

Significant Recent Employment Law Developments in State Common Law and Statutory Decisions

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It is impossible in the limited amount of space permitted by this venue to do a complete review of all fifty state jurisdictions in the area of labor and employment law and do the project any justice. The best that can be done is to do a snapshot of the panorama of these cases, while recognizing that even this picture may miss many significant sights as well as having others out of focus. But this disclaimer should not be taken negatively, only factual. In fact, there have been many significant developments in the area of state common law and statutory decisions, only a few of which I can cover. I will address several of these in some detail, while listing others in summary form for your further consideration and examination.¹

Most of you who practice in the area of labor and employment law do so before various federal forums such as the National Labor Relations Board, the Equal Employment Opportunities Commission, the United States Department of Labor, the United States Occupational Safety and Health Commission, or the federal courts. Even your arbitration practice is in the shadow of federal law as set forth in the Steelworkers' Trilogy and its progeny.² But some of you may spend significant time before state tribunals and courts in a myriad of cases ranging from specific questions, such as the final compensation payments when the employee leaves the employment, to broader and more fundamental issues of whether an individual is an employee or an independent contractor so as to enjoy, or be precluded from, certain statutory benefits or a required payment to be made to the state for some benefit provided an employee, such as unemployment compensation or workers' compensation benefits. Some of these areas, such as workers' compensation and unemployment compensation, mentioned above, provide a bounty of decisions, but are very specialized so that the typical labor and employment attorney either rarely enters those domains or is there almost exclusively. These areas I will not try to cover in this review and leave to others to explore in a different forum. But I will tackle several other areas of interest, with a sampling of cases decided by our various state supreme courts, that labor and employment lawyers may expect to address in the normal course of their practice even though it may be only on a sporadic basis.

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¹ I have limited my research to only state supreme court decisions since January 1, 2006, except in a couple of instances where I have reported on intermediate court decisions that warrant consideration due to their potential for significant developments. I have also not attempted to cover the area of state equal employment discrimination which could have provided itself a paper of this length on that topic alone.

² *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

I think that it is appropriate to observe that the labor and employment lawyer in private practice, while engaged in federal forums common to all throughout the country, will probably specialize in only one or two separate state jurisdictions in that lawyer's practice. Only a few lawyers representing national and international clients and those of you who are in-house counsel for such companies will be concerned with the decisions of multiple state courts and involved with the application of appropriate state statutes covering the employment relationship. My approach of highlighting only selected decisions and statutes, while not fully satisfying anyone from a particular state or those with a national practice, hopefully will provide some insight into the various approaches by the state courts and legislatures of our country.

I start first with the formation of the employment relationship as opposed to that of an independent contractor. I next review several recent decisions on the at-will relationship and certain exceptions to that doctrine. Next, I review cases in the area of application of employment class actions, arbitration and the interrelationship with the Federal Arbitration Act. I then address several miscellaneous cases involving such varied topics as the right of undocumented workers to receive protection of the state wage and hour laws, the concepts of non-competition and non-disclosure agreements, whistleblowers' statutes, attorneys' fee pursuant to state statutes, and SLAPP statutes. I conclude with comments about efforts to develop anti-bullying statutes and the formation of a Restatement of the Law of Employment, which several of you are involved with and of which many of you have never heard.

The Independent Contractor vs. Employee Conundrum

There is probably no area of labor and employment law wherein the lawyer will face greater potential malpractice exposure than to advise an employer that a group of individuals are independent contractors and not employees entitled to the various protections afforded particular statutes.³ With all of our legal history about this area ranging from decisions under the National Labor Relations Act, FICA withholding, to the common law there still appears to be no simple test that can be followed, except to err on the side of caution and treat the individual as an employee if there is any question over the matter.

The Vermont Supreme Court faced resolution of this issue in the case of Fleece on Earth v. Department of Employment Training.⁴ The employer in this case was in the children's wear retail clothing business. The owners of the company designed all of the apparel sold by the company, but had the product made by knitters and sewers who worked at home and were paid at a piece-rate for those goods produced. The company

³ There is probably no larger consequence to this decision that the individual thought by the employer to be an independent contract subsequently is found to be an employee than in the area of workers' compensation. See generally, 3 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 60.02 (2006), 6 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 102.02 (2006)[hereinafter "Larson"]. As mentioned before, I will not try to tackle this issue, but direct you to the experts in the area.

