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EMPLOYMENT LAW COMMENTARY

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Inside

Courts Issue Important New Decisions: Good or Bad News

By Colette M. LeBon

Over the last few months, federal and state courts have issued a number of important new employment law decisions. The U.S. Supreme Court has given employers a bright-line standard to help avoid disparate impact liability, and several new California cases will likely increase the number of Private Attorneys General Act (PAGA) actions brought by plaintiffs against employers.

U.S. SUPREME COURT DECISION — *RICCI V. DESTEFANO*

Employers Taking Affirmative Action Must Have "Strong Basis in Evidence" for Potential Disparate Impact Liability

In *Ricci v. DeStefano*, No. 06-1505 (U.S. June 29, 2009), the United States Supreme Court ruled in a 5-4 decision that "race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." Because the ruling is grounded on Title VII, the case has significance for all employers in both the private and the government sectors.

Factual and Procedural Background

In 2003, the City of New Haven, Connecticut (the "City"), administered examinations in an effort to promote qualified applicants to fill vacant lieutenant and captain positions in its Fire Department. When they analyzed the test results, City officials found that the pass rate for black candidates was approximately half the pass rate of white candidates. Because of the limited number of vacant positions and promotion criteria, no black candidates would receive any of the 19 possible promotions. Based on concerns about being sued by black candidates who would not have been promoted, the City did not certify the exams, and no firefighters of any race received promotions.

The plaintiffs were firefighters who would have received promotions but for the City's refusal to certify the test results. The plaintiffs argued that the City engaged in disparate treatment based on the plaintiffs' race, arguing that the scores were not certified because the higher-scoring candidates were not black, in violation of both Title VII and the

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Equal Protection Clause. The City argued in the lower courts that its decision not to certify the exam results was not based on race, but instead was motivated by the City's goal to avoid a Title VII disparate impact lawsuit from African Americans who might allege that they had been denied promotions based on a test that had a disparate impact.

The District Court granted summary judgment in favor of the City. A three-judge panel of the Second Circuit Court of Appeals, which included Supreme Court nominee Judge Sonia Sotomayor, affirmed without analysis, relying on the lengthy District Court opinion. The plaintiffs sought rehearing before the full Second Circuit, which was denied in a 7-6 vote over a strong dissenting opinion.

Legal Analysis

The Supreme Court held that the City's action in discarding the tests violated Title VII, and avoided reaching the constitutional Equal Protection argument. Title VII prohibits both intentional acts of employment discrimination based on race, known as disparate treatment, and policies which unintentionally have a disparate impact on a racial group. The Court noted that these two

Schwarzenegger Signs New E-Discovery Law

By Colette M. LeBon

On June 29, 2009, Governor Schwarzenegger signed into law the Electronic Discovery Act. The new law amends the current Civil Discovery Act to include electronically stored information ("ESI"). The Act makes the California scheme similar to the federal e-discovery system. However, there are some small differences, and it remains to be seen how the California rules will be interpreted in practice. Detailed below are some highlights of the new law and its expected impact on employers.

Forms of Production

The Act provides that a discovery request may specify the form in which each type of information is to be produced. If a discovery demand or subpoena fails to specify the form of production for ESI, the recipient can produce the information in the form in which it is usually maintained or in a form that is reasonably usable. Employers will have to be strategic about the most cost-effective and least burdensome way to produce electronically stored information when the form is not specified. In most cases, native file formats will be the easiest form of production.

Objections Based on Inaccessibility

The Act contains specific provisions for objections to production of ESI based on lack of reasonable access to the material. If the propounding party moves to compel further responses, the burden is on the responding party to demonstrate that the search and production of the ESI would be unduly burdensome or costly. The responding party must specify in its objections the types and categories of ESI that it asserts are not reasonably accessible. Failure to include the required specification could lead to waiver. A party may also move for a protective order on the grounds the information sought is inaccessible. However, courts have the discretion to require limited discovery even in those cases.

Employers and their counsel will need to be familiar with their electronically stored information to facilitate making efficient objections.

