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## "Unfortunate" and "Clumsy" Termination Does Not Equal Discrimination!

In *Bailey v. Oakwood Healthcare, Inc.*, the 11th Circuit found that an employer's decision to terminate an employee on the day she returned from maternity leave was not discriminatory because during her leave, the employer discovered deficiencies in performance and falsifications in her employment application.

The decision in ***Bailey*** reinforces that taking a protected leave does not insulate an employee from termination for poor performance and other inappropriate conduct. However, it should also serve as reminder that the perceived unfairness associated with a termination so close in time to taking a protected leave may result in a lawsuit (and the headache that come with it). In so ruling, the Circuit concluded that the timing of the employer's termination of Bailey was "unfortunate" and that the "manner in which the decision was communicated was clumsy." Still, the 11th Circuit found "no fault" in Oakwood's decision to terminate Bailey and noted that the Court had "no authority to interfere in the private personnel management matters, however unwise or unfair they may appear to be."

Employers should always be cautious when terminating an employee who has taken a protected leave (or engages in other protected activity). Where an employer has a good reason for termination and that reason is supported by objective evidence, an employer may consider (carefully) terminating that employee. Be mindful, however, that even with objective evidence – such as a falsified employment application in this case – the employer could still be liable for discrimination or retaliation if, for example, it knew of other employees who engaged in similar activity but terminated only the one who engaged in protected activity. [PE]

## Repeat Violator — Implement Safety Program and Pay $389k

**If a company repeatedly ignores safety warnings and endangers workers, OSHA won't hesitate to involve the legal system.**

A Maine roofing contractor has been taught an expensive lesson after being cited by Federal OSHA multiple times at 11 different worksites from 2000 to 2011 for fall hazards.

Despite his multiple violations, Stephen Lessard, of Lessard Roofing & Siding Inc. and Lessard Brothers Construction Inc., failed to correct the safety violations or pay the accumulated fines and was held in contempt by the U.S. Court of Appeals for the 1st Circuit.

The court has ordered him to implement a comprehensive safety and training program, notify OSHA about each worksite, ensure that employees and contractors use required safety equipment and fall protection, and conduct worksite safety analyses and meetings, along with other requirements.

The safety program must also include acceptance of the contractor's responsibility to ensure workers are using appropriate safety equipment and fall protection.

In addition, Lessard has $389,685 in outstanding fines and interest to pay.

If Lessard doesn't follow the court's orders, he could face jail time. [PE]

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# What's News!

## Expands Reach PAGA Representative!

**The California Court of Appeals recently decided a new case potentially expanding the scope and impact of Private Attorneys General Act (PAGA)** claims brought by an employee against his employer. In *Huff v. Securitas Security Services USA, Inc.,* the court posed the question of "whether a plaintiff who brings a representative action under PAGA may seek penalties not only for the Labor Code violation that affected him or her, but also for different violations that affected other employees."

The court then answered that question in the affirmative, concluding "PAGA allows an 'aggrieved employee' – a person affected by at least one Labor Code violation committed by an employer – to pursue penalties for all the Labor Code violations committed by that employer." Accordingly, an employee alleging a single violation of the California Labor Code may now bring PAGA claims against his employer for all violations, suffered by any other employee, of the same employer

Although a defeat for employers, the practical effect of Huff may be limited. First, an employee is required to provide the Workforce Development Agency with written notice of the facts and circumstances relating to each alleged violation of the Labor Code before bringing a representative action under PAGA. This may be difficult to do when addressing speculative or ill-defined violations, and an employer may attempt to use the scope of the letter actually submitted to limit discovery.

If the employee just submits a fact-free letter citing a long list of Labor Code violations, that vagueness may provide a basis to demur to the PAGA claim for failure to properly exhaust administrative remedies with the required specificity. Furthermore, employers may still assert the defense of manageability against a PAGA action. Even if an employee can now plead a broad spectrum of Labor Code violations, it doesn't follow that those violations can all be manageably tried through a single lawsuit. [PE]

## Ruling for Baker, Issues Unresolved!

**The U.S. Supreme Court ruled June 4 in favor of a Colorado baker who refused to make a wedding cake for a same-sex couple.** The 7-to-2 decision was based on very narrow grounds and left unresolved whether business owners have a First Amendment right to refuse to sell goods and services to same-sex couples.