⁴ 2007 VT 29, 923 A.2d 594 (2007).

supplied the patterns and yarn for the knitters and patterns and pre-cut fabric for the sewers. These individuals worked on their own machines at their own pace. While there was a standard rate for the items some individuals negotiated a higher rate. The individuals presented statements at the end of every month for the work performed. The company retained the right to reject pieces it did not feel conformed to its specifications.

The company came to the attention of the Vermont Department of Labor and Industry when one of the individuals hired pursuant to this arrangement filed for unemployment benefits when she left another job. The Department investigated and decided that the company owed back taxes for these individuals. The company contested that determination before both an administrative law judge as well as the Vermont Employment Security Board which found that the individuals were employees under the provisions of the state's unemployment compensation statutes. The company then appealed to the Vermont Supreme Court.

The Court first recognized the tension between protecting workers entitled to unemployment compensation and the economic realities faced by small business owners who utilize the services of individuals who work at home. It then examined a three part test provided in the state statute that the Court observed had not changed since 1937.⁵ That provision required that an individual who worked for wages was an employee unless it can be shown that the person 1) was free from control or direction over the performance of the services, 2) the services were either outside the usual course of the business or performed outside of all the places of business for the enterprise, and 3) the individual was customarily engaged in an independently established trade, occupation, profession or business. In this case, the Court found that the department had properly determined that the first requirement was not met in this case. The Court noted that the common law test of master-servant was more restricted than the statutory test and that the statute brought within its realm cases which at common law would be considered as an independent contractor relationship. The Court distinguished other cases that the company asserted controlled and stated that the first part of the three-part test was to be liberally construed to provide coverage. It noted the changing nature of work in today's environment where work can be done at home as well as in the traditional work place. Since it found that the department had established that there was sufficient control or direction over the individuals involved the company could not establish the first part of the exception. As a result the individuals were considered employees under the statute. While the Court disagreed with the department as to the third part of the exclusion concerning two individuals it did not matter since the three part exception is conjunctive and the company could not prevail having failed to satisfy the first part of the test.

In a similar case the New Jersey Supreme Court held that a chiropractic medical director who had signed a contract with Prudential Insurance Company stating that he was an independent contractor was nevertheless an employee under a state statute whistleblowers' protection act.⁶ The one-year "Medical Director Consultant Agreement" between the parties was executed by the plaintiff in the name of his professional

⁵ Id. at ___, 923 A.2d at 597, quoting Vermont statute Title 21, § 1301(6)(B).

⁶ D'Annunzio v. Prudential Insurance Company of America, 192 N.J. 110, 927 A.2d 113 (2007).

association rather than in his individual capacity as a licensed doctor. The agreement provided that plaintiff was required to pay his own self employment withholding and applicable federal, state and local taxes. The parties agreed in the contract that the relationship was not intended to create, among other relationships, an employee-employer agreement, but was that of an independent contractor. Both parties had the right to terminate the agreement on sixty days notice and Prudential retained the right to terminate it immediately if the plaintiff committed a material breach.

Plaintiff testified that he thought that when he entered into the contract in February of 2000 he was to exercise his professional judgment as a chiropractic medical director in reviewing cases for approval of treatment free of extensive supervision. When he started to perform his duties he found that Prudential sought to exercise extensive control over his performance of these functions including step-by-step directions for him to use in his review of personal injury claims. He was provided a work station, telephone, e-mail address as well as office supplies typical of an employee. He was told to use Prudential letterhead on all letters, had to leave all files on the company's premises and was trained in all related company policies and computer programs.

By the summer of 2000 the agreement between the parties had become strained. Plaintiff had complained to his superiors that he perceived insurance violations in the way Prudential was conducting its operation. Prudential put plaintiff on notice in August and early September that he was not meeting its expectations and was told to speed up his review of files, limit his reviews to only chiropractic evaluations, and to reduce the number of treatment plans that he was denying. On September 11, 2000, Prudential notified him it was terminating the agreement pursuant to the sixty-day notice provision.

Plaintiff brought his claim under the New Jersey Conscientious Employee Protection Act (CEPA).⁷ The trial court granted summary judgment to Prudential finding that Plaintiff was not an employee entitled to protection under CEPA. Plaintiff appealed to the Appellate Division that reversed the trial court's grant of summary judgment, finding that there were issues of fact to be determined on remand. Prudential petitioned for certification to the Supreme Court which was granted. The Supreme Court agreed with the Appellate Division, finding that the exercise of control over Plaintiff by Prudential were sufficient to bring Plaintiff within the protection of CEPA.

