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representation and the success of those election outcomes.

"To be included in the Top One Hundred is a tremendous honor," according to LRI President Donald P. Wilson. "It acknowledges these attorneys' professionalism and long-term dedication to their clients."

In Memoriam: Remembering Our Friend and Colleague Stanley E. Tobin

An accomplished member of the profession and devoted partner of the firm, Stan Tobin, passed away on June 15, 2007, in Sherman Oaks, CA.

After graduating cum laude from Harvard College in 1953, Stan served as a military historian for the U.S. army before attending Yale Law School, where he was editor of the Yale Book Review and a recipient of the Israel Perez award.

Stan joined Hill, Farrer & Burrill in 1959 and retired 44 years later as a senior partner in 2003. He was a member of the ABA, the Los Angeles County Bar Association, and was actively involved in the alumni affairs of each of his schools. Stan also served as a teaching fellow at Stanford Law School and as a visiting and guest lecturer.

Two Hill, Farrer & Burrill Labor Attorneys Among Top One Hundred in the United States

James Bowles and Richard Zuniga of Hill Farrer & Burrill, LLP were recently named to the list of Top One Hundred Labor Attorneys in the United States of 2007, as compiled by Labor Relations Institute, Inc., a leading industry information source.

Inclusion on the list puts Bowles and Zuniga in the top one percent of labor attorneys in the U.S., making them two of the most active attorneys representing companies in National Labor Relations Board-monitored elections.

Bowles and Zuniga made the elite list by being selected from more than 8,600 attorneys evaluated by Labor Relations Institute. The honor of "Top One Hundred" was determined by the number of NLRB elections in which each attorney provided

This occasional newsletter is published by Hill, Farrer & Burrill LLP as a service to clients, friends and colleagues.

Each publication summarizes recent developments in state and federal law affecting employers, but should not be relied upon as an opinion or advise of the Firm regarding any specific matter.

Stan had a life long love of politics and was a speechwriter on the legal staffs of many candidates including President Clinton, Senator Muskie and President Carter. He authored *A Journey in Search of Justice* and *A Legacy Lost*, both on the American political process.

Stan is survived by his daughter, Lisa, her husband Michael, and his granddaughter, Leah, along with his three brothers, Alan, Robert and Mark.

Supreme Court Rules Home Health Care Workers Employed By Third Parties Are Not Owed Overtime

In-home health care providers employed by third parties are exempt from Fair Labor Standards Act overtime requirements, according to the unanimous decision of the Supreme Court on June 11 in *Long Island Care at Home, Ltd. v. Coke*. Coke had sued her former employer for failing to pay her minimum wages and overtime wages under the FLSA.

The FLSA exempts from its wage and hour rules any employee providing domestic companionship services to individuals unable to care for themselves. A thirty year old Department of Labor regulation extends the exemption to situations where a worker is employed by someone other than the family or household of the companionship services recipient, such as Coke was.

While the Second Circuit concluded that the regulation was contrary to the FLSA and congressional intent, the Supreme Court reversed the decision, explaining that the broad statutory terms of

“domestic service employment” and “companionship services” were intended to be refined by the agency. Because Congress left it to the Department of Labor to decide whether workers paid by third parties were to be included within the scope of the definitions, and because the resulting regulation had been subjected to notice-and-comment rulemaking procedures and was reasonable in its conclusion, deference was required.

This case increases employer certainty in relying on Department of Labor wage and hour regulations and their interpretations by the DOL. It also saves third-party home health care employers across the country the expense of curing numerous wage and hour claims likely amounting to millions of unpaid dollars.

High Court Places a Limit on Employees’ Ability to Sue for Pay Discrimination

Workers who wait too long to sue for pay discrimination will be out of luck, according to the recent Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.* Ruling against an employee who earned thousands of dollars less than her male counterparts, the court applied a 180-day deadline for bringing federal civil rights law claims and determined the complaints were untimely.

According to the Court majority, employers would be hard-pressed to defend claims arising from long past employment decisions if no deadline to file such claims was in place. The dissent, however, urged Congress to amend the law. In response, Congress has

proposed legislation that allows employees to assert claims for pay discrimination after receiving each paycheck.

Ledbetter had worked at Goodyear for 19 years, and was making \$6,500 less than the lowest-paid male supervisor. While the company asserted Ledbetter had received poor performance evaluations resulting in lower pay increases, Ledbetter claimed that a series of management decisions proved discrimination on the basis of her gender.