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The Court's opinion makes it clear that mere fear of litigation, without a deeper analysis as to potential liability for disparate-impact discrimination, is not sufficient to engage in race-based workplace decisions.

provisions were in conflict in this case. To resolve this conflict, the Court adopted the strong-basis-in-evidence standard, which has been used to resolve similar tensions in affirmative action cases.

The Court reasoned that although the City was faced with a prima facie case of disparate impact liability, this was "far from a strong-basis-in-evidence" that the City would be found liable. The exams were job-related and consistent with business necessity. Further, there was no equally valid, less discriminatory testing alternative available to the City. Therefore, there was no strong basis in evidence that a court would find the City liable for the disparate impact against African-American firefighters.

Consequently, the Court reversed the judgment of the District Court, and found that the white firefighters were entitled to summary judgment in their favor. The Court concluded that "fear of litigation alone cannot justify an employer's reliance on race to the detriment of other individuals" in the workplace.

Application for California Employers

The outcome of this case provides guidance for both private and public employers about how to permissibly achieve racial diversity in the workplace while avoiding lawsuits. First, any employment testing should be carefully validated to avoid disproportionate impact on protected categories of employees. Second, employers should carefully examine test results for clear bias in favor of one racial group, and thoroughly investigate whether other available practices that serve their job-related evaluation purposes have less impact on a protected class. However, the Court's opinion makes it clear that mere fear of litigation, without a deeper analysis as to potential liability for disparate-impact discrimination, is not sufficient to engage in race-based workplace decisions.

In addition, while *Ricci v. DeStefano* involved promotions, the logic of the opinion is equally applicable to other employment decisions, including hiring and termination practices.

The clear message from the Supreme Court is that employers must tread carefully when considering race-based actions as a means of avoiding potential disparate-impact liability.

CALIFORNIA SUPREME COURT — *ARIAS V. SUPERIOR COURT* AND *AMALGAMATED TRANSIT UNION V. SUPERIOR COURT*

Aggrieved Employees May Bring Representative Actions Under PAGA Without Meeting Class Action Requirements

In recent years, wage-and-hour representative actions have increased dramatically in California and other states. Not surprisingly, the focus of much of this litigation is on the question whether the action can properly proceed as a class action based on California Code of Civil Procedure section 382 (i.e., whether common questions of law and fact predominate and whether the class is ascertainable). Given the mounting difficulties plaintiffs have had in obtaining class certification, however, plaintiffs and their attorneys have been feverishly searching for alternative avenues to pursue these claims without the burden of having to pass through the class certification gauntlet.

In *Arias v. Superior Court*, No. S155965 (Cal. June 29, 2009), the Supreme Court expressed its approval of one such representative action. The plaintiff sought to evade class certification

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requirements by pursuing wage-and-hour claims on behalf of a group of employees pursuant to two separate statutes: (1) the Private Attorneys General Act of 2004 (PAGA), Cal. Lab. Code § 2698 *et seq.*, and (2) California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq.* The plaintiff did not attempt to plead either claim in a manner that would comply with the section 382 class action requirements.

The Supreme Court ruled unanimously that representative lawsuits brought on behalf of a group of nonparty employees under PAGA need not comply with class certification requirements. In contrast, the Supreme Court also found that UCL actions must now satisfy class action requirements based on amendments made to applicable UCL provisions in 2004.

Factual and Procedural Background of Arias

Plaintiff Jose Arias, a former Angelo Dairy employee, brought an action against Angelo Dairy and its owners, alleging numerous Labor Code violations, including that Angelo Dairy did not compensate him for overtime wages or provide meal and rest periods during his shifts. In addition to seeking penalties and

Schwarzenegger Signs New E-Discovery Law

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"Safe Harbor" from Sanctions

The rules afford a "safe harbor" to protect parties and attorneys from sanctions when ESI cannot actually be produced. Parties and attorneys cannot be sanctioned for failure to produce data that was lost as a result of the "routine, good faith operation of an electronic information system." Cal. Civ. Proc. Code § 2031.060(i)(1). Despite the assurance that sanctions will not inure for lost data, employers should continue to be diligent about their electronic data storage. They should develop and follow specific policies for document retention and deletion, and make sure to retain any documents that may relate to potential litigation. ■

California Supreme Court Expands Remedies for Unintentional Denial of Disability Access

By James E. Boddy, Jr.