The Court first noted that the definition of employees under CEPA is not limited to a narrow band of traditional employees.⁸ It then set CEPA in context as the legislature's adoption of protection for conscientious employees arising out of the Court's 1980 decision in *Pierce v. Ortho Pharmaceutical Corporation*.⁹ It noted that its goal in interpretation of a statute is to determine the legislative intent, looking first to the plain language of the statute. The Court also observed that CEPA as a worker protection statute should be construed liberally to afford the greatest protection available. In this

⁷ N.J.S.A. 34:19-1 to -8.

⁸ 927 A.2d at 115.

⁹ 84 N.J. 58, 417 A.2d 505 (1980).

context it found that the statutory definition of employee did not exclude persons who are designated as independent contractors.

The Court went on to observe that the common law right-to-control test does not necessarily result in the identification of all those workers that social legislation seeks to reach.¹⁰ It noted that the definition of employee contained in CEPA must be applied in the setting of the person involved and the labels attached to the relationship will not control. The court considered three aspects that come into play: 1) employer control, 2) the individual's economic dependence on the relationship, and 3) the degree to which there has been a functional integration of the company's business with that of the person doing the work at issue.¹¹ The Court proceeded to examine the twelve factors (the *Pukowsky* test) that the Appellate Division had adopted from a previous decision.¹² It noted that the test was a hybrid that reflected the common law right-to-control test, the Restatement (Second) of Agency test and the economic realities test. It also noted, as did the Vermont Supreme Court, that any test must be adjusted to accommodate the modern reality of the business world in the hiring of individuals such as professionals.

The Court examined all of the factors that Plaintiff had presented in the preliminary stages of the case as to why he should be considered an employee protected by CEPA and not an independent contractor excluded from coverage under the act. It concluded that at this early stage of the proceeding it was error to conclude that Plaintiff could not establish an employment relationship that fell under the protection of CEPA. It remanded to case for a determination on the merits of the case.

One Justice dissented. The dissent felt that the legislature knew the difference between an employee and an independent contractor and that should conclude the matter. An extensive notation of different statutes was made to establish this point. The dissent also noted that Plaintiff had gone to significant lengths to establish himself as an independent contractor and now sought to negate these efforts in this action. The dissent found that the contract between the parties could have been clearer and should control this situation.¹³

A third case illustrates this conflict between what the parties' contract states and what the realities of the situation present. While it is an intermediate decision of the California courts, I believe it is a harbinger of what the California Supreme Court will eventually decide, either in this case or one similar to it. In *Estrada v. FedEx Ground Package System, Inc.*, the court had to determine whether numerous drivers were independent contractors, not entitled to certain statutory benefits, or employees entitled to those benefits.¹⁴ This was the third time the case had been considered by the appellate court. It had before it the issues of whether the drivers were independent contractors or

¹⁰ 927 A.2d at 119.

¹¹ 927 A.2d at 120.

¹² *Pukowsky v. Caruso*, 312 N.J.Super. 171, 711 A.2d 398 (App.Div. 1998). The Court noted that it had already adopted this test its previous decision of *Feldman v. Hunterdon Radiological Assocs.*, 187 N.J. 228, 901 A.2 322 (2006).

¹³ 927 A.2d at 123-29.

¹⁴ 154 Cal.App.4th 1, 64 Cal. Rptr.3d 327 (2007)

employees, whether the lower court had properly certified the class, the appropriateness of the reimbursement orders to the drivers, and the award and amount of attorneys' fees to the plaintiffs. I will discuss the determination of the legal status of the drivers while mentioning only briefly the other aspects of the case.

The previous decisions of the court had limited the scope of the class to present and former drivers who had personally performed pickup and delivery services for FedEx on a full-time basis in a single work area or route (SWA's).¹⁵ Drivers who had worked in multiple work areas or routes (MWA's) had been excluded from the class. Each of the SWA's had signed a document entitled "Pick-up and Delivery Contractor Operating Agreement" which contained statements that the drivers were independent contractors and not employees for any purpose. The agreement required drivers to purchase trucks with certain specifications and signage, and a whole host of other requirements down to such details as the uniforms they wore and their personal appearance. In addition, the court found credible evidence that the drivers were also subject to other documents such as a Ground Manual, Operations Management Handbook as well as recruiting materials, welcome packets and similar training materials.¹⁶ The court also reviewed the compensation programs and various other matters governing the relationship between the drivers and FedEx down to the smallest detail such as the color of sox the drivers could wear.¹⁷ As the court observed:¹⁸

FedEx's control over every exquisite detail of the driver's performance, including the color of their socks and the style of their hair, supports the trial court's conclusion that the drivers are employees, not independent contractors.