The case, *Masterpiece Cakeshop, LTD., et al. v. Colorado Civil Rights Commission et al.*,started when a same-sex couple filed a complaint with the state civil-rights commission after Jack Phillips,a baker and owner of Masterpiece Cakeshop, refused to design their wedding cake. Colorado, like most states, has a state anti-discrimination law that applies to businesses that sell to the public. The Colorado Civil Rights Commission and the Colorado Supreme Court both ruled in favor of the couple.

Seven justices agreed that Phillips was entitled to a fair hearing, it didn't meet that standard, there were four separate opinions filed for the majority. [PE]

***Attendance Record & Vacation Scheduler Enclosed!***

# President's Report
~Dave Miller~

## Vacation & Attendance Forms

**Enclosed in this edition of the *Management Advisor* is our 2019 Vacation Scheduler** that provides the opportunity to visually and graphically display the employees' vacation choices. If you need additional copies, please contact our office or just stop by!

### Attendance Record

Also this month we supply you with the "2017 Attendance Record." Its purpose is to provide a way to keep track of an employee's annual attendance on a single sheet.

A shorthand guide for keeping track of absences, injuries, leaves of absence, sick days, vacations, etc., is included on the form. If you need additional copies, you may download a ***PDF*** copy from our website ***Forms*** page or you may contact our office. [PE]

"Every prudent and cautious judge ... will remember, that his duty and his business is, not to make the law, but to interpret and apply it."
-- James Wilson (1742-1798) --
Member of Continental Congress

## Adopting Alternative Work Schedules

Alternative work schedules are popular with employees, **who like the flexibility and the extra full days off, and with employers, who have increased flexibility without overtime liability.**

An employer may adopt an AWS providing for no more than 10 hours of straight time in one day without the payment of overtime, only if it receives approval in a secret ballot election by at least two-thirds of the affected employees. (Labor Code § 511)

Industrial Welfare Commission wage orders provide further requirements applicable to specific industries, including the following:

- The proposal must be in the form of a written agreement from the employer.
- The employer must disclose, in writing, to affected employees, the effects of the proposed arrangement on the employees' wages, hours, and benefits (if 5 percent or more of the affected employees speak a language other than English, the disclosure must also be provided in that language).
- A duly noticed meeting must be held at least 14 days prior to the secret ballot vote.
- Notice of election results must be provided to the California Division of Labor Statistics and Research.
- There must be a 30-day waiting period between the election and implementation.

In addition, employers are prohibited from intimidating employees, or forcing them to vote for or against a proposed AWS. [PE]

## State Slaps Restaurants With $20 Million Penalty!

**The California Labor Commissioner's Office has cited seven Bay Area restaurants more than $10 million for wage theft violations affecting 431 workers.**

The restaurants inspected included Kome Japanese Seafood & Buffet in Daly City, Burma Ruby Burmese Cuisine in Palo Alto and Rangoon Ruby Burmese Cuisine located in Palo Alto, San Francisco, San Carlos, Burlingame and Belmont. The citations issued to Kome total more than $5.16 million and involve 133 workers, and the Burmese restaurant chain was cited more than $4.96 million for its 298 underpaid workers. The wage theft violations and civil penalties cited include failure to pay minimum wage, overtime and split shift premiums. "Taking tips from workers and paying workers by salary to deny them their hard-earned overtime pay is wage theft," says Labor Commissioner Julie Su.

The Labor Commissioner's investigation and payroll audit of Kome determined that 69 cooks, sushi chefs and dishwashers typically worked more than 55 hours per week but were paid a fixed salary that did not include overtime. As a result, these workers are owed nearly $3 million in unpaid wages and penalties.

Other staff, including hosts, servers and bussers, are owed more than $1.4 million for overtime, split shift premiums, and unpaid minimum wage violations, including the illegal counting of tips received as part of the minimum hourly wage. In California, tips are the sole property of the worker and cannot be credited towards an employer's obligation to pay minimum wage.