In *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661 (2009), the California Supreme Court expanded the remedies available under a state statute for violation of federal disability-access law. It held that a violation of the federal Americans with Disabilities Act ("ADA") entitles a plaintiff to damages under California's Unruh Civil Rights Act[1] without regard to whether the violation was intentional, disapproving of two California court of appeal cases to the contrary.

The federal ADA itself does not require proof of intentional discrimination to establish a violation of its disability-access provisions,[2] but it also does not provide damages for such violations. A plaintiff may seek injunctive relief and attorneys' fees under the disability-access provisions of the ADA, but not damages.

In contrast, the California Unruh Act does provide for damages, but under a prior decision of the California Supreme Court in *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142 (1991), such damages may be obtained only upon proof of intentional discrimination.

After *Harris* was decided, the California legislature in 1992 amended the Unruh Civil Rights Act to provide that a violation of the federal

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lost wages in an individual capacity, Arias's complaint also sought these same remedies on behalf of other current and former employees of Angelo Dairy based on his PAGA and UCL claims. Arias, however, did not comply with class action pleading requirements.

In response, Angelo Dairy moved to strike Arias's representative claims due to his failure to comply with the requirements for pleading a class action. The superior court granted Angelo Dairy's motion, and Arias petitioned for a writ of mandate in the Court of Appeal, asserting he did not need to comply with class action requirements to pursue a PAGA or UCL claim. The appellate court concluded that PAGA permits an employee to bring an action on behalf of other employees without meeting class action standards, but it found the amended UCL provisions expressly require compliance with class action requirements. The Court of Appeal issued a peremptory writ of mandate directing the superior court to strike only the UCL causes of action, and to permit Arias to amend his complaint to let the PAGA representative claim go forward. Arias then petitioned for review by the California Supreme Court.

The Private Attorneys General Act — Labor Code Section 2698, et seq.

PAGA permits "aggrieved employees" to act as private attorneys general and bring actions in the public interest for violation of any Labor Code provision. This includes claims for failure to pay overtime, meal and rest period violations, and employee misclassifications.

In recent years, wage-and-hour representative actions have increased dramatically in California and other states. Not surprisingly, the focus of much of this litigation is on the question whether the action can properly proceed as a class action based on California Code of Civil Procedure section 382.

Under PAGA, the plaintiff may only be awarded civil penalties, and is not entitled to recover unpaid wages. These penalties can add up quickly, even for relatively small employers, if pursued on a representative basis. For instance, an employer whose payroll violation affects 200 employees each bi-weekly pay period for one year may be subject to penalties in excess of $500,000. PAGA also provides that a prevailing employee is entitled to an award of reasonable attorneys' fees and costs.

In *Arias*, the Supreme Court affirmed the appellate court's finding that PAGA representative actions need not meet class action requirements. It based this conclusion in part on the language of the Act. The court noted that Labor Code section 2699(a) provides that PAGA applies "notwithstanding any other provision of law," such as class action statutes, and PAGA does not expressly require compliance with Code of Civil Procedure section 382 (California's class action statute). The court also found that any due process concerns arising from maintaining a representative action without meeting class action procedural requirements are alleviated, because only civil penalties (and not wages) are available under PAGA, and nonparty employees as well as the government are bound by the judgment.

The Unfair Competition Law — Section 17200

The *Arias* decision also confirmed the general understanding that, based on the amendment of UCL provisions by Proposition 64, representative actions brought under the UCL must now meet class

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certification requirements. The Supreme Court based its reasoning on a review of the language of Proposition 64 and the intent of the voters who approved it. Through this analysis, the Supreme Court noted that the stated purpose of Proposition 64 was to amend the UCL to require compliance with Code of Civil Procedure section 382, which is commonly understood to authorize class actions. Accordingly, the Court confirmed that in order to pursue a UCL claim, a plaintiff must now comply with class action procedures.