The court set forth an eight part test it labeled "control of details" that it felt governed such determinations. The test included such items varying from the skill required and method of payment to whether the parties felt that they were creating an employer-employee relationship.¹⁹ The court found that on appeal the question was one of fact which must be affirmed if supported by substantial evidence, which it found the trial court possessed.²⁰ The court then found that while attorneys fees were appropriately awarded under the statute, the sum of over \$12.3 million awarded by the trial court was excessive under the facts of case wherein the class had been awarded only about \$3 million that even with prejudgment interest had only increased to about \$5 million.²¹ The matter was remanded to the trial court for the fourth time to determine these matters.

I think that each of these cases illustrates the childhood adage that "you can't have your cake and eat it too." Each of these cases, and many more like them, contain the

¹⁵ 154 Cal.App.4th at ___, 64 Cal. Rptr.3d at 331, n.1.

¹⁶ 154 Cal.App.4th at ___, 64 Cal. Rptr.3d at 332-33.

¹⁷ 154 Cal.App.4th at ___, 64 Cal. Rptr.3d at 336, n.9.

¹⁸ 154 Cal.App.4th at ___, 64 Cal. Rptr.3d at 336 (footnote omitted).

¹⁹ 154 Cal.App.4th at ___, 64 Cal. Rptr.3d at 335. The eight part test was drawn from the California Supreme Court case of *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341, 256 Cal. Rptr. 543, 769 P.2d 399 (1989).

²⁰ 154 Cal.App.4th at ___, 64 Cal. Rptr.3d at 336.

²¹ 154 Cal.App.4th at ___, 64 Cal. Rptr.3d at 340-41.

elements that the employer desires to be free of the constraints of the employer-employee relationship, but desires the control over how its product is produced or delivered to its customers. The cases illustrate that there is no “bright line” test that can be applied, but where there is a social policy involved the court will interpret any ambiguity in favor of finding an employer-employee relationship. Whether you applied a three part, eight part or twelve part test the more control and supervision by the company over the manner and means of production by the individual the more likely there will be found an employer-employee relationship. It is a gradual continuum between the independent contractor status to the employer-employee status, with no definite division between the two except on the extreme ends of the continuum.

These cases also illustrate another common phenomenon that some would encapsulate with the colloquial expression that “You can talk the talk, but can’t walk the walk.” In many cases attorneys for employers may have prepared standard contracts with the aim of creating an independent contractor status for the persons retained by the client. But after the contract is signed the client ignores, in part or in total, the restrictions on the control of the individual and starts treating the person as it would treat an employee. Most contractual relationships involve both rights and duties on the part of both sides. In these cases the employer will often try to eliminate the duties that it incurs in the employer-employee relationship in favor of the independent contractor relationship, such as payment of minimum wages and overtime premiums, treatment for the purpose of social security and unemployment taxes and workers’ compensation benefits, but then assert those rights of control over the relationship that are usually enjoyed in the employment relationship, but missing if the individual is truly an independent contractor. Even the most carefully drafted contract establishing an independent contractor relationship can be nullified if the employer ignores the independence of the contractor and treats that person as an employee. As one leading treatise has observed:²²

No one has ever succeeded in stating a rule or set of rules which, applied to a tangle of facts . . . , will reveal where the line between employment and independent contract lies.

Having tilted for awhile at the employment/independent contractor windmill we should move on to the nature of the employment contract.

At-Will Employment Stills Rules, Except

A number of state supreme courts since the start of 2006 have had to address the issue of the nature of the employment relationship where either the parties are silent in how they label it or expressly state that it is to one at the will of those parties, but extenuating circumstances have occurred resulting from the termination of that relationship. It is fair to observe that the at-will concept remains firmly implanted in the vast majority of the states, but it is also appropriate to observe that the exceptions to the rule first appearing in the late 1970’s and early 1980’s remain as a fruitful source of litigation.

²² Larson, supra, at § 60.02.

The Supreme Court of Oklahoma faced the issue of whether the termination of an employee, who had sought public records under the Oklahoma Open Records Act in a lawsuit brought by a public entity against him, violated the public policy of that state when his private sector employer demanded that he withdraw his request for those records.²³ The individual was employed by a bank and the public entity was a customer of that bank. When the employee refused to withdraw his request for the documents the bank terminated his employment. The employee prevailed in the actions against the public entity and subsequently brought an action against his former employer for violation of public policy in his termination.

