

Issue of Ex-Worker Suits Goes to High Court

By Thom Senzee - 5/25/2009
San Fernando Valley Business Journal Staff

In agreeing to hear a case that deals with an area of California law that has grown into a dark cloud hanging over the heads of employers, the state Supreme Court may settle the issue of whether or not former employees can sue companies for whom they once worked under the Unfair Competition Law.

Specifically, in *Pineda v. Bank of America*, the court will decide whether lower courts decided properly in denying penalties for the plaintiff, an employee who gave his employer two weeks advance notice of his resignation, but who did not receive his final pay until several days after his resignation date.

The *Pineda v. Bank of America* case was filed as a class action lawsuit, because the plaintiff contended the practice of withholding pay was widespread at the bank.

The fear of an onslaught of similar class action lawsuits against any employer in the state using the precedent, should the court decide in favor of the plaintiff, has Valley corporate defense attorneys voicing concern.

"The scope of fallout will be far-reaching," said Mona Hanna, department chair of the Business and Commercial Litigation Department at Encino-based Michelman & Robinson, LLP.

"If you take a statute of limitation from one year, as is the time limit with most of the labor code, and quadruple it, you would effectively be quadrupling the funds companies would be paying out for (wage infraction) claims arising out of suits filed under the (Unfair Competition Law) laws," Hanna said.

The crux of the matter is the Unfair Competition Law allows for a four-year statute of limitations, while the state labor code under Section 203 only allows one year in most cases. Both a trial court and an appeals court found that, in the case of *Pineda v. Bank of America*, the more conservative time constraints of the labor code applied.

"The Court of Appeal held that plaintiff's claim for willful failure to timely pay wages under Labor Code section 203 was barred by the applicable one-year statute of limitations," said Felix Shafir, an associate attorney at Encino-based Horvitz and Levy.

The court in that case also found that wage infraction penalties are not restitution and cannot be recovered under the Under Competition Law.

In fact, Shafir said, the California Supreme Court has decided, albeit less than crystal-clearly, that, indeed, penalties cannot be collected by a plaintiff suing an employer under the UCL.

In *Kasky v. Nike, Inc.*, the court ruled that "In a suit under the UCL, a public prosecutor may collect civil penalties, but a private plaintiff's remedies are 'generally limited to injunctive relief and restitution.'"

The word “generally” has left attorneys on both sides of the issue and some employers feeling the need for more clarity on the matter from the state Supreme Court.

However, that does not mean all are happy to see the court taking the Pineda case.

“I guess I can say I’m somewhat surprised it was accepted for review,” Michelman’s Hanna said. “The appellate court case was based on well established principles of law.”

Hanna believed there might be some credence to a theory she said is circulating in the legal community that the court took the case to send a message that plaintiffs not use the Unfair Competition Law to seek penalties in labor cases.

For his part, Shafir is concerned that the floodgates of litigation would swing wide open for Horvitz & Levy clients if the court decides against Bank of America.

The result would expose business to a barrage of lawsuits at a time when they are already facing hard challenges.

“Depending on the decision, we may find consumers, agencies and employees seeking to recover penalties under UCL, again at a time when businesses can least afford it,” Shafir said.

Horvitz & Levy represents companies being sued for UCL violations and argues against class actions in the appellate court.

If, as Hanna theorized, the Supreme Court has taken the case in order to reaffirm *Kasky v. Nike* she and Shafir can take some comfort from the definitiveness with which the appeals court stated its opinion.

“Despite plaintiff’s creative attempt to recharacterize the liability imposed by the statute, section 203 penalties do not meet this definition,” the court wrote. “There is no automatic right to the penalty. The employee must first bring an enforcement action and establish that the employer willfully failed to timely pay his or her wages.”

Hanna believed it is likely the state’s highest court will affirm both the trial and appellate courts’ decisions.

Attempts to reach counsel for the plaintiff were not successful.