Though the jury sided with Ledbetter and awarded her several million dollars in damages, the 11th Circuit Court of Appeals overturned the verdict on the basis that it was untimely. Unsympathetic to Ledbetter’s argument that she had not sued earlier because she did not want to “rock the boat,” the Supreme Court affirmed the 11th Circuit decision, noting that the passage of time “may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened.”

It is important to note that employees are not likely to receive more favorable treatment under California law. Although federal civil rights claims are subject to 300 day deadline, and a one year statute of limitations period applies to claims filed under the state Fair Employment and Housing Act (FEHA), FEHA only permits that limitations period to be extended a maximum of ninety (90) days in instances in which the employee was unaware of the allegedly discriminatory basis for the action during the one-year period.

Manager Unable to Show Firing for Unethical Behavior Was Pretext for Disability Discrimination

After warning an employee several times that his hours exceeded U.S. Department of Transportation's hours of work standards, King, a supervisor at United Postal Service responsible for ensuring employees properly logged their hours, persuaded an employee to revise a time card to make it appear the employee had not violated the DOT guidelines. UPS fired King, despite 30 years of capable service, because the company deemed his actions an integrity violation. King sued, claiming disability discrimination, failure to reasonably accommodate, and breach of contract.

Affirming the opinion of the lower court, the California Court of Appeal held that King failed to raise a triable issue of fact. King did not deny instructing the employee to alter her time card and could not show any connection between his termination and the fact he had recently returned from a medical leave of absence. The court dismissed King's arguments that the employee whose time card was falsified had not actually been at risk of going over her hours, and that his managers were out to get him, because he had not shown the stated reason for his firing was a pretext for discrimination.

This holding confirms that where an employer terminates a manager in good faith believing he engaged in misconduct, the manager cannot support a claim of discrimination based on speculative hidden motives for the firing.

Consultant Providing Customer Support and Training Not Subject to Administrative Employee Overtime Exemption

In *Eicher v. Advanced Business Integrators, Inc.*, a California appellate court recently held that employer, Advanced Business Integrators, did not establish that Eicher, its former employee, was an exempt administrative employee who was not entitled to overtime compensation.

Exemption from overtime laws is an affirmative defense to California wage and hour claims that employers bear the burden of proving. While the Labor Commissioner found in favor of ABI, the Superior Court determined otherwise, awarding Eicher nearly \$57,000. Affirming the lower court opinion, the Court of Appeal stated that Eicher, whose duties as a consultant for ABI primarily included providing customer service and training customer employees on the company's software, did not meet the first part of a five-part test for determining whether the administrative exemption applies.

To be exempt, an employee must: 1) perform work directly related to management policies or general business operations of the employer or its customers; 2) regularly exercise discretion and independent judgment; 3) perform or execute work under only general supervision; 4) be engaged in such activities at least 50 percent of the time; and 5) earn twice the state's minimum wage. Eicher's responsibilities did not relate to management but were that of a production employee, one who engages in an activity constituting the company's

primary purpose. "He had no personal effect on the policy of general business operations of ABI or its customers."

California Court of Appeals Denies FEHA Harassment and Disparate Impact Claims Where Incidents Were Few and Far Between

On June 14, the California Court of Appeals ruled in *Jones v. California Department of Corrections* that a plaintiff, Jones, failed to establish a prima facie case of harassment or disparate treatment on the basis of race or gender where she repeatedly testified she did not believe or know whether the comments forming the basis of her complaint were motivated by race or gender. Without a nexus between the plaintiff's gender and the alleged harassment, there can be no triable claim under the Fair Employment and Housing Act.

Moreover, though Jones claimed she had been subjected to "hostility, disrespect and cruelty" from her male coworkers, the court held that the sporadic incidents cited by Jones did not rise to a level to constitute harassment or discrimination, because they were not severe or pervasive.

Delivery Drivers Held Employees, Not Independent Contractors, Despite Evidence Suggesting Otherwise

A California court of appeal recently upheld a trial court ruling denying a refund of employment taxes to plaintiff

employers that argued their employees, whose job function was to pick up and deliver packages, were independent contractors. According to the holding in *Air Couriers International v. Employment Development Department*, the drivers were not independent contractors despite setting their own schedules, determining how long they would work and when they would take breaks, working other jobs in conjunction with their employment as drivers, and maintaining the ability to reject assignments they did not want. The drivers were paid by the job, did not receive paid leave or medical insurance, negotiated higher rates for certain jobs, and supplied their own equipment. Some executed independent contractor agreements and understood that they were operating as such.

