Employment Law Memo 05/08/2023

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*** Featured Cases ***

5th - Trial court erred in denying preliminary injunction to invalidate Department of Labor's new tip credit rule.

Restaurant Law Center v. Dept of Labor (5th Cir 04/28/2023)
http://case.lawmemo.com/5/restaurant.pdf

Plaintiffs challenged the Department of Labor's ("DOL") 2021 amendment to 29 C.F.R. Sec. 531.56, the regulation that defines how the federal minimum wage applies to

tipped employees. The amendment permits an employer to take a tip credit for work that "directly supports tip-producing work, provided that the employee does not perform that work for a substantial period of time." The regulation further defines "substantial period of time" to be no more than 20 percent of an employee's time on directly supporting work per workweek, or more than 30 minutes of continuously performing duties. Plaintiffs alleged the amendments violated the Fair Labor Standards Act, the Administrative Procedure Act, and Constitution's separation of powers. The trial court denied the plaintiffs' preliminary injunction, finding the plaintiffs failed to show they were irreparably harmed by the costs of complying with the new rule.

The Fifth Circuit reversed and remanded. The trial court erred in finding no evidence of irreparable harm. The trial court did not acknowledge the DOL's concession that some businesses would incur ongoing costs to ensure they could continue to claim a tip credit, nor did it acknowledge prior case precedent establishing that nonrecoverable compliance costs usually are sufficient to constitute irreparable harm. The regulation amendments introduced new provisions that constituted an independent constraint on an employer's taking of the tip credit. Employers, like the plaintiffs, who desire to continue claiming the tip credit will incur ongoing management costs to ensure compliance.

5th - Warehouse worker has potential negligent supervision and invasion of privacy claims against UPS for failure to provide him adequate bathroom breaks.

Amin v. UPS (5th Cir 04/27/2023)
http://case.lawmemo.com/5/amin.pdf

Amin, a warehouse worker, claimed he was denied a bathroom break by UPS until he was forced to defecate on himself at a workstation. Amin sued UPS for negligent supervision, invasion of privacy, and intentional infliction of emotional distress. The trial court dismissed Amin's claims for negligent supervision and invasion of privacy and granted summary judgment in favor of UPS on the intentional infliction of emotional distress claim. The Fifth Circuit affirmed in part and reversed in part. The trial court was correct in determining Amin had not met the standard for IIED claims. Testimony that Amin was withdrawn and unhappy was insufficient evidence that his emotional distress was "severe" enough for purposes of an IIED tort. However, the trial court erred in concluding that the negligent supervision claim was preempted by the federal Labor Management Relations Act ("LMRA"). Texas law imposes a continuous, non-delegable duty on an employer to supervise employees' activities, and this duty exists separately than rights created by a collective bargaining agreement. The trial court also erred in determining that the alleged facts did not constitute a claim for invasion of privacy. In recent years, there have been concerning reports of industry practices that deny employees adequate bathroom breaks. Such actions are not immune from liability under an invasion of privacy theory.

9th - Ninth Circuit certifies immunity question to Washington Supreme Court in police misconduct lawsuit.

Cruz v. Spokane (9th Cir 04/28/2023)
http://case.lawmemo.com/9/cruz1.pdf

Cruz, a former police officer, sued the City, the Washington State Criminal Justice Training Commission ("Commission") and other City officials for ten causes of action based on race discrimination and retaliation for reporting sexual misconduct by another police officer. The defendants moved the case to federal court and moved for partial summary judgment as to the state law claims. The defendants contended they were entitled to statutory immunity under Washington Revised Code ("RCW") 43.101.390(1), which provides the Commission and individuals acting on behalf of the Commission are immune from suit based on acts performed in the course of their official duties. The trial court determined that the defendants were not "automatically immunized" from suit under the statute, and that further discovery was necessary to determine whether they acted within the scope of their official duties. The Ninth Circuit determined it must decide whether the statute's immunity provision covers all torts, including intentional torts, committed by the defendants while administering the police academy, and that this question was unsettled under Washington law. The Ninth Circuit certified the following question to the Washington Supreme Court: "What is the scope of immunity provided by RCW 43.101.390? Specifically, does the provision grant immunity for intentional torts committed in the course of administering the Basic Law Enforcement Academy?"

