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## Inside

### RECENT APPELLATE DECISIONS

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### ***PROTECTING YOURSELF FROM CLASS ACTION WAGE AND HOUR LAWSUITS***

by **Dee H. Stasnopolis, Esq.**

In the recent case of *Koenig v. U-Haul Company of California* (2006), the California Court of Appeal upheld the trial court's ruling that a class action waiver did not render the arbitration agreement unconscionable. In this case, an employee entered into an arbitration agreement as part of his employment with the U-Haul Company. When a dispute arose regarding whether or not he was properly classified and was entitled to overtime pay, he sought to pursue a class action on behalf of all similarly-situated employees in superior court. U-Haul responded by petition to arbitrate and dismiss the class action. Thus, the only issue would be the dispute between this particular employee and U-Haul. The lower court approved the petition and dismissed the class action. On appeal, the Court of Appeal affirmed the trial court's action, holding that the employee did not establish at the trial court that there were predictably small amounts of damages involving individual claimants, warranting a class action and a disregard of the arbitration provision.

This case could have significant consequences, permitting employees that have an arbitration provision fully encompassing all the disputes that could involve a potential

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### ***Dee Stasnopolis***



Dee H. Stasnopolis is a Partner in the Bakersfield office of Borton Petrini, LLP. Dee graduated from Southwestern School of Law in 1982. In addition to his admittance to the State Bar of California, he is admitted to practice before the U.S. Supreme Court, the Ninth Circuit Court of Appeals and all Federal District Courts for the State of California.

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Dee is a member of the Kern County Bar Association, as well as the State Bar of California. His professional involvement also has included instructing insurance companies on settlement tactics, conducting legal-liability assessments for companies, handling unfair labor practice charges in front of the NLRB, advising clients on collective bargaining issues, conducting seminars on employment law for businesses, and has served as an arbitrator for the Los Angeles and Kern County Superior Courts. He sits on the Labor and Employment Law Committee of the Bakersfield Chamber of Commerce. He is a member of the Bakersfield Employers Advisory Council and the Society for Human Resource Management. He also is a member of the Employment Law Section of the State Bar of California.

## RECENT APPELLATE DECISIONS

By Dee H. Stasnopolis

### *Singleton v. United States Gypsum (2006).*

John Singleton, a maintenance mechanic employed by USG, was, according to the employer, terminated for having said words to the effect of “if we [have to] work on Christmas, I am going to come in here with a gun and shoot everybody except Sandy.” Singleton denied making the statement, though he admitted to being angry about possibly having to work on Christmas and saying, “Now I know why some people go postal.” In his lawsuit alleging sexual harassment and unlawful retaliation, among other things, Singleton asserted that prior to his termination, he was subjected to harassing comments from two of his male co-workers who called him names (e.g., “Sing-a-ling”) and who talked about his performing oral sex on them and their engaging in anal sex with him. Singleton further testified that his supervisors ignored his complaints about these statements that made his employment a “living hell.” The Court of Appeal reversed the summary judgment that had been entered in favor of the employer, concluding there was sufficient evidence to create a triable issue of material fact.

### *Butler v. The Vons Companies, Inc. (2006).*

While working as a stock clerk for Vons, Sheldon Butler signed a “Compromise and Release Settlement Agreement” arising from an altercation that Butler had with a co-employee. Approximately two years later, Butler filed unrelated claims alleging employment discrimination and violation of California Business and Professions Code section 17200 and Vons sought to rely upon the Release to bar Butler’s claims. The trial court granted Vons’ motion for summary judgment, but the Court of Appeal reversed, holding that the scope of the waiver contained in the Release was ambiguous. The “principal source of ambiguity” was that there were three parties to the Release – Vons, Butler and Butler’s union. (The reason for the union’s participation was that the union had filed, pursued and resolved the grievance that arose from the altercation that was the subject of the initial dispute.) The court concluded “as a broad general proposition, it does not necessarily follow that the settlement of a labor grievance between a union and an employer is intended to extend to personal claims of the employee.”

### *Blum v. Superior Court (2006).*

The California Appellate Court held that a Department of Fair Employment and Housing complaint, which is required

to be verified, may be verified by an attorney on behalf of his client.

### *Deveraturda v. Globe Aviation Sec. Services (2006).*

Virgil Deveraturda and other similarly situated employees, who were employed by Globe Airport Security Services to provide screening services at San Jose International Airport, were laid off as a result of the Aviation and Transportation Act of 2001. The employees were not given the 60 days’ notice provided under the WARN Act. The Ninth Circuit held that the WARN Act did not apply because the layoff resulted from the government’s decision after September 11, 2001, to federalize airport security, a decision over which Globe had no control.