Nevertheless, the court found that the drivers were not independent contractors because many of the factors considered in making such a determination were absent from the relationship between the drivers and plaintiffs. While the most important factor in determining status is the right to control the manner and means of accomplishing the desired result, other factors include: 1) whether the person performing the services is engaged in a distinct occupation or business; 2) whether the work done is typically performed under the direction of the principal; 3) the skill required for the occupation; 4) whether the principal or workman supplies the instruments and place of work; 5) the length of time the services are performed; 6) whether payment is by time or by job; 7) whether the work is part of the regular business of the principal; and 8) whether the parties believe they are creating an

employer/employee relationship.

In regard to the right of control, the court stated that where an employment relationship exists, "the fact that a certain amount of freedom is allowed or is inherent in the nature of the work involved does not change the character of the relationship, particularly where the employer has general supervision and control." Applying the above considerations, the court determined that the company exerted control over the coordination and supervision of its most basic function, the timely delivery of packages.

Another Employment Agreement Arbitration Provision Bites the Dust

In the latest blow to enforceable arbitration clauses, on May 14, 2007, the Ninth Circuit found the arbitration clause used by law firm giant O'Melveny & Myers in all of its employment agreements to be unconscionable. The plaintiff in *Davis v. O'Melveny & Myers*, a former paralegal of the firm, filed a class action against O'Melveny alleging violations of the Fair Labor Standards Act and California wage and hour laws. While the district court granted a motion to dismiss the class action and compel arbitration based on a Dispute Resolution Program (DRP) that had been distributed to employees through interoffice mail and was posted on the company intranet website, the appellate court concluded that the agreement was unenforceable.

The issue was not whether the DRP governed this particular dispute, but whether the DRP itself was enforceable. The

Ninth Circuit held that the question of unconscionability is for a court to decide rather than an arbitrator. In this case, the court determined the DRP's arbitration provision was procedurally unconscionable because although employees had three months notice of the clause, "in a very real sense the DRP was 'take it or leave it'" due to the fact that an employee who disagreed with the provision would have no means of opting out save leaving the company.

The court also found the provision substantively unconscionable based on the one year limitations period for asserting claims against O'Melveny, even though O'Melveny would be subject to the same limitations for bringing claims against employees, because there was no true mutuality between O'Melveny and its employees. According to the court, such a limitations period was so one-sided as to shock the conscience.

Additionally, the court held that a confidentially provision prohibiting parties from discussing their disputes with anyone outside of the mediation or arbitration process was unconscionable and, therefore, unenforceable. Rather than sever or ignore these offending provisions, the Ninth Circuit held the entire DRP unenforceable.

This case provides another example of how over-reaching and one-sided arbitration agreements are not likely to be enforced by the courts for employment law claims.

New EEOC Guidance Addresses Disparate Treatment of Employees Who Are Caregivers

Recently, the EEOC issued new Enforcement Guidance, titled "Unlawful Disparate Treatment of Workers with Caregiving Responsibilities." While the Guidance does not purport to create a new federal class of protected individuals, it does highlight the assorted theories by which an employer's actions toward employees or applicants with family caregiver responsibilities may violate Title VII of the Civil Rights Act, or the Americans with Disabilities Act. The Guidance states it focuses on workers who are family caregivers, because such workers are "particularly vulnerable" to retaliation.

The Guidance spends considerable time discussing potential gender discrimination claims by female caregivers. For example, a discrimination claim may lie if a female applicant is rejected after an interview discussion about her family caregiver responsibilities. Similarly, reducing a working mother's job responsibilities after her return from maternity leave, even for benevolent reasons, may violate Title VII due to gender-based stereotypes. Acts such as strictly monitoring and recording late arrivals by a female worker with childcare responsibilities (as opposed to males or non-caregiver females), may also run afoul of the law. The Guidance also reinforces the prohibition of pregnancy discrimination under federal law, stating that employees disabled by pregnancy must be treated similarly to employees with other medical conditions in regard to leave provisions and other benefits.

The Guidance discusses potential theories of discrimination by male caregivers, including acts such as denying a male employee's request for childcare leave, although a similar request from a female employee is granted. Also, any leave specifically provided to women as opposed men must be limited to the time that a woman is incapacitated by pregnancy or childbirth. These examples highlight that gender-based stereotypes are not permissible.