Fed - Army veteran entitled to attorney's fees and expenses under the Equal Access to Justice Act.

Crawford v. US (Fed Cir 04/26/2023)
http://case.lawmemo.com/fed/crawford1.pdf

Crawford appealed the decision of the United States Court of Federal Claims holding he was not entitled to attorney's fees and expenses under the Equal Access to Justice Act (EAJA). The Federal Circuit reversed the Court of Federal Claims' decision that Crawford was not entitled to attorney's fees and expenses under §2412(d)(1)(A). Crawford served in the United States Army and Florida Army National Guard for two decades before he was discharged in 2011 for failure to meet medical retention standards due to his service-connected PTSD. During Crawford's second tour of duty, his PTSD began, and he was referred to the Florida State Surgeons Medical Discharge Review Board (SSMDRB). The SSMDRB found Crawford did not meet medical retention standards and that his PTSD was incurred in the line of duty. Despite SSMDRB's findings, Crawford was not referred to the Physical Evaluation Board (PEB), a prerequisite for medical retirement, and was instead erroneously discharged. Crawford sought correction of his records and retroactive benefits before the Army Board for the Correction of Military Records (ABCMR). The ABCMR did not grant him

relief and directed the Office of the Surgeon General to further review Crawford's records to determine whether he met retention standards at the time of his discharge. Dr. O'Donnell recommended that Crawford not be referred for a fitness determination because, in her opinion, Crawford met retention standards at the time of his discharge.

On appeal, Crawford directly challenged the ABCMR's and Dr. O'Donnell's decisions and findings but also alleged an original error in the Army's failure to refer him to a PEB for a fitness determination before his separation, as required by Army Regulation 40-501. The government filed a voluntary motion for remand to the ABCMR. On remand, the ABCMR found Crawford was entitled to medical retirement based solely on the evidence available at the time of his separation and granted him complete relief, including the correction of his records and medical retirement benefits retroactive to the date of his discharge.

Crawford moved for attorney's fees and expenses under §2412(d)((1)(A) of the EAJA. Crawford argued the remand was predicated on agency error and that he was, therefore, a prevailing party under the statute. The Court of Federal Claims denied the motion, reasoning the remand was based on judicial economy rather than a finding or admission of agency error, and that Crawford was therefore not a prevailing party. §2412(d)(1)(A) of Title 28 directs courts to award attorney's fees and expenses incurred in civil actions against the government if: (1) the litigant is a prevailing party; (2) the position of the United States was not substantially justified, and (3) special circumstances do not make the award unjust. The court concluded all three conditions were satisfied.

***** Capsules *****

3rd - Uber drivers are not a class of workers engaged in interstate commerce.

Singh v. Uber (3rd Cir 04/26/2023)
http://case.lawmemo.com/3/singh2.pdf

Plaintiffs who are current and former Uber drivers from many different states filed a lawsuit against Uber, alleging it violated various labor and employment laws. The 3rd Circuit affirmed the trial court's decision that Uber drivers are not engaged in foreign or interstate commerce. The FAA compels federal courts to enforce a wide range of arbitration agreements. However, it does not apply to arbitration agreements contained in the contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce under 9 U.S.C. §1. On appeal, the court reviewed two consolidated cases where the court reviewed whether Uber drivers belong to such a class of workers. The court turned to the decisions of its sister circuits, who have held that a class of workers comes within the exception only if "interstate movement of goods or passengers is a central part of the job description of the class." The court found Uber drivers are in the business of providing local rides that sometimes,

as a happenstance of geography, cross state borders. However, the work of Uber drivers remains fundamentally the same. The court noted that plaintiffs failed to show that drivers' interstate duties, such as driving riders to and from airports, are a constituent part of the interstate movement of goods or people. Thus, Uber drivers are not a class of workers engaged in interstate commerce and do not fall under the §1 exception.

