISA LTD plans have an "own occupation" standard of disability that shifts to an "any occupation" standard of disability after 24 months. In other words, after 24 months, the claimant has to be disabled from any occupation given her education, training, experience, and station in life, to continue to receive LTD benefits. Many ERISA LTD plans also have a 2-year limitation for certain conditions. Common limitations include mental illnesses, "self-re-ported" conditions, neuro-musculoskeletal disorders, chronic fatigue conditions, chronic pain conditions, allergies, and chemical sensitivities. **TIP: if you are working with a disabled client's physicians and there are also emotional distress issues, be aware that the mental health component should be listed as secondary to the physical component of the disability to avoid the 24-month mental health limitation in the ERISA LTD plan.**

Types of Plans

There are two types of ERISA LTD Plans: insured and self-funded. With self-funded plans, the employer sets aside funds for qualified participants. Because the risk of payment lies with the employer, usually big employers like AT&T or Johnson & Johnson are the only employers providing self-funded plans. With these plans, non-preempted state law insurance protections do not apply. With insured plans, the employer purchases an insurance policy to provide disability benefits to its. Often, the insurer both decides liability and pays the benefits. The Supreme Court recognizes this as a structural conflict of interest. *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008). In my experience, some insurers are better than others. Standard Insurance currently has the worst definition of disability, limiting so many conditions to 24 months that it shocks me when someone is eligible for benefits beyond two years; Liberty Mutual is particularly cantankerous in litigation.

(Cont'd on Page 17, **PRACTICE GUIDE**)

POP QUIZ!

Time for some ERISA issue spotting!

1. If someone has a disability or other employee benefit claim, does ERISA govern if the employer is:

A: A private company?

B: Government (U.C., federal employee, state employee, public school teacher)?

C: A partnership that covers both partners and employees?

D: A private company where there are only owners but no employees?

Answers: A: Yes; B: No; C: Yes; D: No (there must be an employee covered as well for ERISA to govern)

2. If someone has been disabled from her "own occupation" for 24 months, then the plan switches to an "any occupation" standard of disability, is she still entitled to benefits where she is:

A: a lawyer with bipolar disorder who is told by the insurer to go get a job as a manual laborer?

B: a construction worker who has a high school education but who also has lifting restrictions, where the insurer tells her to go get a job as a receptionist for a construction company?

Answers: A: No (not appropriate given education, training, experience, and station in life); B: Yes (as long as the salary matches her station in life)

3. What allegations will be preempted by ERISA?

A. Discrimination caused the employee to lose accrual of retirement benefits.

B. Emotional distress resulted from denied disability claim.

C. Employee was not paid fair wages.

D. California's "notice prejudice" rule trumps an ERISA Plan's claim filing deadline.

Answers:

A: Preempted – remedy of restored retirement conflicts with ERISA's remedy for a breach of fiduciary duty claim. *Ingersoll-Rand Co. v McClendon*, 498 U.S. 478, 483 (1990);

B: Probably preempted: one court has recently held that emotional distress claims, if they are independent from the lost benefit claims, can proceed in state court. *Daie v. The Reed Grp., Ltd.*, No. C 15-03813 WHA, 2015 WL 6954915, at *3 (N.D. Cal. Nov. 10, 2015) ("Our defendants' duty not to engage in the alleged tortious conduct existed independent of defendants' duties under the ERISA plan.");

C: Not preempted: *California Div. of Labor Standards Enf't v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 328, 334 (1997);

D: *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 373, 119 S. Ct. 1380, 1389, 143 L. Ed. 2d 462 (1999).

A Final Tip: Don't Waive Your Client's ERISA Claims in a Severance Agreement

Finally, many clients call me after having accepted a "standard" severance agreement from their employer, where they unknowingly waived their ERISA disability claim rights. Oops! While ERISA pension claims vest and cannot be waived, the same is not true for ERISA health and welfare claims, including disability claims. Please be sure that your clients do not waive their ERISA rights, as their disability and life insurance plans in particular may be far more valuable to them than the severance itself. Employers are

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PRACTICE GUIDE (From Page 17)

generally willing to agree to carve out ERISA disability and life insurance claims once they understand the ramifications.

Example of a good ERISA carve-out: … However, the following claims are specifically and expressly excluded from the foregoing Release: (i) health insurance benefits under the Consolidated Omnibus Budget Reconciliation Act (COBRA); (ii) claims with respect to benefits, including short- and long-term disability benefit benefits, under a welfare benefit plan governed by the Employee Retirement Income Security Act (ERISA); or (iii) claims with respect to vested benefits under a retirement plan governed by ERISA.

