KAMER ZUCKER & ABBOTT
ATTORNEYS AT LAW

EMPLOYER REPORT

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KZ&A SCORES VICTORY ON RETALIATION CLAIM BEFORE U.S. SUPREME COURT

In a highly unusual procedural move, the United States Supreme Court recently ruled in favor of one of KZ&A's clients, the Clark County School District (CCSD), on a Title VII retaliation claim filed by one of its employees, Shirley Breeden. As most people are aware, the Supreme Court selects only a handful of the thousands of cases which are brought before it for potential review. Both KZ&A and CCSD were gratified that the high court chose the *Breeden* case for its consideration. Even more surprising, however, was the Court's summary reversal of the Ninth Circuit Court of Appeals decision in favor of Breeden.

Breeden's lawsuit was originally filed in federal district court, claiming sexual harassment and retaliation in violation of Title VII. Breeden had been employed in CCSD's Human Resources department as an administrator and part of her job duties was to review application materials of candidates for school police officer positions. In the psychological evaluation of one candidate, the applicant had stated that he made the following comment to a coworker at a former job: "I hear making love to you is like making love to the Grand Canyon." Breeden was not disturbed by her reading of this particular comment.

During a later meeting between Breeden, her male supervisor, and a male subordinate to discuss concerns over certain applicant materials, the supervisor read aloud the remark made by the candidate during his psychological evaluation. The supervisor then said he did not know what the remark meant, and the male subordinate said, "Well, I'll tell you later." At that point, both men chuckled. Breeden claimed she was harassed by the supervisor's action in reading the comment, and then made an internal complaint. Breeden then contended that she was retaliated against for having made her harassment complaint. Her retaliation claim was premised upon CCSD's lateral transfer of her to another department in 1997.

The district court granted summary judgment in favor of CCSD, finding that the isolated comment by Breeden's supervisor did not constitute actionable sexual harassment. The district court also stated that Breeden failed to demonstrate that her transfer was retaliatory or adverse to her. Breeden then appealed to the Ninth Circuit Court of Appeals, abandoning her sexual harassment claim and instead solely pursuing her retaliation claim. The Ninth Circuit reversed the district court's decision and remanded the case for trial. CCSD then requested review of the case by the United States Supreme Court.

In a bold and unexpected move, the Supreme Court determined that the Ninth Circuit's decision was erroneous and reversed it, thereby summarily disposing of the case. In its unanimous decision, the high court provided employers with

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FORE! ADA HITS THE PGA TOUR

The United States Supreme Court ruled on May 29, 2001 that the PGA Tour must accommodate pro-golfer Casey Martin's disability by allowing him to use a golf cart during tournaments and qualifying events. Since birth, Martin has been afflicted with a degenerative circulatory disorder that has atrophied his right leg. As a result, walking is extremely painful for him. Despite this disease, Martin is a talented and successful professional golfer. However, since the latter part of his college golf career, Martin is no longer able to walk an 18-hole golf course and carry his own clubs. Accordingly, he asked the PGA to waive its requirement that a golfer walk the course in certain qualifying competitions and tours. The PGA denied Martin's request and refused to review the medical records submitted by him documenting his condition.

The Supreme Court held that Title III of the ADA (addressing public accommodations) prohibits the PGA from denying Martin equal access to its tours because of his disability. Finding that the PGA Tour is a place of public accommodation, the Court then turned its attention to Martin's specific accommodation request. The PGA argued against the accommodation, stating that walking is a requirement of participation in a PGA tournament. The Court disagreed, and determined that allowing Martin to use a golf cart in lieu of walking does not fundamentally alter the nature of the PGA's tours. More specifically, the Court found that the essence of golf is shot-making and that allowing a player to use a cart does not alter this essential aspect of the game, unlike, for example, changing the diameter of the hole. The Court also found that allowing Martin to use a cart does not give him an advantage over other players especially in light of a lower court's finding that Martin endures greater fatigue during the game when he uses a cart than do his walking competitors.