5th - Trial court did not err in granting an anti-suit injunction barring Indian litigation against former employee.

Ganpat v. Eastern Pacific Shipping (5th Cir 04/28/2023)
http://case.lawmemo.com/5/ganpat.pdf

Ganpat, a citizen of India, worked as a crew member on a merchant ship managed by Eastern Pacific. When the ship stopped in Savannah, Georgia, it failed to stock up on anti-malarial medicine. Ganpat contracted malaria and eventually his gangrenous toes needed to be amputated. Ganpat sued Eastern Pacific in Louisiana state court alleging claims under the Jones Act and general maritime law. Over a period of two and a half years, Eastern Pacific evaded service. Eastern Pacific then sought an anti-suit injunction in India to prevent Ganpat from litigating in the American court. The Indian court granted the injunction, arrested Ganpat, and compelled him to appear before the Indian court. Ganpat then sought an anti-suit injunction in the Louisiana court to prohibit Eastern Pacific from prosecuting its Indian suit against him. The trial court granted the injunction in favor of Ganpat. The Fifth Circuit affirmed. The vexatiousness of the Indian suit was severe compared to the considerations of comity. The Indian litigation would result in substantial hardship as Ganpat faced the real possibility of being sent back to jail and having his property seized based on Eastern Pacific's attempt to have the Indian court enforce sixteen counts of contempt against him. There was no basis to conclude the trial court abused its discretion in granting the injunction.

CA - New case law consistent with the court's decision to deny the employer's motion to compel arbitration.

Westmoreland v. Kindercare Education (California Ct App 04/24/2023)
http://case.lawmemo.com/ca/Westmoreland.pdf

The employer appealed the trial court's decision denying its motion to compel arbitration. The California Court of Appeal affirmed the trial court's decision. The employer asked the trial court to compel arbitration of Westmoreland's claims under the Labor Code and to stay her claims under PAGA. The trial court granted the motion, but this court subsequently issued an alternative writ of mandate denying it. Thus, the trial court complied with this court's order. On appeal, the employer argued that new law required the court to compel Westmoreland to arbitrate at least some part of her case. The court found the trial court did not abuse its discretion because its decision to deny

the employer's renewed motion to compel arbitration was consistent with the new case law cited by both parties.

CA - Employer's online arbitration agreement was not substantively unconscionable.

Basith v. Lithia Motors (California Ct App 04/21/2023)
http://case.lawmemo.com/ca/basith.pdf

The employer challenged the trial court's decision denying its motion to compel arbitration. The California Court of Appeal reversed the trial court's decision. Basith signed an online arbitration agreement before starting work with the employer. The employer terminated Basith, and he sued the employer. The employer moved to compel arbitration. Basith argued the contract's wording was so convoluted that uncounseled lay people would not understand whether the agreement meant they were waiving rights. Specifically, a sentence in the contract implied to lay people that it barred filing a charge with the Department of Fair Employment and Housing or the Equal Employment Opportunity Commission. The court found the language of "I understand and agree that nothing in this agreement shall be construed as to preclude me from filing any administrative charges or from participating an any investigation***[with the] Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission" was reasonably clear and comprehensible. The language did not bar Basith from filing a charge with either agency. The court explained Basith's arguments about prolix legalese went to procedural and not substantive unconscionability. A complaint about prolix legalese is the same type of objection as a complaint about font size. The court said, "if the substance of a contract is fair, how the contract is expressed cannot change that. Font, size format style, or verbal obscurantism does not affect the fairness of the final allocation of rights and duties. To rule otherwise would drain the element of substantive unconscionability of meaningfully independent content and effectively would turn the unconscionability doctrine into a one-element test of vast and unsettling sweep."