The trial court granted the employer's motion to dismiss the action for failure to state a claim and the employee appealed. The Supreme Court noted that since the employee did not allege that he was employed for a definite term the reasonable inference was that the employment was at-will.²⁴ As a result, the court observed that the longstanding rule of Oklahoma was that where the contract of employment was for an indefinite period and it may be terminated without cause at any time without constituting a breach of contract. The court then addressed the only issue in the case of whether asserting a right under the Open Records Act is a basis for an action in tort against an employer for the termination of an at-will employee who asserted such right.

The court reviewed a prior case wherein it had rule that a public policy exception to the at-will rule was not created where an employee had been terminated for refusing to take a polygraph test.²⁵ In this case, the Open Records Act similarly contained no prohibition against such action. In this absence, the court noted succinctly:²⁶

While we recognize the Open Records Act speaks explicitly of public policy-specifically concerning the people's right to knowledge and information about their government in keeping with that particular public policy, Employee here made a choice to forgo his employment with the Bank and ultimately was victorious in his pursuit of his rights and remedies afforded under the Open Records Act in his action against [the public entity]. Employee was not ordered to perform an illegal act or denied an opportunity to exercise his legal rights such that might serve as public policy grounds giving rise to liability for an at-will employee's discharge. [citation omitted] Rather, the Bank's decision to terminate Employee upon Employee's refusal to abandon claims against Bank's customer was a private business decision.

The court observed, as it had in another case, that even if it felt that the decision of the Bank may have been contrary to good business decision-making, or even morally wrong, the termination did not violate the public policy of the state.²⁷

²³ *Shero v. Grand Savings Bank*, 2007 OK 24, 161 P.3d 298.

²⁴ *Id.*, 2007 OK at ___, 161 P.3d at 299-300.

²⁵ *Id.*, 2007 OK at ___, 161 P.3d at 301, citing *Pearson v. Hope Lumber & Supply Co.*, 1991 OK 112, 820 P.2d 443.

²⁶ *Id.*, 2007 OK at ___, 161 P.3d at 301-02.

²⁷ *Id.*, 2007 OK at ___, 161 P.3d at 302 citing *Hayes v. Eateries, Inc.*, 1995 OK 108, 905 P.2d 778.

The Supreme Court of North Dakota was presented with the issue of whether a head cook of a public school whose contract was not renewed for an additional year had stated a claim for breach of contract or denial of due process rights.²⁸ The cook had been employed by the school district for two consecutive years, each time with a one-year contract. When she applied for a third year she was not awarded the position. She brought suit asserting that the personnel policies and procedures handbook created a contract of employment, that there was an implied contract for continued employment based upon her two prior years of service, and that she had a property interest in the position that could not be taken from her except with due process of law. The trial court had denied each of these claims and had granted summary judgment for the school district. The Supreme Court agreed with the trial court and affirmed the dismissal.

The court first found that while a handbook and personnel policies may create a contract of employment these documents did not do so in this case. Rather these documents were primarily a resource guide and did not create a legal obligation between the parties. Similarly, the court found no evidence of an implied contract between the parties based upon her two prior one-year contracts. While Plaintiff was advised she could apply for a third year of employment, and she did, the record demonstrated that each year of employment was a separate contract with no automatic right of renewal. This single year of employment with no guarantee of a renewal also disposed of her due process claim since the court found that she had no property right or legitimate expectation of continued employment. Without a property interest in her employment she was not entitled to the due process rights of notice and an opportunity to respond.²⁹

The Nebraska Supreme Court was presented with the issue of whether to extend an exception to the at-will employment rule in that state where an employee asserted that she was demoted as a result of filing a workers' compensation claim where the statute does not contain such a prohibition.³⁰ The court had previously decided that where the employee alleged that she was terminated for filing a workers' compensation claim a public policy exception was established to the normal rules of at-will employment.³¹ The issue in *Trosper* was whether this public policy exception should be extended to include a demotion from deli manager to deli clerk with a decrease in her compensation from \$30,100 to \$22,500 per year. Plaintiff had alleged that her demotion was the direct result of her reporting a work-related injury to her managers. The trial court had granted the employer's motion that her complaint failed to state a claim upon which relief could be granted. The Supreme Court reversed.