The ADA prohibits discriminatory treatment of an employee due to his or her relationship with a disabled individual. This provision of the ADA may be violated if, for example, an applicant is rejected because he is a single father with sole custody of a disabled child, if the employer concludes that the applicant's caregiver responsibilities would negatively affect attendance and performance.

Should you have any questions about your company's compliance with this new Guidance, please contact your attorney at Hill, Farrer & Burrill.

Employee Held to Have Provided Sufficient Notice for CFRA Leave

A recent California Court of Appeal case reminds employers of the importance of providing adequate notice to employees of their right to medical leave. In *Faust v. California Portland Cement Company*, the court held that failure by the employer to explain California Family Rights Act (CFRA) requirements to an injured worker precluded it from arguing that the worker had failed to provide sufficient documentation to substantiate

the need for a medical leave of absence.

Employers of more than 50 employees, generally, are covered by CFRA, and are required to provide employees with up to 12 weeks of leave per year for qualified family and medical reasons. Covered employers must notify employees of their right to request leave and explain in advance any notice requirements. Employees need not expressly assert CFRA rights to trigger employer compliance; rather, any verbal notice sufficient to make an employer aware of the need for CFRA leave will suffice.

In *Faust*, the plaintiff left work claiming that poor treatment by his co-workers had caused him stress and mental anxiety. After concluding a psychiatric program, the plaintiff sought treatment for severe back pain, and submitted a medical certification from his chiropractor indicating he was "unable to perform his regular duties."

The employer's Human Resources Manager attempted to contact Faust to discuss the information provided. Claiming Faust was too stressed to speak, the employee's wife returned the call, offered to address the employer's questions, and suggested contacting Faust's chiropractor or workers' compensation attorney for any additional information. The employer declined to do so, instead sending a letter to Faust advising him that the certification he provided was inadequate because it did not place him "off work." Faust was given a week to respond to the letter, and when he did not he was terminated for insubordination.

The court held that the employer had failed to provide Faust with notice of CFRA rights once he provided notice sufficient to establish the need for a CFRA-qualifying leave. It explained that an employer may not take adverse action against an employee for failing to substantiate a CFRA-qualifying leave if the employer has failed to sufficiently notify the employee of his or her rights under CFRA. The court specifically stated that in this particular case the employer could have reasonably obtained more information from the workers' compensation attorney.

Claim that Religious Affiliations Permeated Advancement Decisions Raises Triable Issue of Religious Discrimination

Under the recent Ninth Circuit ruling in *Noyes v. Kelly Services*, a plaintiff may defeat a summary judgment motion on a claim of religious discrimination without showing that the employer's allegedly nondiscriminatory reasons for promoting certain individuals were a mere pretext for intentional discrimination.

Noyes was allowed to proceed based on her claims that membership in a religious sect, the Fellowship of Friends, permeated the promotion process and that the supervisor controlling promotion decisions was a member of that sect; that she was more qualified than the promoted employee; and that the controlling supervisor acknowledged the perceived favoritism was an ongoing issue.

In *McDonnell Douglas v. Green*, the Supreme Court established a three-step process to

assigning the burden of proof in Title VII employment discrimination cases. Under this framework, where a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to explain away the evidence of discrimination. The employee may then try to show that the asserted reason was not the real reasons for the decision and was a mere pretext for discrimination.

The court found that Noyes established a prima facie case of reverse religious discrimination by showing that: 1) she lacks adherence to the religious beliefs promoted by the management; 2) she was performing according to her employer's legitimate expectations; 3) she suffered an adverse employment action; and 4) other employees with similar qualifications were treated more favorably. It is the first point that differentiates a religious discrimination case from a case arising from gender or race discrimination. While the latter cases require a showing that plaintiff is a member of a protected class, the basis of a religious discrimination claim is the adherence to a particular set of beliefs by the employer and the fact the employee does not share in those beliefs.

This decision reminds employers to be aware of discussions of religion in the workplace, particularly between those in supervisory positions and the employees they are directly responsible for.

“Combination Exemption” Rejected for Software Engineer

In a recent decision of the U.S. Fourth Circuit Court of Appeals,

a software engineer was found ineligible for the “combination exemption,” which permits employers to “tack together” time spent by an employee under two or more exemptions for purposes of establishing an exemption from the overtime laws. The court ruled that the employee was not eligible for an exemption based on his being both an administrative employee and an outside salesperson, because he did not earn a salary which was required for application of the administrative exemption.

If you have any questions about these issues or any other labor matters, please contact any member of the Labor & Employment Department at Hill, Farrer & Burrill LLP

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