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Borton Petrini, LLP  
5060 California Avenue, Ste. 700  
Bakersfield, CA 93309  
bpbak@bortonpetrini.com

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**Editor:**  
**Jonathan P. Geen**  
**(619) 232-2424**

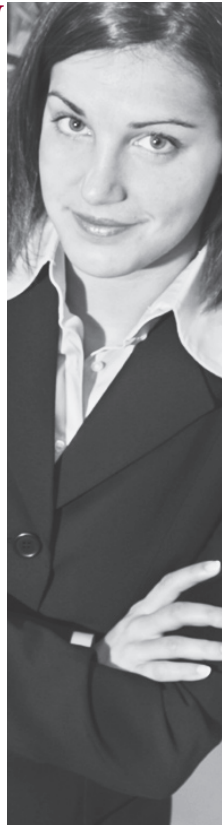
## **POTENTIAL EMPLOYERS' INSULATION FROM RETALIATION CLAIMS**

by Jonathan P. Geen, Esq.

In *Lakeside-Scott v. Multnomah County*, a February 12, 2009 decision, the Ninth Circuit reversed the district court's denial of defendant's motion for judgment as a matter of law on a retaliation claim based on the defendant supervisor's not having been the ultimate decision maker on plaintiff's termination. The Ninth Circuit held that defendant's having established another management employee, and not the lower-level supervisor plaintiff alleged had a retaliatory motive to get her fired, was the ultimate decision maker with regard to termination, insulated the lower-level supervisor from liability for retaliatory termination.

In the *Lakeside-Scott* case, the plaintiff had been fired from her position as an information systems specialist at Multnomah County's department of community justice, ostensibly for her improper use of her department's computers and e-mail system. She then brought a lawsuit alleging that her termination was actually in retaliation for her engaging in First Amendment protected speech and protected whistle blowing. Specifically, she alleged that while she was employed at the County, she had complained about coworkers' violations of county policies, including submitting complaints against one of her supervisors, Jan Brown ("Brown"). Brown played a role in the process that led to plaintiff's termination, although the ultimate decision was made independently by the department's director of information systems. Plaintiff then sued both the County and Brown, her individual supervisor, under the civil rights statute, 42 U.S.C. section 1983, as well as under the First Amendment and

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## **Jonathan P. Geen**



Jonathan P. Geen is a partner in the San Diego office of Borton Petrini, LLP. He received his undergraduate degree from Columbia College of Columbia University in the City of New York, and received his J.D. from Northwestern University School of Law.

Jonathan has practiced law in Illinois, as well as California. He is experienced in both litigation and non-litigation matters. He has successfully defended employers from wrongful termination, wage and hour, discrimination, harassment, and retaliation claims before both courts and administrative agencies, and managed to get employee cases decided in employers' favor on summary judgment.

He is regularly consulted by numerous companies on all of their day-to-day human resources issues, including employee disputes, effective discrimination/harassment investigation and training, as well as evaluation and drafting of their employment policies. He

has presented seminars on employment law for several organizations, including the San Diego Employers' Association.

**RECENT APPELLATE DECISIONS**

By Jonathan P. Geen, Esq.

**NINTH CIRCUIT**

In the case of *Solis v. Matheson*, the Ninth Circuit held that, despite the general immunities and preemptions granted to Native American tribes under federal law, the overtime requirements of the Fair Labor Standards Act still apply to retail businesses located on an Indian reservation that are owned by Indian tribal members. The Ninth Circuit held that the Secretary of Labor had authority to enter the Indian reservation to audit the books of the business, as she would do regularly with respect to any private business.

**CALIFORNIA STATE COURTS**

In the case of *State Building & Construction Trades Council of California v. City of Vista*, the Court of Appeal rejected a labor union's peremptory writ of mandate forcing the City of Vista to comply with prevailing wage laws after the city adopted a charter specifically for the purpose of building its planned capital improvements without complying with the prevailing wage laws. The Court of Appeal stated that California's prevailing wage law does not address matters of statewide concern and, therefore, chartered cities are not required to comply with the provisions of such wage law with respect to public works contracts financed solely from city revenues. Rather, the court ruled such contracts are municipal affairs over which charter cities have paramount power under the California Constitution.