The court stated the general rule to be:³²

²⁸ *Good Bird v. Twin Buttes School District*, 2007 ND 103, 733 N.W.2d 601 (2007).

²⁹ *Id.*, 2007 ND at ____, 733 N.W.2d at 606-07.

³⁰ *Trosper v. Bag 'N Save*, 273 Neb. 855, 734 N.W.2d 704 (2007).

³¹ *Jackson v. Morris Communication Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003).

³² *Id.*, 273 Neb. at 857-58, 734 N.W.2d at 706-07 (footnotes omitted).

Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason. We recognize, however, a public policy exception to the at-will employment doctrine. Under the public policy exception, we will allow an employee to claim damages for wrongful discharge when the motivation for the firing contravenes public policy. The public policy exception is restricted to cases when a clear mandate of public policy has been violated, and it should be limited to manageable and clear standards. In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.

The court proceeded to review those instances where it had found previously that the exception had not been established and those where it had. It also reviewed the decisions of a number of state courts on the same issue, noting the conflict in those decisions. It concluded that in this case an exception would be found since an "employee's right to be free from retaliatory demotion for filing a worker's compensation claim is married to the right to be free from discharge."³³ The matter was reversed and remanded to the trial court for further proceedings.

One justice dissented, finding that while he felt that *Jackson* was correctly decided this case significantly expanded that limited exception to the common law rule.³⁴ He felt that if there was to be an expansion of protecting employees from termination for filing workers' compensation claims to those who were only demoted such protection should be given only by the legislature. Three justices responded to these concerns in a concurrence that noted that the court had already adopted the *McDonnell Douglas* burden-shifting analysis in establishing the necessary proof in such cases.³⁵ They felt that while the legislature could make such changes the court retained its own authority in establishing the public policy of the state.

The Supreme Court of Tennessee found that the state had not waived its sovereign immunity for back pay and lost benefits to a wrongfully discharge university professor at a public institution, even though the legislature had permitted by statute equitable appeals to be brought against state universities.³⁶ The Plaintiff had been discharged by the university, but a court of chancery reversed the decision because it found that there had not been sufficient evidence that the professor had violated professional standards of conduct. But when the professor brought an action in the law courts to recover damages for \$600,000 for back pay, attorney's fees, lost benefits and litigation costs his claim was denied by the Supreme Court. It noted that a change in the statutory scheme wherein tenured college and university professors were separated from tenured elementary and secondary educators indicated that the two groups were to be treated differently. Since

³³ Id., 273 Neb. at 864, 734 N.W.2d at 711.

³⁴ Id., 273 Neb. at 873, 734 N.W.2d at 716. Full disclosure concepts dictate that I disclose that dissenting Justice Stephan (as well as Justice Wright who joined the majority) was a law school classmates of mine.

³⁵ Id., 273 Neb. at 868-69, 734 N.W.2d at 713-14.

³⁶ *Wells v. Tennessee Board of Regents*, ___ S.W.3d ___, 2007 WL 2332962

the statute governing professors contracts did not mention back pay or monetary relief the court would not create one. The court found that it was the prerogative of the legislature to determine to what extent sovereign immunity was to be waived and that it had not been done in this case.³⁷

A final case of interest in this area is from the Mississippi Supreme Court. In this case, former employees who were African American brought an action for a breach of the covenant of good faith and fair dealing, wrongful termination and intentional infliction of emotional distress.³⁸ They had complained of the actions of one supervisor and felt that these actions had created a hostile work environment based upon their race. After their complaints they were laid off or terminated and this suit commenced. The trial court granted summary judgment for the employer on all counts and this appeal was taken.

The Supreme Court found that all of the employees were at-will and their contract could be terminated at any time. The court noted that the only exceptions to the at-will doctrine in Mississippi were if they had been terminated for illegal activities or if they had reported an illegal activity of the employer. They tried to fit under this umbrella, asserting that the activities of the supervisor constituted a disturbance of the peace. The court rejected this argument finding that any report of illegality under the at-will exception had to be related to the business of employer. Since the supervisor's actions were not related to the employer's business and since the act of reporting those actions was not done because it was illegal the court found the narrow exception was not met.

The court did find, contrary to the trial court, that the employees had established a claim for intentional infliction of emotional distress that should be presented to the jury for determination. The issue of racism in the workplace had been examined in previous decisions of the court and by the courts of other states. Consequently, the actions of the supervisor involving a racial slur connected with a reference to lynching "could permit a reasonable juror to conclude that this comment was outrageous and revolting."³⁹ The court remanded the matter to the trial court for resolution of that aspect of the case.