Although *Martin* is a public accommodation case under the ADA, it is instructive for employers. The Supreme Court carefully focused upon the fundamental nature of the game of golf, and concluded that "the walking rule is not an indispensable feature of tournament golf." This analysis is similar to an evaluation in the employment context of what constitutes an essential function of a particular job. Under the ADA, a qualified individual with a disability is one who can perform the essential functions of a position with or without a reasonable accommodation. As employers draft or revise job descriptions to identify essential functions, *Martin* serves as a reminder that merely peripheral or secondary features will likely not pass muster as essential functions. (*PGA Tour, Inc. v. Martin*, 121 S.Ct. 1879 (5/29/01)).

PAYING SUPERVISOR ONLY FOR HOURS ACTUALLY WORKED DURING FMLA LEAVE DID NOT JEOPARDIZE EXEMPT STATUS

In *Rowe v. Laidlaw Transit Inc.*, the Ninth Circuit examined the Fair Labor Standards Act ("FLSA") and Family Medical Leave Act ("FMLA") issues associated with Laidlaw's decision to pay one of its salaried exempt supervisors only for the hours she actually worked while on a temporary part-time schedule during her recovery from an ankle injury. Rowe did not request that her leave be designated as FMLA leave, and Laidlaw did not discuss it with her. She later resigned and sued Laidlaw for failing to pay her overtime. The Court found that the part-time schedule worked by Rowe qualified as leave under the FMLA. Surprisingly, the Ninth Circuit found that whether or not Laidlaw designated Rowe's reduced hours as FMLA leave was *irrelevant*.

Under the FLSA's salary basis test, if a bona fide executive, administrative, or professional employee is regularly paid, on a weekly or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which is not subject to reduction because of variations in quality or quantity of work, an employer need not pay such employee overtime. Rowe contended that when she worked part-time, her salary was improperly reduced — thereby invalidating her exemption from overtime. However, Laidlaw argued that Rowe's salary was properly reduced under a section of the FMLA, 29 U.S.C. § 2612(c), which states that an employer's provision of unpaid FMLA-qualifying leave to an otherwise exempt employee will not cause the employee to lose his or her FLSA exempt status. Here, Laidlaw provided Rowe with a reduced leave schedule, allowing her to work less than her normal work hours, during her recovery.

In agreeing with Laidlaw's position, the Ninth Circuit held that an employer's prior notice to an employee regarding the FMLA-qualifying nature of the employee's leave is not a prerequisite for a partial leave to be protected under the FMLA, regardless of whether the leave is paid or unpaid.

However, the Court also observed that notice would be relevant regarding the amount of FMLA leave. Specifically, if leave is not designated as FMLA leave, it does not count against the employee's annual 12-week entitlement. (*Rowe v. Laidlaw Transit, Inc.,* 244 F.3d 1115 (9th Cir. 4/4/01)).

EMPLOYEES ENTITLED TO TIPS AND HOLIDAY PAY UNDER WARN ACT

On April 11, 2001, the Ninth Circuit Court of Appeals found that under the Worker Adjustment Retraining and Notification Act ("WARN") employers must pay employees for tips and holidays that they would have earned during any period where the employer is required to pay employees because it violated the notice provisions of the WARN Act.

The WARN Act provides that covered employers must give 60 days written notice to employees prior to a contemplated plant closing or mass layoff. Employers who fail to give proper notice are liable to employees for damages in the amount of back pay for each day of the violation at the rate of the average wage for the past three years or the final regular rate, whichever is higher.

The court found that the Sands Hotel violated the WARN Act by giving only 45 days notice before its closure in 1996. Therefore, the Sands was liable to its employees for the remaining 15 days it was in violation of the Act. Employees complained that they should be compensated for tips they would have received, as well as holiday pay if they would have worked the July 4 holiday that fell within the 15 day period. The Court agreed.