NJ - Former teacher was not disqualified from pension benefits for past criminal conduct unrelated to his position.

Caucino v. Board of Trustees (New Jersey App Div 05/01/2023)
http://case.lawmemo.com/nj/Caucino.pdf

Caucino was a teacher employed by the school district and a contributing member of the teachers' pension fund. Caucino pled guilty to bank fraud and was sentenced. The New Jersey Board of Education notified Caucino that he was disqualified from employment under New Jersey law because of his conviction. Caucino then applied for deferred retirement benefits, but the teachers' pension Board of Trustees ("Board") denied his application. The Board determined that Caucino's involuntary separation

from service was a "removal for conduct unbecoming a teacher," and rendered him ineligible for deferred retirement benefits. The New Jersey Appellate Division reversed and remanded. Caucino's criminal conduct took place well before he started teaching and was unrelated to his conduct as a teacher. The Board committed legal error when it determined that Caucino's bank fraud conviction or the revocation of his teaching certification was a separation from membership in the teacher' pension fund for "conduct unbecoming a teacher." The disqualifying conduct must in some way involve the employee's official duties to qualify for forfeiture of his vested pension right.

NY - The court reduces award of damages to former employee to prevent double recovery.

Hempstead v. New York State Div of Human Rights (New York App Div 04/26/2023)
http://case.lawmemo.com/ny/Hempstead1.htm

Whitaker filed a claim alleging discrimination in the conditions of her employment. The New York Appellate Division affirmed the Commissioner of the Division of Human Rights (DHR) decision that the employer unlawfully discriminated against Whitaker but reduced the damages awarded to Whitaker. On July 15, 2013, the employer advised Whitaker that because she had been on a leave of absence for an occupational injury for an excess of one year, her employment was terminated under the Civil Service Law, but that she could be reinstated if she were found fit to return to work after a medical examination. Whitaker retired from her position. Whitaker filed another complaint with the DHR, claiming she had been forced to retire because she had not been afforded accommodation for her disability. The Commissioner of DHR found the employer unlawfully discriminated against Whitaker when it refused to permit her to return to work and failed to provide her with a reasonable accommodation for her disability, and awarded her damages. The court found that Whitaker established a prima facie showing of a violation of Executive Law §296(1)(a). The court concluded Whitaker was entitled to back pay but the Workers' Compensation benefits she received should have been offset against the award of back pay to prevent a double recovery.

NY - Employee fails to set forth allegations and articulate grounds for recovery.

Mendoza v. Cornell University (New York App Div 04/27/2023)
http://case.lawmemo.com/ny/mendoza1.htm

Mendoza challenged the trial court's dismissal of her complaint and denial of her cross-motion to amend the complaint. The New York Appellate Division affirmed the trial court's decision. The court found Mendoza failed to set forth sufficient allegations to support her Labor Law overtime claim because she did not allege that she worked more than 40 hours per week. The court also found Mendoza failed to articulate a theory for gap-time recovery under §198. The court held Mendoza's Labor Law §663 argument for gap-time claim also failed because she cited no authority holding that §663 creates a

right of action for unpaid work absent a minimum wage violation. Because Mendoza did not claim that she was paid less than minimum wage, she cannot recover under §663. Further, the court agreed the trial court properly dismissed Mendoza's claim under the Wage Theft Prevention Act. Mendoza failed to sufficiently articulate a ground for recovery on this claim beyond general allegations that she worked more hours than she was paid for.

OH - Former chief operating officer allegedly emailed 19 gigabytes of data from her work computer to her personal work email without permission.

