Labor & Employment Law Section Newsletter

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Ninth Circuit Holds Ratio Test for Determining Excessiveness of Punitive Damage Awards Unnecessary in Title VII Cases

By Bryan Cohen, Esq.

In *Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. Dec. 10, 2014), the United States Court of Appeals for the Ninth Circuit, sitting en banc, analyzed the ratio test for punitive damages set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), in the context of damages awarded in a Title VII case. The en banc court determined that where a consolidated damages cap has been established by statute, a ratio analysis between punitive and other damages becomes unnecessary.

Angela Aguilar and the State of Arizona filed suit against ASARCO claiming sexual harassment, disparate treatment, retaliation, and constructive discharge. A jury found ASARCO liable on the sexual harassment claim and awarded one dollar ($1.00) in nominal damages and $868,750 in punitive damages. The defendant moved for judgment as a matter of law, contending that the punitive damages award was unconstitutionally excessive. The district court denied the motion for judgment as a matter of law, finding that the punitive damages award was not unconstitutional. The district court, however, reduced the punitive damages award to $300,000 given the cap on compensatory and punitive damages under 42 U.S.C. 1981a(b)(3). ASARCO appealed the district court's refusal to reduce the punitive damages award further. A three-judge panel of the Ninth Circuit vacated the punitive damages award, finding the 300,000 to 1 ratio of punitive to nominal damages awards excessive. The Ninth Circuit panel thereafter reduced the punitive damages award to $125,000. *Arizona v. ASARCO LLC*, 733 F.3d 882, 891-92 (9th Cir. 2013).

Upon review, the en banc court noted the guideposts established by the U.S. Supreme Court in *Gore* when assessing the constitutionality of a state common law punitive damages award: 1) the degree of reprehensibility of the defendant's misconduct; 2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and 3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Although recognizing the relevance of *Gore*, the Ninth Circuit remarked that the issue in this case was different from that analyzed by the Supreme Court inasmuch as Title VII includes "a carefully crafted provision, § 1981, that imposes a cap on punitive damages." *ASARCO*, 773 F.3d at 1055.

The court addressed the

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Labor and Employment Law Section at the State Bar Annual Meeting

The Labor and Employment Law Section is very excited that our proposed presentation, *Clearing the Smoke: Medical Marijuana in the Workplace*, has been selected for inclusion at the bar's Annual Meeting in Seattle, Washington. Our section's session is currently scheduled to be presented on Saturday, July 11, 2015, but be sure to check the official schedule once it has been released.

The presentation will be a panel discussion addressing the employment ramifications of NRS Chapter 453A and will include information regarding any action taken by the Legislature during its 2015 session regarding medical marijuana and the any potential effects on employment law. Our panel will include management side attorneys Eddie Keller and Matt Cecil, as well as employee side attorneys Senator Richard "Tick" Segerblom and Kathy England. Labor and Employment Law Section Chair J.P. Kemp will be moderating what promises to be an intriguing and lively conversation on this cutting edge issue.

The Executive Committee of the section encourages you to attend the Annual Meeting and come to our presentation. This is the first time that our section will be making a presentation at the Annual Meeting and we want to make sure that it is a resounding success by having a good turnout by our section members.

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U.S. Supreme Court News

High Court Says No Pay for Security Check Time

By Sandra Ketner, Esq.

Employers across the country are breathing a sigh of relief following the recent unanimous ruling of the U.S. Supreme Court in *Integrity Staffing Solutions, Inc. v. Busk et al.*, No. 13-433, that time spent by warehouse workers waiting for and undergoing antitheft security screening is not compensable time under the Fair Labor Standards Act (FLSA). The case, which originated in Nevada, is of significant import for many of the nation's largest employers, as security screening and bag checks have become an increasingly ubiquitous part of an employee's ingress and egress to and from work. Indeed, the significance of this ruling is underscored by the spate of class-action suits that were filed after the U.S. Court of Appeals for the Ninth Circuit, which has jurisdiction over appeals from Nevada federal courts, held that such time could be compensable under the FLSA. *Busk et al. v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525 (2013). Like the *Busk* litigation, the suits that followed the Ninth Circuit's ruling have been brought by employees seeking back-pay for time spent in security screening, and represented massive potential liability. Justice Thomas authored the majority opinion that reversed the Ninth Circuit's holding in *Busk* with a concurring opinion authored by Justice Sotomayor and joined by Justice Kagan.