The Court first found that tips are part of back pay. This conclusion was reached because the court found that the definition of back pay in other federal employment statutes includes tips. In addition, the Court found that the purpose of the WARN Act was to function as a "wage worker's equivalent of business interruption insurance" and therefore "damages under the Act should compensate employees for the money they would have earned but for the premature closure in violation of the WARN Act."

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The Court also found that damages including tips and holiday pay are not presumed, but must be proven. The burden is therefore on the employee to show that but for the WARN Act violation, he or she would have received a certain amount in tips or would have worked on the holiday(s) in question. (*Local Joint Executive Board of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152 (9th Cir. 4/11/01)).

TITLE VII PENALTIES EXPAND

In a unanimous decision earlier this month, the United States Supreme Court ruled that "front pay" is not a form of compensatory damages and thus is not subject to the compensatory and punitive damages caps placed on Title VII actions by the Civil Rights Act of 1991. Writing for the Court in *Pollard v. E.I. du Pont de Nemours & Co.*, Justice Clarence Thomas stated that the Civil Rights Act of 1991 allowed for additional remedies beyond those already authorized and was not meant to include front pay, a remedy that courts had previously awarded as equitable relief. The Court's decision overturned a ruling by the Sixth Circuit Court of Appeals which limited the front pay recovery against DuPont, concluding that front pay was a form of compensatory damages. The $300,000 damage award is the maximum amount of compensatory damages that could be awarded against an employer of DuPont's size.

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While reinstatement is usually the preferred remedy for a victim of discrimination, an award of front pay can be awarded to compensate the victim for the future effects of discrimination, particularly where it is expected that significant time would pass before the victim could assume his or her "rightful place in the workplace." Front pay has also been awarded where there is no vacancy to which a plaintiff could be immediately promoted, where reinstatement would displace a plaintiff's replacement, or where reinstatement would not be feasible because of the hostility and antagonism between the employer and the plaintiff.

Employers should keep in mind that in addition to front pay, successful plaintiffs can also force their employer or former employer to pay their attorney's fees, which are also not encompassed within the damage caps on compensatory and punitive damages. (*Pollard v. E.I. du Pont de Nemours & Co.*, 121 S.Ct. 1946 (6/4/01)).

COMPULSORY ARBITRATION OF EMPLOYMENT DISPUTES UPHELD BY SUPREME COURT

In an important decision on March 21, 2001, the United States Supreme Court has bolstered the rights of employers seeking to compel arbitration of employment-related disputes. In *Circuit City Stores, Inc. v. Adams*, the high court found that the Ninth Circuit Court of Appeals had inappropriately determined that the Federal Arbitration Act (FAA) does not apply to employment agreements. Rather, the Supreme Court held in a 5-4 decision that the FAA precludes the enforcement of arbitration agreements *only* under employment contracts involving transportation workers.

In general, the FAA favors the enforcement of all valid arbitration agreements before claims can be asserted in court. Section One of the FAA excludes from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Until recently, all of the Circuit Courts of Appeals, except the Ninth Circuit, interpreted this provision as exempting only contracts of employment involving transportation workers from the FAA's coverage.

While the *Circuit City* ruling does provide employers with renewed hope as to the enforceability of arbitration agreements, it does not give employers the ability to enforce employment arbitration agreements in all cases before the Ninth Circuit.

In the facts of the *Circuit City* case, the plaintiff, Saint Clair Adams, signed an employment application including an arbitration provision when he applied for a sales job with Circuit City Stores in Santa Rosa, California. Two years later, he sued the company in state court, bringing state law employment discrimination and tort claims. Circuit City successfully convinced a federal district court to enjoin the state action and compel Adams to arbitrate his claims as he agreed when he signed his application for employment. The Ninth Circuit, however, reversed the lower court's decision. In so doing, the Ninth Circuit found that the application form was an employment contract, despite a disclaimer to the contrary, and held that the FAA does not apply to employment contracts of any kind.