### *Dark v. Curry County (2006).*

Robert Dark, an epileptic since the age of 16, worked as a maintenance and construction worker for Curry County, Oregon for approximately 16 years. Among other things, Dark operated heavy equipment, such as construction vehicles for the County. On the morning of January 15, 2002, Dark experienced an “aura” (a “nervous jerk”) that signaled to Dark that he might have a seizure that day – approximately half of the time after experiencing an aura, Dark would have a seizure. Despite this warning, Dark reported for work as scheduled and failed to inform anyone of the possibility of his suffering an epileptic seizure. Later that day, Dark suffered a seizure and fell unconscious while driving a County pickup truck. Dark’s passenger, another County employee, was able to gain control of the truck before anyone was injured. Following a disciplinary hearing, Dark’s employment was terminated on the grounds that he could not perform the essential functions of his position and that his continued employment posed a threat to the safety of others.

Dark filed a lawsuit under the Americans with Disability Act (ADA) alleging discrimination on the basis of a disability. The district court granted the County’s motion for summary judgment, but the Court of Appeal reversed after observing that the County had offered “two divergent explanations” for Dark’s termination:

- (1) inability to perform the essential functions of the job, and



(2) misconduct associated with operating the truck in total disregard of the safety of himself and others.

The court concluded that the “summary judgment record is replete with evidence suggesting that ‘misconduct’ was a pretext for discrimination on the basis of a disability” and that a genuine issue of material fact existed as to whether a reasonable accommodation could have been provided for Dark.

***Kearney v. Salomon Smith Barney, Inc. (2006).***

In this proceeding, several California clients of SSB filed a putative class action seeking damages and injunctive relief against SSB’s Atlanta-based branch’s practice of recording telephone conversations with California residents without their knowledge or consent. The lower court affirmed dismissal of the lawsuit after applying the law of the State of Georgia. The California Superior Court, however, concluded that the failure to apply California law in this context would impair California’s interest in protecting the degree of privacy afforded to California residents by California law. Further, the Supreme Court concluded that applying Georgia law in this instance would place California businesses (that are subject to California’s privacy law) at an unfair disadvantage vis-à-vis their out-of-state competitors. The court also concluded that the action could go forward insofar as plaintiffs sought injunctive relief, but no damages or restitution based on SSB’s past conduct.

***Soukup v. Law Offices of Herbert Hafif (2006).***

Peggy Soukup, a former employee of the law offices of Herbert Hafif, sued Ronald C. Stock for abuse of process and malicious prosecution of an earlier lawsuit against Soukup on behalf of the Hafifs and their law firm. The underlying lawsuit, which involved Soukup’s alleged disclosure to a third party of confidential information that Soukup obtained during her employment with the Hafifs, was itself dismissed in response to Soukup’s special motion to strike under the anti-SLAPP provisions of California Code of Civil Procedure. Although the trial court denied Stock’s special motion to strike the malicious prosecution lawsuit, the Court of Appeal reversed, holding that the later action arose out of Stock’s exercise of his free expression rights on behalf of his clients, the Hafifs. However, the California Supreme Court reversed the Court of Appeal, holding that Soukup had demonstrated a probability of prevailing on her malicious prosecution action.

***Hernandez v. Hillsides, Inc. (2006).***

The Court of Appeal held that plaintiffs could maintain an action against her employer, even if they could not

establish that they were actually viewed or recorded by hidden camera, in a cause of action against her employer for invasion of privacy. In this case, the employer, without notice to their employees and suspecting employees were accessing pornographic materials at night, installed a motion-detecting camera to be activated at night in order to determine if any of the employees were performing this activity. The employees discovered the hidden camera and sued their employer for invasion of privacy and intentional and negligent infliction of emotional distress. As to the intentional and negligent infliction of emotional distress, the Court of Appeal struck those claims.

***Cassidy v. Morgan, Lewis & Bockius, LLP (2006).***

The California Court of Appeal affirmed the trial court’s granting of a new trial pursuant to Labor Code section 2802. At issue in this case was whether the plaintiff, a past employee/attorney of Morgan, Lewis & Bockius, was entitled to indemnification for attorney fees and costs incurred in the defense of claims brought against him, for actions performed by another attorney with the prior law firm. The trial court and the Court of Appeal both held that, under Section 2802 of the Labor Code, an employer must indemnify an employee for attorney fees and costs incurred in defending a third-party lawsuit where such expenses are necessary and the lawsuit is based on the employee’s conduct within the course and scope of his or her job duties.

***Welch v. Nevada Department of Human Resources (2006).***

The Ninth Circuit Court of Appeal held that individual supervisors cannot be held personally liable for violations of the ADA in an employer/employee context. Under the ADA, the remedy was solely as against the employer.



**PROTECTING YOURSELF FROM CLASS ACTION WAGE AND HOUR LAWSUITS**

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employee, that satisfies the requirements of both California and federal law to preclude future class actions with respect to wage and hour disputes.

In light of the *Koenig* decision, a reevaluation of your employment hiring practices and your arbitration provisions should be made so as to ensure that they are fully compliant with both state and federal law and drafted in such a fashion so as to bring your employees under the protection of the *Koenig* decision. In taking these steps, you could preclude future class actions being pursued against your company and provide your company a significant savings in future litigation fees.



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