If you ever have a question about how to navigate ERISA's tricky waters, call an experienced ERISA attorney. Us ERISA nerds are typically happy to field questions and co-counsel if you find yourself in over your head. I can be reached at cassie@benefitslaw.com if you have any questions. You can also find more information about ERISA on the Department of Labor's Employee Benefits Security Administration (EBSA) website, at https://www.dol.gov/ebsa/.

Cassie Springer Ayeni is the President and Founder of Springer Ayeni, A Professional Law Corporation, in Oakland, CA, where she focuses on ERISA disability and life insurance cases. She can be reached at cassie@benefitslaw.com or www.benefitslaw.com

DECISIONS (From Page 15)

represented by Bacilio Ruiz Torres and Jose Amador (collectively, Plaintiffs). Mercer operates a fruit and vegetable farm near Prosser, Washington. In 2013, Mercer participated in the federal H-2A program, which permitted Mercer to hire foreign workers to fill temporary agricultural positions at an hourly wage of $12.

Plaintiffs brought a putative class action, claiming that Mercer had a common policy or practice of failing to inform domestic farm workers of the availability of H-2A work that paid $12 per hour, in violation of the Agricultural Workers' Protection Act (AWPA), 29 U.S.C. §§ 1831(e) and 1821(f), and the Washington Consumer Protection Act (CPA), Wash. Rev. Code § 19.86.020. In addition, Plaintiffs alleged that Mercer failed to pay its own domestic workers $12 per hour when they carried out the same tasks as foreign H-2A workers, in violation of AWPA and state wage laws.

The district court certified an Inaccurate Information class and an Equal Pay subclass, corresponding to Plaintiffs' claims. We affirm the district court's class certification order."

Eric D. Miller (argued), Michael T. Reynvaan, Frederick B. Rivera, and William B. Stafford, Perkins Coie LLP, Seattle, Washington, for Defendant-Appellant.

Lori Jordan Isley (argued), Joachim Morrison, and David Solis, Columbia Legal Services, Yakima, Washington; Adam J. Berger and Martin S. Garfinkel, Schroeter Goldmark & Bender, Seattle, Washington; for Plaintiffs-Appellees.

Ninth Cir. 8/31/16 decision by Smith, Tashima and Kobayashi concurring; ___ F.3d. ___, 2016 WL 4537378.

CELA'S CLE CATALOG WITH SEMINARS AND WEBINARS NOW AVAILABLE

By Christina Krasomil, CELA Administrative Director

Christina Krasomil, CELA Administrative Director

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"They'd Better Watch What They Say" Seminar

This 3-hour video with Bernard Alexander, Paul Greenberg and Christopher Whelan covers how plaintiffs' employment attorneys can identify, establish, preserve, revive, use, and win defamation cases. The seminar includes 3 hours of MCLE credit and materials.

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Federal Rule 26 – Friend or Foe?

Many CELA members practice primarily in state court and are uncomfortable when they find themselves removed to federal court. Sound familiar? Experienced federal practitioners explain how Rule 26 of the Federal Rules of Civil Procedure can serve as a road map to successful federal litigation. The panel covers the ins and outs of the Rule 26 disclosure requirements, provides tips on using Rule 26 to your advantage, and points you to helpful forms and templates.

Workplace Discrimination Against Muslims: What Muslims Face in the Modern Workplace and What Advocates Need to Know to Protect Their Rights

Our knowledgeable speakers delve into this timely issue, exploring such issues as: discrimination based on physical appearance, beliefs, and national origin; accommodations, including prayer and holidays; EEOC v. Abercrombie and Fitch and its aftermath; and predicted future developments in the law.

Human Trafficking: A Primer for Employment Law Practitioners

Human trafficking is a very serious issue that has received a lot of media attention in recent years. Did you know that it could affect your employment law practice, too? Professor Ruth Silver Taube discusses how to incorporate human trafficking causes of action into the employment cases you already file. Many workers who are trafficked to California solely to fill positions in the workforce wind up suffering further workplace indignities and violations once they arrive, including discrimination, harassment, and wage and hour violations.

The webinars and seminars range in price between $25-$100. NELA's CLE catalog is also available.

CELA is a State Bar of California approved MCLE provider (#2292). Questions? Please contact christina@cela.org.

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