On appeal by the employer, the Supreme Court found that the Ninth Circuit's decision contradicted the general federal policy favoring the arbitration of disputes. Writing for the Court, Justice Anthony Kennedy noted that there are very real and recognized benefits to the enforcement of arbitration agreements, even within the employment context.

While the *Circuit City* ruling does provide employers with renewed hope as to the enforceability of arbitration agreements, it does not give employers the ability to enforce employment arbitration agreements in all cases before the Ninth Circuit. Though it did compel arbitration of a claim under California anti-discrimination statutes in *Circuit City,* the Supreme Court has not expressly addressed whether a court could compel arbitration of federal statutory claims under Title VII. The ability of employers to compel arbitration of Title VII claims remains somewhat uncertain for employers covered by the Ninth Circuit given that court's 1998's decision in *Duffield v. Robertson Stephens & Co.,* which rendered unenforceable any pre-dispute agreement to arbitrate Title VII claims. Despite the recent ruling in *Circuit City*, *Duffield* remains good law within the Ninth Circuit because it did not rely upon an interpretation of the FAA. Instead, *Duffield* relied specifically on an analysis of the 1991 amendments to Title VII. The Ninth Circuit noted that those amendments were passed immediately following a Supreme Court decision compelling arbitration of claims brought under the Age Discrimination in Employment Act (ADEA). According to the Ninth Circuit's rationale in *Duffield*, when Congress passed the 1991 amendments to Title VII to expand remedies such as jury trials and compensatory and punitive damages, such legislative action was taken to prevent Title VII claims from being submitted to compulsory arbitration.

Though *Duffield* remains good law in this jurisdiction, there are signs of its gradual erosion. Notably, the Nevada Supreme Court announced its disagreement with *Duffield* last year, holding in *Kindred v. Second Judicial District Court* that in Nevada state courts an employee may be compelled to arbitrate Title VII, state law discrimination, and Family Medical Leave Act (FMLA) claims. Since the Supreme Court's decision in *Circuit City* specifically mentions that an employee can validly redeem his or her statutory rights within an arbitration forum, it is likely that other courts will begin to likewise question the soundness of *Duffield*. Already, one federal district court in California has utilized *Circuit City* to compel arbitration of a Title VII case. The pressure on the Ninth

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STEVE GARVEY STRIKES OUT IN ARBITRATION

Former baseball star Steve Garvey recently struck out in a labor dispute when the United States Supreme Court reversed a Ninth Circuit decision awarding him $3 million. Specifically, in *Major League Baseball Players Association v. Garvey*, the Supreme Court held that the Ninth Circuit impermissibly exceeded the bounds for a court's review of an arbitration award by deciding the case's merits on its own.

According to the facts, in 1990 the players union and the Major League Baseball Clubs entered into a settlement agreement to resolve grievances by players alleging that the clubs violated the industry's collective bargaining agreement by decreasing free agent salaries. As part of the settlement agreement, a fund was established to provide compensation to players who could prove that a club refused to extend their contracts while acting in collusion with other clubs. The union was given the responsibility of reviewing all claims and recommending fund distribution. Garvey submitted a $3 million claim for damages, alleging that the San Diego Padres refused to extend his contract to the 1988 and 1989 seasons due to collusion. The initial claim was denied by the union because Garvey presented no evidence that the Padres had ever offered to extend his contract.

During a subsequent arbitration hearing on the matter, Garvey presented a 1996 letter from the President of the Padres offering to extend Garvey's contract through the 1989 season. However, the arbitrator refused to credit the evidence and ruled against Garvey. A federal district court refused to vacate the decision, but the Ninth Circuit later reversed the arbitration award, stating that there was no logical reason for the arbitrator to discredit the 1996 letter. The Ninth Circuit further held that the arbitrator "distributed his own brand of industrial justice" in finding against Garvey. In a subsequent appeal, the Ninth Circuit refused to remand the case for further arbitration proceedings, and instead issued its own decision in favor of Garvey.