Only an Aggrieved Party May Bring a Representative Action

In *Amalgamated Transit Union Local 1756, AFL-CIO v. Superior Court*, No. S151615 (Cal. June 29, 2009), the companion case to *Arias*, the Supreme Court qualified that in addition to the rules set down in *Arias*, in order to bring an action under either the UCL or PAGA, the party bringing the suit must be either "injured" or "aggrieved," respectively.

In *Amalgamated*, just as in *Arias*, the plaintiff union brought representative actions against the employer both under PAGA and under the UCL without meeting the requirements for a class action. However, the plaintiff union actually suffered no injury and was not an aggrieved party. The Supreme Court ruled that without an injury or aggrieved status, a plaintiff cannot bring a representative action under either the UCL or PAGA. Further, as detailed above, no plaintiff can bring a representative action under the UCL without meeting the requirements for a class action.

Application for California Employers

The California Supreme Court's finding that a plaintiff can maintain a PAGA claim without meeting burdensome class action requirements certainly increases the likelihood of additional representative actions for violation of California Labor Code provisions. As a result, employers should consider taking the following actions:

- Conduct a thorough wage-and-hour audit on an annual basis.
- Modify past practices as appropriate with the advice of counsel.
- Confirm that employment policies and training materials regarding wage-and-hour issues are up-to-date.
- Seek to resolve wage-and-hour issues raised by individual employees early in the process and before the dispute grows into a representative action. ■

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[1] The Unruh Civil Rights Act is codified in section 51 of the California Civil Code. Damages for violation of the Act are set forth in section 52 of the Civil Code. In this article, sections 51 and 52 are referred to together as the Unruh Civil Rights Act or simply as the Unruh Act.

[2] As it pertains to the claim in *Munson*, the ADA defines "discrimination" to include "a failure to remove architectural barriers . . . in existing facilities . . . where such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv). "Readily achievable" means "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9).

[3] Stats. 1992, ch. 913, § 3, pp. 4283, 4284.

[4] *Gunther v. Lin,* 144 Cal. App. 4th 223 (2006); *Coronado v. Cobblestone Village Community Rentals, L.P.*, 163 Cal.App.4th 831(2008).

[5] *See, e.g., Lentini v. California Center for the Arts*, 370 F.3d 837, 846–47 (9th Cir. 2004); *Wilson v. Haria and Gogri Corp.*, 479 F. Supp. 2d 1127, 1137 (E.D. Cal. 2007).

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This newsletter addresses recent employment law developments. Because of its generality, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

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California Supreme Court Expends Remedies

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ADA would also be a violation of the state Act.[3] Relying on *Harris*, two California courts of appeal held that only intentional violations of the ADA would support a damages remedy under the Unruh Act.[4] Various federal courts reached a contrary conclusion.[5]

In *Munson*, a disabled individual who used a wheelchair brought suit in federal district court against a Del Taco restaurant constructed prior to enactment of the ADA, alleging among other things that the facility's restroom was not accessible, that removal of the barrier to access was "readily achievable," and that the restaurant's failure to remove the barrier therefore violated the ADA. The individual further alleged that the violation of the ADA entitled him to a damages remedy under the Unruh Act. The district court granted summary judgment for the individual notwithstanding the absence of any evidence of intentional discrimination, and the restaurant appealed.

Noting the split of authority among state and federal courts as to whether a showing of intentional violation of the ADA is necessary to obtain damages under the Unruh Act, the Ninth Circuit Court of Appeals certified the question to the California Supreme Court.

The California Supreme Court adhered to its prior ruling in *Harris* that proof of discriminatory intent ordinarily is required to recover damages under the Unruh Act, but held that the legislature created an exception to this requirement in 1992 when it amended the Act to make violation of the ADA, which does not require discriminatory intent, also a violation of the Unruh Act. Thus, the court concluded, a plaintiff who seeks damages under the Unruh Act for violation of the ADA need not prove intentional discrimination.

The decision can be expected to spur disability-access litigation. Remedies under the Unruh Act include "actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto . . . ." (Cal. Civ. Code § 52(a).) ■

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