There is nothing striking in the decisions of the courts in any of these cases. The at-will doctrine remains strong, but the well-recognized exceptions to that doctrine continue to provide some relief to employees if proper facts are established, usually based upon egregious circumstances. This nibbling at the outer reaches of the doctrine seems to have remained fairly consistent but does not appear to have grown in intensity. The stream of exceptions to the at-will doctrine continues to flow. It has not dried-up, but it has not increased in size and is doubtful that it ever will.

³⁷ Id., ___ S.W.3d at ___, 2007 WL 2332962 at page 6. The Nebraska Supreme Court in another case involving sovereign immunity found that the state had waived the principle in a case involving sick leave credits for the calculation of retirement benefits for retired state patrol officers. *Livengood v. State Patrol Retirement System*, 273 Neb. 247, 729 N.W.2d 55 (2007). The court found, however, that the retired employees lost these credits through the process of collective bargaining and therefore did not constitutionally impair their contract rights. Id., 273 Neb. at 262, 729 N.W.2d at 67.

³⁸ *Jones v. Fluor Daniel Services Corp.*, 959 So.2d 1044 (2007).

³⁹ Id. at ____.

Class Actions and Arbitration

One of the more interesting frontiers of employment law is the intersection of class actions and arbitration. The typical scenario is that the employer establishes an arbitration clause in its standardized employment agreement to resolve any contractual or statutory claims that the employee may have arising out of the employment relationship. As this phenomenon has grown this usually also includes within its perimeter a limitation by the employer of the jurisdiction of the arbitrator to consider the matter as a class action or to impose punitive damages upon the employer. Some event then occurs, usually termination of the employee, and a lawsuit is commenced by the individual. The employer then moves the court to submit the matter to arbitration to resolve the dispute.

A case similar to this scenario was recently decided by the California Supreme Court in a 4-3 decision, although it did not involve a termination, but a claim to statutory benefits under the state labor code.⁴⁰ The case involved Circuit City Stores, Inc., an innovator in the use of arbitration in the employment setting and party to numerous federal and state cases in this area.⁴¹ The Plaintiff was hired by Circuit City in 1995 as a customer service manager, a position that Circuit City considered exempt from overtime pay under the managerial/executive category. In August of 2002 he commenced this action for a class of individuals in his position asserting that they were not exempt and entitled to overtime compensation for hours in excess of eight in a day or forty in a work week under California law.

Circuit City filed a motion to compel arbitration of the matter pursuant to its employment contract. The trial court granted the motion, but the Plaintiff filed a writ of mandate to determine whether he was bound by the arbitration provisions. After some preliminary shuffling between the Court of Appeal and the Supreme Court, the Supreme Court granted review of the petition. In extended opinions both the majority and dissent set forth numerous points and authorities for their respective opinions. A thorough discussion of these views is impossible in the limitations of this paper. But the summary of the majority of its decision does provide some insight into the issues involved. The majority summarizes its decision as follows:⁴²

We conclude that at least in some cases, the prohibition of classwide relief would undermine the vindication of the employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws. Accordingly, such class arbitration waivers should not be enforced if a trial court determines, based on the factors discussed below, that class arbitration would be a significantly more effective way of vindicating the rights of affected employees

⁴⁰ Gentry v. Superior Court, ___ Cal.4th ___, ___ Cal. Rptr.3d ___, ___ P.3d ___ (2007) 2007 WL 2445122.

⁴¹ See, for example, Circuit City Stores, Inc v. Adams, 532 U.S. 105 (2001); Circuit City v. Adams, 279 F.3d 889 (9th Cir.2002); Morrison v. Circuit City Stores, Inc. 317 F.3d 646 (6th Cir.2003).

⁴² Gentry v. Superior Court, supra ___ Cal.4th ___, ___ Cal. Rptr.3d ___, ___ P.3d ___ (2007) 2007 WL 2445122 at pages 5-6.

than individual arbitration. We therefore reverse the judgment of the Court of Appeal upholding the class arbitration waiver and remand for the above determination.