In an 8-1 decision handed down last month, the Supreme Court issued an opinion both granting review of the case and summarily reversing the two Ninth Circuit rulings. The high court, referencing its earlier precedents regarding the review of arbitration awards, stated that courts are not authorized to review an arbitrator's decision on the merits of a case despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. Furthermore, the Supreme Court held that when a court weighs the merits of a grievance, it usurps the role of the arbitrator. The Court also stated that even in those circumstances where there is a finding of arbitrator error or misconduct, a reviewing court may not decide the merits of the underlying case in order to preclude additional arbitral proceedings. In the Court's opinion, the Ninth Circuit rulings revealed that the arbitrator's decision was overturned because the Ninth Circuit disagreed with his factual findings.

(T)he Supreme Court held that when a court weighs the merits of a grievance, it usurps the role of the arbitrator.

The *Garvey* case serves as an important reminder to employers who utilize arbitration as a means of addressing employment-related disputes that judicial review of arbitration awards is extremely narrow. For those employers who may be contemplating the implementation of arbitration agreements with employees, particularly in light of the Supreme Court's recent favorable decision in *Circuit City Stores, Inc. v. Adams*, they must remain mindful of this fact. While the use of arbitration in the workplace has tremendous benefits, there are also some drawbacks, particularly with respect to the limited bases for appeal and review of arbitration awards. (*Major League Baseball Players Association v. Garvey*, 121 S.Ct. 1724 (5/14/01)).

▶ CIRCUIT CITY *CONTINUED FROM PAGE 4*

Circuit to overturn *Duffield* will most likely increase as courts continue to reference *Circuit City* and its affirmation of a strong federal policy favoring arbitration over litigation.

Given the recent developments in the area of arbitration, employers may wish to revisit whether they should establish arbitration policies to address any employment issues or disputes which may arise. The benefits of arbitration are numerous, particularly when an employer considers the rising cost of litigating employment claims. However, employers should also be careful in drafting such policies, keeping in mind that *Duffield* still presents a significant obstacle to enforceability as well as the virtual certainty that employees will assert legal challenges to said policies. (*Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302 (3/21/01)).

NLRB TEST FOR SUPERVISOR STATUS REJECTED

In a 5-4 opinion, the United States Supreme Court held that the National Labor Relations Board's ("NLRB") test for deciding whether an employee uses independent judgment in performing certain job tasks, one component of determining an employee's supervisory status, is inconsistent with the National Labor Relations Act ("NLRA"). Writing for the majority, Justice Scalia held that the NLRB's "independent judgment" test improperly focuses on whether an employee uses ordinary professional or technical judgment in directing less-skilled employees.

Individuals are "supervisors" under Section 2(11) of the NLRA, and thus excluded from its protections as to such things as union organizing activities, if they have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline or direct other employees, or to adjust their grievances, or effectively to recommend such action, "if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." In deciding that the nurses at issue in the case were not supervisors, the NLRB found that employees do not use independent judgment when they exercise "ordinary professional or technical judgment in directing less-skilled employees." However, Justice Scalia stated that the NLRB's interpretation is not supported by the statutory text. He explained that Section 2(11) of the NLRA focuses on whether the exercise of judgment is merely "clerical" or "routine," not whether it is "professional or technical." Indeed, Justice Scalia rhetorically asked, "What supervisory judgment worth exercising, one must wonder, does not rest on 'professional or technical skill or experience?'"

The NLRB contended that its interpretation of independent judgment was needed to protect professional employees under the NLRA. Pursuant to Section 152 of the NLRA, professional employees, whose work involves the consistent exercise of discretion and judgment, are covered by the NLRA. The Court rejected this argument, stating that the coverage of professional employees could not be given effect through the NLRB's current interpretation of the term "independent judgment." (*NLRB v. Kentucky River Community Care, Inc.*, 121 S. Ct. 1861 (5/29/01)).