Background

In 2010, the plaintiffs, warehouse workers employed by the staffing company to work in an internet retailer's fulfillment centers in Fernley and Las Vegas locating and preparing merchandise for shipment to the retailer's customers, filed suit against the staffing company alleging violations of the FLSA and Nevada labor laws. After clocking out at the conclusion of their shifts, the plaintiffs would exit the warehouse, passing through a security check that required them to remove items such as wallets, keys, and belts and pass through a metal detector. The plaintiffs claimed that they, and workers like them across Nevada, should be paid for the security screening time. The U.S. District Court for the District of Nevada disagreed and dismissed the putative class action. The plaintiffs appealed the decision to the Ninth Circuit which reversed the dismissal of the plaintiffs' FLSA claim (but affirmed the dismissal of the plaintiffs' claims alleging violations of Nevada labor law). The Supreme Court, however, disagreed with and reversed the Ninth Circuit's determination in a rare 9-0 decision.

Supreme Court's Ruling

The Court's ruling clarifies its precedent regarding tasks that are excluded from compensable work time by virtue of their being preliminary or

Ninth Circuit

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constitutionality concerns raised by the Supreme Court in *Gore* by analyzing the statutory scheme set forth in § 1981a. The court found that the constitutionality elements were satisfied inasmuch as § 1981a "clearly sets forth the type of conduct, and mind-set, a defendant must have to be found liable for punitive damages[, and] . . . sets a cap on certain types of compensatory damages, combined with punitive damages." Id. at 1056. The court noted that employers are on notice regarding the type of conduct that could subject them to liability and the dollar amount to which they could be subjected.

The Ninth Circuit concluded:

> When a statute narrowly describes the type of conduct subject to punitive liability, and reasonably caps that liability, it makes little sense to formalistically apply a ratio analysis devised for unrestricted state common law damages awards. That logic applies with special force here because the statute provides a consolidated cap on both compensatory and punitive damages. ...By establishing a consolidated damages cap that includes both specified compensatory and punitive damages, Congress supplanted traditional ratio theory and effectively obviated the need for a *Gore* ratio examination.

Id. at 1057. The court also noted that by capping both compensatory and punitive damages, § 1981a provides the opposite result that a ratio analysis would provide. Unlike in a ratio analysis, where the punitive damages would increase proportionately to an increase in compensatory damages, under § 1981a, when the compensatory damages increase, there is less available for punitive damages.

Accordingly, the Ninth Circuit reversed the panel decision and affirmed the district court's award of $300,000 in punitive damages. The court also affirmed that sufficient evidence existed justifying the district court's award of punitive damages, that the district court did not err in admitting evidence of sexually explicit graffiti, and that the attorney's fees and costs awarded were reasonable.

High Court

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postliminary to an employee's principal activity under the Portal-to-Portal Act. Specifically, the Court explained that it had consistently held that the term "principal activity" is expansive enough to encompass not only those tasks an employee is employed to perform (those that are obviously principal activities), but also tasks that are an "integral and indispensable" part of the principal activities. The Court went on to explain that because the words "integral" and "indispensable" are to be given their plain and ordinary meanings, an activity is integral and indispensable to the principal activities only "if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."

The Court reasoned that warehouse workers are not hired to undergo security screening and that such screening is not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment. That is, the Court explained, warehouse workers are just as able to perform the activities for which they are employed without the screenings as they are with them. The Court concluded, therefore, that security screenings performed after the conclusion of the plaintiffs' shifts were not integral and indispensable to their principal activities as warehouse workers and the time spent undergoing the screenings is therefore, not compensable under the FLSA.

The Court took specific issue with the Ninth Circuit's interpretation of the "integral and indispensable" test, saying that it erred by focusing on whether the particular activity at issue was required by the employer. Indeed, as the Court pointed out, if it were enough to merely show that a particular task was required by the employer to satisfy this test, it would nullify the Portal-to-Portal Act, "sweeping into 'principal activities' the very activities [that Act] was designed to address."