Investigators inspecting the Burmese restaurant chain also discovered the 87 cooks, paid a fixed salary at the six restaurants, typically logged more than 10 hours of unpaid overtime each week. They are owed $3.8 million for unpaid overtime wages, minimum wages, split shift, liquidated damages, waiting time penalties, and failure to provide accurate itemized wage statements. The remaining 211 servers, hosts, dishwashers and bussers at the Burmese chain were not paid the daily extra hour of minimum wage required when their employer scheduled them to work split shifts. Those workers are due $590,072 for split shifts and other wages and penalties owed.

David Tai Leung, Wendy Lai Ip, Jun Zheng, Gang Zhou, Bai Dong Zhang and Tiffany Leung, owners of the corporations Kome Japanese Seafood Buffet Inc. and Koshi Food Service Inc., are ordered to pay the 133 workers at Kome Buffet $4,381,461 in unpaid wages, premiums and liquidated damages, as well as civil penalties of $780,400.

Max Lee and John Lee, owners of Rangoon Ruby Investment LLC and Burma Ruby Investment LLC, have been ordered to pay their 298 workers $4,394,118 for unpaid wages, premiums, liquidated damages and itemized wage statement violations, and civil penalties of $574,150. [PE]

## Illegality of Union Resignation Rule

**The D.C. Circuit recently upheld the National Labor Relations Board's (NLRB) finding that a union's resignation rule violated the National Labor Relations Act (NLRA).** Under the rule, employees who wanted to resign from the union or opt out of paying dues had to travel to the union hall with a picture ID and a written request. The NLRB held that it was inconvenient for workers to have to travel to the hall to resign and that the rule might discourage workers who wished to avoid a face-to-face encounter with a union representative over their decision.

Unions have freedom to make their own rules, a fact highlighted by Member Mark Gaston Pearce in his dissent. Unions also have an incentive to make burdensome resignation rules because their financial survival rests on their ability to retain dues paying members.

These rules often require employees to jump through hoops to resign or revoke their dues check-off authorization, and employees have been required to strictly comply with these rules. For example, in a case recently touched on in this blog, an employee did not properly revoke their dues check-offs because the revocation was sent via regular mail instead of certified mail.

Despite wide latitude to make their own rules, the D.C. Circuit agreed with the NLRB majority that the particular rule in this case crossed the line. The Board had found the rule to be invalid on its face because, while the union claimed the rule was enacted to prevent fraudulent resignations, it provided no evidence that any fraudulent resignations had occurred.

The decision is a positive development for employees wishing to exercise their right to choose whether to be in a union or not. Particularly in right to work states, like Michigan in this case, employees have the right to resign or stop paying dues, and this case shows than a union's attempt to impede the exercise of those rights can be unlawful.

Thomas Payne is an associate in the Indianapolis office of Barnes & Thornburg, where he is a member of the Labor and Employment Department. Prior to joining Barnes & Thornburg full time, Thomas served as a summer associate in the firm's Indianapolis office. He also gained experience as a pro bono law clerk for the Indiana Office of the Attorney General and for the Honorable Lance Hamner of the Johnson County Superior Court. [PE]

## Written Hotel Housekeeping Safety Plans!

**Housekeepers In Lodging Establishments such as hotels, motels, resorts, and bed and breakfast inns** will be affected by the new requirements for a hotel housekeeping Musculoloskeletal Injury Prevention Program (MIPP), which have been added to the General Industry Safety Orders as Section 3345 and will take effect July 1.

Lodging establishments not affected include prison or jail facilities, medical facilities or nursing homes, residential communities, homeless shelters, boarding schools, or worker housing.

The MIPP is to be in writing and may be incorporated into the written workplace Injury and Illness Prevention Program (IIPP) or maintained as a separate program.

**Primary Requirements**

The primary requirements for the MIPP are like those for the IIPP. The MIPP must:

- Include the name or job title of the person or persons responsible for implementing the MIPP.
- Have a system to ensure all persons affected by the MIPP comply with it and use the appropriate tools to accomplish the required tasks.
- Have a system to communicate with housekeepers on matters of occupational safety and health that is readily understandable
- Develop procedures for identifying and evaluating housekeeping hazards; reviewed periodically and updated as necessary.
- Include procedures to investigate musculoskeletal injuries of housekeepers. There will be input from the injured and others.
- Include methods or procedures for correcting observed and identified hazards from injury investigations.
- Establish procedures to review the MIPP at least annually to determine its effectiveness and make changes if necessary. Housekeepers and their union representative are to be involved in the process.