EXEMPT STATUS REMAINS INTACT WHEN LEAVE DEDUCTED FOR ABSENCES FOR "PERSONAL REASONS"

As a general principle, the Fair Labor Standards Act ("FLSA") requires that employees who are exempt from the statutory guarantees of minimum wage and overtime compensation must be paid the same amount of compensation in each pay period without regard to the actual number of hours or days worked. In light of this rule, employers have struggled with how to deal with absenteeism by exempt employees. Specifically, many employers are concerned that their attempts to financially penalize exempt employees for absences may convert them to non-exempt (hourly) employees, thereby allowing these employees to receive overtime pay.

The FLSA regulations state that if an exempt employee misses one day or more of work for personal reasons, the employer may deduct the employee's pay without turning an exempt employee into a non-exempt employee. It is important to note, however, that "personal reasons" do not include sickness or accident.

Recently, the Ninth Circuit Court of Appeals held that employers may make deductions from an exempt employee's accrued benefit time where the employee is absent for personal reasons.

Therefore, an employer will not jeopardize the exempt status of its employees if:

- Deductions of salary for personal absences are only made if the absence is more than one full work day.
- Personal absences of less than one day result in deductions from the employee's accrued benefit time (i.e., vacation pay and sick pay).

Employers should keep in mind, however, that these deductions can only be made if:

- The employee is absent for personal reasons and not because of an illness or an accident that prevents him from being at work.
- The employee has accrued leave time available for deduction. When an exempt employee's leave time is used up and deductions would then be made from salary, only whole day absences for personal reasons, other than for sickness or accident, can be deducted from salary.

(*Webster v. Public School Employees of Washington*, 247 F.3d 910 (9th Cir. 3/5/01)).

SUPREME COURT RESTRICTS OPPORTUNITIES FOR PLAINTIFFS TO OBTAIN ATTORNEY'S FEES

Employers won a substantial victory recently when a sharply divided Supreme Court issued a decision holding that civil rights plaintiffs can recover attorney's fees *only* if they: (1) obtain a favorable court judgment on the merits of their claims; or (2) enter into a favorable court-ordered consent decree. The Supreme Court's ruling specifically rejects the "catalyst theory" adopted by nine (9) federal circuits, including the Ninth Circuit, under which a civil rights plaintiff could be entitled to an award of attorney's fees when the plaintiff's actions were arguably influential in obtaining an employer's voluntary change in conduct, such as the abandonment of a discriminatory practice or policy.

The Supreme Court explained that under the "American Rule," a party is not entitled to recover attorney's fees from his or her adversary absent explicit statutory authority. However, most civil rights statutes authorize the award of attorney's fees to the "prevailing party," which is a term of art. In rejecting the catalyst theory, the Court explained that it impermissibly allows an award of attorney's fees where there is no judicially-sanctioned change in the legal relationship of the parties. According to the court, "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change." (*Buckhannon Board & Care Home Inc. v. West Virginia Department of Health and Human Resources*, 121 S. Ct. 1835 (5/29/01)).

NLRB LIMITS EMPLOYERS' ABILITY TO WITHDRAW UNION RECOGNITION

Overturning fifty years worth of prior precedent, the NLRB on March 29, 2001 made it extremely difficult for an employer to remove a union that the employer believes is no longer supported by a majority of employees. In *Levitz Furniture Co. of the Pacific*, the NLRB ruled that employers can no longer withdraw recognition from a union after establishing a good faith and reasonable doubt that the union retains majority support. Now, an employer must be able to prove that a union has actually lost the support of the majority of employees. Effectively, the only way an employer can safely insure that it can meet this burden is by filing a petition seeking an "RM election" conducted by the NLRB. While the NLRB made it somewhat easier for employers to seek RM elections, allowing employers to obtain such elections by demonstrating good-faith reasonable uncertainty as to a union's continued majority support, the specific types of evidence that are probative of such uncertainty will be decided by the NLRB on a case-by-case basis.