What This Means for Nevada Employers

The Supreme Court's decision helps to clarify the principles used to determine what constitutes a compensable activity, adding much needed focus to the legal discourse that had gone far afield with the Ninth Circuits decision in Busk. However, litigation will certainly continue in this area due to the need for clarity with regard to which elements of productive work are actually indispensable or an intrinsic element, leaving the legal profession to argue over the difference between the time it takes a butcher to sharpen her knives or the time it takes a battery plant worker to don protective gear (two tasks that have been deemed compensable), and the time a poultry-plant employee spends waiting to don his protective gear (a task deemed noncompensable, being two steps removed from the productive work). Indeed, Justice Sotomayor's concurring opinion seems primarily directed at offering some further guidance as to what constitutes indispensability, explaining that in her view, the term must signify a task that is required not just for the productive work to actually be performed, but to be performed "safely and effectively."

While the particular activity at issue in *Busk* was found not to be compensable under the FLSA or Nevada law, the result may be different depending upon the activity. Therefore, prudent Nevada employers should check with their counsel before relying on and applying the decision in other contexts.

Franchise Tax Board of the State of California v. Hyatt Clarifies Proof Required for Severe Emotional Distress

By J.P. Kemp, Esq.

On September 18, 2014 the Supreme Court of Nevada issued its opinion in *Franchise Tax Board Of State of California v. Hyatt*, 130 Nev. Adv. Op. 71. The opinion is lengthy, but informative regarding issues such as waiver of sovereign immunity, comity, and whether statutory damage caps apply to other states. These issues can sometimes come up in cases with government agencies in employment matters; however, there are two aspects of this case that should definitely catch the attention of employment law practitioners.

First, the Court formally adopts a cause of action for False Light Invasion of Privacy. Previously in *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 895 P.2d 1269 (1995), the Court had suggested that False Light would be recognized in Nevada, but it did not clearly announce that the tort was recognized. *Hyatt* rectified that ambiguity and states clearly that False Light is a tort under Nevada law. The Court stated that the elements of the claim are those found in Restatement (Second) of Torts § 652E (1977):

> [o]ne who gives publicity to a matter concerning another that places the other before the public in a false light . . . if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Hyatt's False Light claim failed, but the tort is now recognized and under the right set of facts could be an issue in an employment case.

Second, and more importantly to employment practitioners is the Court's ruling regarding the proof required under Intentional Infliction of Emotional Distress (IIED) to meet the element of extreme or severe emotional distress. Mr. Hyatt did not produce any medical evidence in support of his claim. He was actually precluded from presenting any medical evidence because he had refused to provide medical records in discovery. Instead he only provided testimony of his son, his friends, and himself as to how the outrageous conduct of the Franchise Tax Board had impacted his life and his health.

> In support of his IIED claim, Hyatt presented testimony from three different people as to the[sic] how the treatment from FTB caused Hyatt emotional distress and physically affected him. This included testimony of how Hyatt's mood changed dramatically, that he became distant and much less involved in various activities, started drinking heavily, suffered severe migraines and had stomach problems, and became obsessed with the legal issues involving FTB. We conclude that this evidence, in connection with the severe treatment experienced by Hyatt, provided sufficient evidence from which a jury could reasonably determine that Hyatt suffered severe emotional distress

The jury's verdict was for $82 million in emotional distress damages. The Supreme Court upheld the liability finding on this evidence, but remanded for a new trial as to damages only on the IIED claim due to erroneous evidentiary rulings and jury instruction errors. The Court expressly adopted a "sliding scale" approach set forth in The Restatement (Second) of Torts § 46 (1977), comments j and k:

> Based on the foregoing, we now specifically adopt the sliding-scale approach to proving a claim for IIED. Under this sliding-scale approach, while medical evidence is one acceptable manner in establishing that severe emotional distress was suffered for purposes of an IIED claim, other objectively verifiable evidence may suffice to establish a claim when the defendant's conduct is more extreme, and thus, requires less evidence of the physical injury suffered.

Certainly a key factor in Mr. Hyatt's case was the fact that the outrageous conduct of the Franchise Tax Board was so bad that it was easy to see how anyone would suffer extreme or severe emotional distress as a result.

This is an important decision, but it will remain to be seen over time how the rule works in practice in cases that do not have such egregious facts as existed in the *Hyatt* case.

Recent EMRB Decisions

Case No. A1-045735, International Brotherhood of Teamsters, Local 14 v. Clark County School District and Education Support Employees Association (Item 520Q).