Tilr Corp. v. TalentNow (Ohio Ct App 04/26/2023)
http://case.lawmemo.com/oh/Tilr.pdf

Appellants challenged three of the trial court's orders. The Ohio Court of Appeals affirmed the denial of the appellant's motion to dismiss, reversed in part the order compelling discovery and awarding reasonable expenses, and remanded. Tilr is an algorithm-based talent acquisition company. Crenshaw left her position as Tilr's chief operating officer to work as the appellants' chief executive officer. Tilr alleged that Crenshaw had emailed roughly 19 gigabytes of data from her work computer to her personal email without permission from Tilr. Appellants' first assignment of error challenged the trial court's denial of their motion to dismiss Tilr's petition for pre-suit discovery. The court found Tilr's petition satisfied the pleading requirements outlined in Civ. R. 34(D)(1) and R.C. 2317.48. In the second assignment of error, the appellants argued the trial court erroneously granted Tilr's motion to compel and deny the protective order. The trial court granted Tilr's motion to compel and cited Wheeler for the proposition. Wheeler v. Girvin, 1st Dist. Hamilton No. C-980303, 1999 Ohio App. Lexis 1568. The court said, "as we explained, Wheeler did not broaden the scope of discovery under Civ. R. 34(D). Rather each request for documents under Civ. R. 34(D) must be necessary to ascertain the identity of a potential adverse party." Here, the trial court failed to consider whether Tilr's interrogatories were designed to discover a fact necessary to file a subsequent complaint. Thus, the trial court failed to determine whether Tilr's requests exceeded the scope of Civ. R 34(D) and R.C. 2317.48. Further, the court found the trial court abused its discretion when it award Tilr reasonable expenses under Civ.R. 37(A)(5)(a).

TX - Employee only an applicant and not a firefighter entitled to an appeal.

San Antonio v. Saenz (Texas Ct App 04/27/2023)
http://case.lawmemo.com/tx/fire1.pdf

The employer appealed the trial court's denial of its plea to the jurisdiction. The Texas Court of Appeals reversed the trial court's judgment. Saenz, a firefighter, applied for employment with the San Antonio Fire Department, but his application was disqualified. Saenz then filed an appeal with the commission. The commission held a hearing and

denied Saenz's appeal. Saenz filed an original petition with the trial court to set aside the commission's decision under §143.015 of the Texas Local Government Code. The commission filed a plea to the jurisdiction and later an amended plea, arguing the trial court lacked jurisdiction because Saenz's petition was untimely and because Saenz was not a firefighter entitled to appeal under the section. The trial court denied the commission's plea. A firefighter is defined in chapter 143 as "a member of a fire department who was appointed in substantial compliance with this chapter." Saenz was a member of the City of Canyon Lake Fire Department and was appointed to the department in compliance with chapter 143. However, the court found that chapter 143 provides a framework for municipalities to adopt. The court found that within the context of chapter 143, a member of a fire department means a member of the fire department for the particular municipality that has adopted chapter 143 and whose adoption of the chapter established the firefighters' and police officers' civil service commission. Here, Saenz was only an applicant and not a firefighter as the term was used in Chapter 143. Therefore, §143.015 did not provide Saenz with a right to appeal the commission's decision.

TX - Employee failed to show a causal connection between her termination and filing of a workers' compensation claim.

Texas Department of Criminal Justice v. Tidwell (Texas Ct App 04/28/2023)
http://case.lawmemo.com/tx/tidwell.pdf

Tidwell sued her former employer, the Texas Department of Criminal Justice ("Department"), alleging she was terminated in retaliation for filing a workers' compensation claim after she was injured on the job. The trial court denied the Department's claim that it was immune from suit as a governmental entity. The Texas Court of Appeals reversed and remanded. Tidwell failed to establish a prima facie case of workers' compensation retaliation. She failed to present sufficient evidence showing a causal connection between the filing of her workers' compensation claim and her termination. Tidwell also failed to show that other similarly situated employees were treated more favorably. The undisputed evidence established that Tidwell was terminated due to her exhausting her leave options, as required by the Department's uniformly enforced leave policy.

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