In reaching its decision in *Levitz*, the NLRB also failed to appreciate that unions can slow down the processing of RM elections, often for years, by filing unfair labor practice charges ("ULPs") against the employer, which pursuant to the NLRB's regulations, "block" the election until the ULPs are finally resolved. Additionally, a union that loses an RM election can further delay the outcome by filing election objections or challenges.

The *Levitz* case illustrates how increasingly difficult it is to get rid of a union as opposed to the ease with which an employer can be compelled to recognize and bargain with a union. This case is another loud wake-up call for employers to step up their union avoidance training of managers and supervisors. (*Levitz Furniture Co. of the Pacific*, 333 NLRB No. 105 (3/29/01)).

MGM ESCAPES LIABILITY IN FEDERAL "SAME SEX" HARASSMENT CASE

The Ninth Circuit Court of Appeals has ruled that harassment because of a person's sexual orientation is not actionable under Title VII of the Civil Rights Act of 1964. In *Rene v. MGM Grand Hotel, Inc.*, the Ninth Circuit ruled that, to be actionable under Title VII, same sex harassment must either (a) result from the harasser's sexual desire for the victim, (b) consist of harassment in such sex-specific and derogatory terms as to make it clear that the harasser was motivated by general hostility to the presence of persons of a certain gender in the workplace, or (c) show comparatively different treatment of the sexes in the workplace.

Although Title VII does not cover harassment or discrimination due to sexual orientation, Nevada's anti-discrimination statutes were amended in 1999 to specifically prohibit such conduct, including harassment and discrimination based on an individual's perceived sexual orientation. In addition to MGM potentially facing liability under Nevada's amended anti-discrimination laws, the specific conduct at issue in the *Rene* case could have subjected MGM and the alleged harasser to a myriad of state tort claims such as battery, negligence, assault, and intentional or negligent infliction of emotional distress. These state law claims are typically asserted in state court, where it is often very difficult to obtain dismissal of a case before trial. Luckily for the MGM, the plaintiff did not assert these state law claims, and by the time the Ninth Circuit ruled, the statute of limitations had run. (*Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206 (9th Cir. 3/29/01)).

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UPDATE ON MEAL AND BREAK PERIODS FOR NEVADA EMPLOYEES

Under Nevada law, employers are required to give employees, for every eight (8) hours worked, thirty (30) uninterrupted minutes for lunch. In addition, employees are entitled to a ten (10) minute rest break for every four (4) hours worked. According to the Office of the Nevada Labor Commissioner, these obligations are strictly enforced, and alternate break schedules established by an employer cannot be substituted. For instance, an employer who chooses to provide a one (1) hour lunch period for its employees is not relieved of its obligation to also provide two 10-minute breaks. Likewise, an employer who gives its employees longer breaks in the morning is nonetheless obligated to provide a 10-minute break in the afternoon. Furthermore, an employer's decision to compensate employees for lunch periods does not exempt it from also affording paid breaks to its employees.

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further guidance on the issues of sexual harassment and retaliation. First, the Court held that "[n]o reasonable person could have believed that the single incident [between Breeden and her supervisor during the meeting] . . . violated Title VII's standard," especially in light of Breeden's job duties and her admission that reading the remark in the candidate's application packet before the meeting did not bother or upset her. The Court therefore reaffirmed that in order for simple teasing, offhand comments, and isolated incidents to amount to sexual harassment, such conduct must be extremely serious.

"Employers need not suspend previously planned transfers upon discovery that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality."

Second, the Court addressed whether Breeden's transfer was caused by her discrimination charge and lawsuit. Because CCSD had discussed with Breeden's Union its intention to transfer her to another department shortly before Breeden filed suit, the Court found that CCSD's decision to carry out the transfer after being notified of the lawsuit did not demonstrate causation, a required element of a Title VII retaliation claim. In this regard, the Court stated, "Employers need not suspend previously planned transfers upon discovery that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality."

KZ&A is proud to have been part of this important legal development, and congratulates the Clark County School District on its victory. (*Clark County School District v. Breeden*, 121 S.Ct. 1508 (4/23/01)).

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