The Board certified the results of a recently held runoff election. Like the first election, neither Teamsters Local 14 nor ESEA received a majority support from a majority of all the members of the bargaining unit (i.e., a majority of those eligible to vote). The Board then interpreted its rules as not requiring a second runoff election, but in its discretion it then ordered a second discretionary runoff election. It further stated that it was obvious that the current standard, adopted in 2002, is incapable of answering whether any organization enjoys majority support. The Board then stated that a discretionary send runoff election would be warranted if conducted under a standard likely to produce a meaningful result. Noting that prior to 2002 the Board had always used a "majority of the votes cast" standard, which had been used in a number of elections, the Board interpreted its rules as permitting the Board to infer majority support of the unit as a whole based upon a majority of the votes cast. The Board further noted that this "majority of the votes cast"

Recent EMRB Decisions

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standard is not only the standard in labor law, but is also the standard used in Nevada's elections in general. Finally, in ordering that the second discretionary runoff election be held under the "majority of the votes cast" standard, the Board called the "majority of the unit" standard, nicknamed the supermajority rule, a failed experiment incapable of any meaningful practical application.

Case No. A1-046115, Daniel Woyciehowsky v. City of Sparks and Sparks Police Department (No item Number).

A number of the cases filed with the EMRB also have a corresponding grievance that goes to arbitration. In such cases the EMRB generally places its case on hold until the arbitration is concluded. Then it determines whether to defer to the arbitrator's decision. This order is important as it states the standard for deferral as enunciated in City of Reno v. Reno Police Protective Association, 118 Nev. 88, 59 P.3d 1212 (2002). The Board will ordinarily defer to an arbitrator's decision if: (1) the arbitration proceedings were fair and regular; (2) the parties agreed to be bound; (3) the decision was not "clearly repugnant to the purpose and policies of the [Act]; (4) the contractual issue was factually parallel to the unfair labor practice issue; and (5) the arbitrator was presented with the facts relevant to resolving the [unfair labor practice]." The party desiring that the EMRB reject an arbitration award has the burden to show that one or more of these conditions for deferral were not met. By the way, in this case the Board did defer to the arbitrator and dismissed the complaint.

A1-046106, Michael Turner v. Clark County School District (Item 800)

Mr. Turner was terminated by the school district over an off-duty driving incident. The incident occurred while Mr. Turner, a long-time school district employee, was on a probationary period for a promotional position. At the arbitration hearing contesting the termination, the arbitrator overturned the termination and reinstated Mr. Turner to the position he held prior to his promotion since he was on probation for the higher position at that time. Complainant then filed an unfair labor practice case with the EMRB. In the EMRB matter Complainant asserted that the duty to bargain collectively in good faith includes the "resolution of any question arising under a negotiated agreement." NRS 288.033(3). However, Complainant further asserted that this duty to bargain extends to the positions the opposing party might take at an adversarial arbitration hearing, and in particular, the arguments that might be raised by opposing counsel in its closing argument. The school district filed a motion to dismiss, which was granted by the Board upon the conclusion of Complainant's case. The Board, in its decision, opined that the school district "merely advanced the positions that it viewed most favorable to it when making arguments before the arbitrator" and that doing so does not breach any duty to bargain in good faith. The Board went on to further state that the making of such arguments is exactly what is contemplated in an arbitration proceeding.

A1-046127, Laws, Quick and Las Vegas Police Protective Association v. Las Vegas Metropolitan Police Department (No Item Number).

Complainants had filed a public records request with LVMPD pursuant to the Public Records Act. LVMPD withheld certain of the documents as privileged and retracted some of the information on documents that it did provide pursuant to that act. Thereupon the Complainants, who have an active case with the EMRB, filed a motion with the EMRB, requesting that the Board conduct an in-camera inspection of the withheld and/or retracted documents to determine if they, indeed, qualify for a privilege. The Board held that it had no authority to administer the Public Records Act or to rule upon whether documents were properly excluded from a public records request. As a side note, the Public Records Act does provide the means for a party to file an action in District Court to attempt to obtain the documents it believes may have been improperly withheld.

A1-045929, Timothy Frabbiele v. City of North Las Vegas (Item 680J).

Last September the Board ruled in favor of Mr. Frabbiele, including the awarding of fees and costs. Subsequent to that decision, Mr. Frabbiele submitted a memorandum detailing the fees and costs sought. The City filed its opposition. In this decision the Board awarded Mr. Frabbiele $66,962.50 in attorney fees and $10,400.00 in costs.

*** Please note that these summaries are provided for informational purposes only and are not intended to substitute for the opinions of the Board. These summaries should not be cited to or regarded as legal authority. The EMRB will provide copies of the decisions upon request.**

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