**Training Requirements**

An extensive training requirement is part of the new MIPP. It encompasses new hires, annual training, change of equipment or job duties, injury recognition and reporting, and training of supervisors.

The employer must maintain records of the steps taken to implement and maintain the MIPP. All worksite evaluations are to be maintained in accordance with Section 3203(b), part of the IIPP. [PE]





## Human Resources Question with Candice Weaver

### The Month's Best Question

### Obesity: A Protected Disability in California

**Q: "We were advised that our firm must now treat obesity as a protected class, is that true?"**

**A: Obesity alone has not traditionally been considered a disability; to qualify for protected status, obesity must result from an underlying physiological disorder.**

A recent California Court of Appeal case, however, has directed courts to broadly construe the definition of "disability" — including in the cases of obese workers — to ensure the maximum legal protections *(Cornell v. Berkeley Tennis Club)*.

Ketryn Cornell was medically classified as severely obese. She had been obese since childhood and, at the time of her employment, was 5 feet 5 inches tall and over 350 pounds. Her weight interfered with several daily life functions, such as bathing, walking, using transportation and standing. She also experienced significant shortness of breath.

Cornell was fired for allegedly trying to secretly record a board meeting that convened to discuss, among other things, personnel issues and staff rates of pay.

Under California's Fair Employment and Housing Act (FEHA), it's unlawful for an employer to discriminate against, harass or fail to reasonably accommodate an employee on the basis of a physical or mental disability.

The California Supreme Court has held that weight may qualify as a protected disability under the FEHA only if medical evidence demonstrates that it results from a physiological condition affecting one or more of the basic bodily systems and it limits a major life activity *(Cassista v. Community Foods, Inc.)*.

In this case, the Club argued that Cornell did not have a disability. But the court noted that while plaintiffs still bear the burden of demonstrating that their obesity has a physiological cause, recent cases and federal legislation have indicated an "easing" of this burden, allowing lawsuits to proceed whenever possible. With that "easing" standard in mind, the court then evaluated Cornell's claims in the light most favorable to her.

Cornell's doctor testified that her obesity was likely caused by a genetic condition affecting her metabolism, which would constitute a "physiological condition." The court noted that the key question is whether a genetic condition qualifies as a physiological condition. Quoting the Oxford English Dictionary, the court held that the term "physiological" encompasses "genetics."

The court also noted that Cornell could eventually undergo genetic testing if her case were permitted to continue. And methods beyond genetic testing also may determine if obesity had a physiological cause.

Thus, the court held that Cornell had satisfactorily demonstrated that her obesity could constitute a disability, allowing her to proceed with her claim. [PE]

### Sexual Harassment Prevention Training

The Visalia Chamber of Commerce and Pacific Employers will host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop on October 24th, registration at 7:30am, Seminar 8:00-10:00am, at the Lamp Liter Inn, Visalia.

RSVP Visalia Chamber - 559-734-5876
PE & Chamber Members $40
Non-members $50
Certificate – Handouts – Beverages

### Labor Seminars now at the Depot

**Pacific Employers sponsors a seminar series on employee labor relations topics for all employers at**

The Depot Restaurant, **207 E Oak Ave, Downtown** Visalia.

RSVP to Pacific Employers at 559- 733-4256. ***These mid-morning seminars include refreshments and handouts.***

#### 2018 Topic Schedule

**No Seminars in August or December**

♦ **Forms & Posters -** and Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?

**Thursday, September 20st, 2018, 10 - 11:30am**

♦ **Guest Speaker Seminar - Annually we bring you a speaker for a timely discussion of labor relations, HR and safety issues of interest to the employer.**

**Thursday, October 18th, 2018, 10 - 11:30am**

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.

**Thursday, November 15th, 2018, 10 - 11:30am**

**No Seminar in December**