In the case of *Olvera v. El Pollo Loco, Inc.*, the Second Circuit dealt another blow to arbitration agreements between employers and employees based on the facts of that case, where low-wage food service employees were unilaterally handed an arbitration agreement with misleading explanatory materials and there was a showing of extreme procedural unconscionability in terms of the manner in which employees were forced to sign it. The court refused to enforce such arbitration agreement due to the inequality of the bargaining power between the parties. However, the circumstances of the *Olvera* case were more egregious than would usually take place between an employer and employee, and arbitration agreements are, of course, still enforceable under the right circumstances.

In the recent case of *Scotch v. The Art Institute of California - Orange County, Inc.*, the Court of Appeal ruled that summary judgment in the defendant employer's favor was warranted on Scotch's disability discrimination claim, because Scotch did not meet his burden of presenting evidence that the employer had failed to make a reasonable accommodation to him for his disability of HIV and/or that the adverse employment decision in the case (reduction of hours) was discriminatory. Scotch had contended that his employer should have provided him an accommodation in the form of priority in teaching assignments to ensure that he maintained his full-time employment status. The Court of Appeal held that the trial court was correct in

*continued on page 3***POTENTIAL EMPLOYERS INSULATION FROM RETALIATION CLAIMS***continued from page 1*

state whistle-blower statute. The County had already been dismissed by the trial court, and the case went to trial on the claims against the individual supervisor, Brown. The jury entered a judgment in the plaintiff's favor in the amount of \$650,000, which included \$500,000 in punitive damages. The district court had denied Brown's motion for judgment as a matter of law after the jury verdict.

On appeal, the Ninth Circuit reversed, finding that the defendant had sufficiently negated any inference of causation between the plaintiff's complaints and her termination in that the decision to terminate the plaintiff was made by a wholly independent decision maker without any influence from Brown, the supervisor, with the alleged retaliatory motive. The Ninth Circuit, in so ruling, referenced a statement from the United States Supreme Court that, "we must not place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing . . . . That employee ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record."

The Ninth Circuit reviewed the record and confirmed that it established conclusively that the independent decision-maker's actions and judgments were not influenced by any retaliatory motive

on Brown's part. The Ninth Circuit then stated:

"Accordingly, we hold that, as a matter of law, Fuller's wholly independent, legitimate decision to discharge Scott, uninfluenced by the retaliatory motives of a subordinate prohibited the jury from finding Brown liable for Scott's termination."

It is somewhat difficult to predict how expansively the Ninth Circuit's analysis in *Lakeside-Scott* can be viewed in terms of a potential defense to retaliation claims, in that the judgment that was entered by the jury was against the individual supervisor, and not the County itself. Nevertheless, an employer would be well advised to use the analysis of the Ninth Circuit in deciding how to move forward with terminating an employee, when such termination is necessary or well advised because of important business considerations, but the employer is aware that the subject employee has engaged in protected activity, such as submitting internal complaints.

By taking very clear steps to implement, maintain and document a very clearly designated division of labor and independent decision maker for the subject termination, the employer may well minimize the likelihood of successful retaliation claims against it, as well as against its supervisors not directly involved in the ultimate adverse employment action.

Our Firm, as always, is available to assist employers with using preventative and planning techniques to minimize the risk of litigation, and other day-to-day human resources issues. ♦

## ARE THE WORKERS YOU ARE CALLING “INDEPENDENT CONTRACTORS” TRULY INDEPENDENT OR ARE YOU PLAYING RUSSIAN ROULETTE?

By Jonathan P. Geen, Esq.

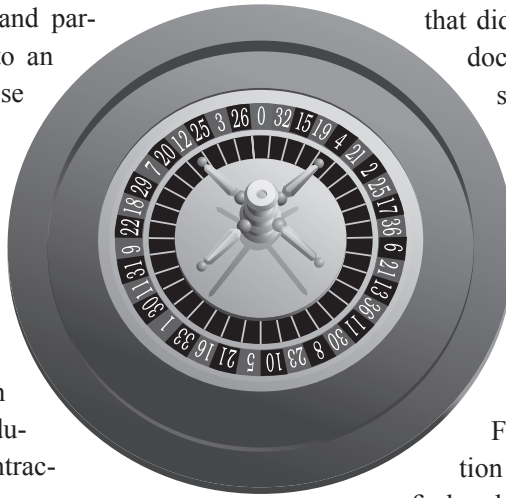
Employers throughout the country, and particularly in California, are being subjected to an ever more common torture technique otherwise known as the wage and hour class action.

While these class actions were and still are frequently brought to address an employer’s alleged misclassification of its employees as “exempt,” more and more class actions are being brought to address the fact that in order to save money, particularly with the troubled economy, companies have been using workers on all kinds of projects and duties and designating them as “independent contractors.”

The independent contractor relationship is very tempting at first blush. Many workers prefer to be “independent” in order to have greater flexibility in work hours, the manner in which they conduct their work, and what other companies they work for or with. The company in turn can greatly reduce its costs by not having to pay those “independent contractors” benefits, workers’ compensation insurance, and the employer’s share of taxes.

However, more and more plaintiff employment law firms see the promise of huge legal fee payoffs from suing companies that use what they think are “independent contractors.” These law firms are using the presumption of employment status, the lack of clarity in the line between employee and independent contractor, and the many automatic damages and penalties that result from the misclassification of employees as independent as atom bombs on a wide variety of different industries. Just some of the industries that have been hit are the transportation industry, including taxi and airport shuttle companies, parcel/mail delivery companies, as well as real estate and insurance companies.

These cases are not only expensive but in fact intensive. One of the challenges employers face in defending these misclassification claims is that the testing factors used by the various administrative agencies (i.e., EDD, Workers’ Compensation Appeals Board, Department of Labor) are not always uniform. The primary, but far from only, consideration used by all agencies is whether the company reserves the right of control over the worker, whether or not the right is actually exercised. The company’s contracts, policies, and procedures, as well as the day-to-day realities of the working conditions are closely scrutinized and analyzed. Companies



that did not take the time to have their policies and documents reviewed by competent labor counsel provide considerable ammunition to eager plaintiff law firms.

The class-action lawsuits that are being filed seek millions of dollars for the large purported classes and can literally put companies out of business. This makes the ability to find a way to prevent certification of the case the employer’s best chance for survival if a suit has already been filed. Our Firm recently prevented a purported class action of San Diego taxicab drivers from being certified and such denial of certification has been affirmed on appeal by the Fourth District Court of Appeal in *Ali v. U.S.A. Cab, et al.* We can help your business defend these cases.

However, an ounce of prevention is worth ten pounds of cure. If your business is considering designating certain workers as “independent,” a consultation and review of your policies and practices is definitely a worthwhile investment. ❖

### RECENT APPELLATE DECISIONS

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holding that this proposed accommodation was not reasonable, and that Scotch therefore failed to satisfy his burden to identify a reasonable accommodation that would have been available during the interactive process. The court further ruled that Scotch had failed to establish any causal connection between his disability and the adverse employment action. The court stated that it was at least incumbent upon Scotch to prove by a preponderance of the evidence that there was a causal connection between the employee’s protected status and the adverse employment decision. The evidence before the court was that the primary decision makers who decided to reduce Scotch’s work responsibilities were unaware of his disability at the time of their decision. The court therefore ruled that the mere timing of the Art Institute’s decision to require a master’s degree for full-time employment, which decision it made at or about the time Scotch disclosed his HIV status to one supervisor, was insufficient to create an inference of the requisite causal connection. ❖

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