Another issue posed by this case is whether a provision in an arbitration agreement that an employee can opt out of the agreement within 30 days means that the agreement is not procedurally unconscionable, thereby insulating it from employee claims that the arbitration agreement is substantially unconscionable or unlawfully exculpatory. As explained below, a finding of procedural unconscionable is not required to invalidate a class arbitration waiver if that waiver implicates unwaivable statutory rights. But such a finding is a prerequisite to determining that the arbitration agreement as a whole is unconscionable. Plaintiff in this case argues that other terms of the arbitration agreement were substantially unconscionable and that the entire agreement should not be enforced. Contrary to the Court of Appeal, we conclude the present agreement has an element of procedural unconscionability notwithstanding the opt-out provision, and therefore remand for a determination of whether provisions of the arbitration agreement were substantially unconscionable.

I find the most fascinating aspect of this case is the interrelationship of these state law principles with the Federal Arbitration Act.⁴³ The issue arises because Section 2 of the FAA provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁴⁴ Both the majority and dissent discuss this interrelationship. The majority finds that a restriction on the limitation of class actions in arbitration is an arbitration-neutral rule that covers both contracts with arbitration clauses and those without such clauses and so is not preempted by the FAA.⁴⁵ The dissent finds that both the FAA and the applicable state statute dictate that the matter be submitted to arbitration with the restrictions on class actions intact.⁴⁶ As this case evolves, I think that this aspect may be the most telling.

This case may present the “perfect storm” of what state courts can do with contractual limitations of what issues and procedures are to be submitted to arbitration. Since the United States Supreme Court has found that the FAA controls procedural as well as substantive issues submitted to arbitration there is a real question in my mind if the California court should have turned this whole matter over to the arbitrator in the first instance to make the determination.⁴⁷ The United States Supreme Court in *Green Tree Financial Corp. v. Bazzel* decided that a state court was in error when the state court decided in the first instance that an arbitration clause that did not specifically prohibit

⁴³ 9 U.S.C. § 1 et seq.

⁴⁴ 9 U.S.C. § 2.

⁴⁵ *Gentry v. Superior Court*, supra ___ Cal.4th ___, ___ Cal. Rptr.3d ___, ___ P.3d ___ (2007) 2007 WL 2445122 at page 14.

⁴⁶ *Id.*, ___ Cal.4th ___, ___ Cal. Rptr.3d ___, ___ P.3d ___ (2007) 2007 WL 2445122 at pages 18-19.

⁴⁷ *Southland Corporation v. Keating*, 465 U.S. 1 (1984); *Allied-Bruce Terminix Cos. V. Dobson*, 513 U.S. 265 (1995); *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

class actions permitted the state court to resolve the matter.⁴⁸ Two terms ago the Court decided that a state could not declare that a cash checking contract that contained an arbitration clause was unenforceable because the contract in its entirety violated state public policy and contract law.⁴⁹ In that case the Court found that a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause within it, must go to the arbitrator and not the court. Only Justice Thomas dissented from the opinion, although Justice Alito took no part in the consideration or decision of the matter. So it appears to me that there is a real question for determination exactly what the scope of the state courts may be in determining these issues of contractual restraints on the breath of the arbitration clause and underlying agreement. I think that a better approach may be to permit the arbitration to proceed before the arbitrator and then move to vacate any award under Section 10 of the FAA if some “manifest disregard of the law” has occurred.⁵⁰

I agree that an arbitration clause that prohibits any rights to an employee under the wage hour and overtime provisions is probably not enforceable due to an outright prohibition of the substantive issue. On the other hand, a state court decision that required all arbitration clauses to contain a right to a jury trial and full discovery would equally be preempted by the FAA. The current case falls somewhere along this continuum of a valid check by the state court on the employer’s attempt to limit liability for overtime compensation and a prohibited interference by the state court in the application of the FAA as interpreted by the United States Supreme Court. For this final determination we must await the decision of the Court, but based upon *Buckeye* it would seem that *Circuit City* and the dissent in *Gentry* may have the better of the argument.

A second state supreme court case involving class actions in the employment relationship was decided by the Ohio Supreme Court.⁵¹ In that case the plaintiffs took an appeal from a lower court’s denial of their motion to certify the matter as a class action. The plaintiffs sought to represent a class of assistant public defenders and support personnel in a dispute over eligibility for the public employees’ retirement system. The lower court had denied the motion for class action status based upon a failure to show the need for such an action since any determination in favor of the plaintiffs would automatically inure to the benefit of those similarly situated.

The case does not present any new or a startling revelation in the area of class actions by employees. What it does do, however, is to set forth a good summary of the principles of class actions and what plaintiffs must present to certify a class under the state rules for class actions that are similar to the federal rules of civil procedure.

⁴⁸ 539 U.S. 444 (2003).

⁴⁹ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. ___, 126 S. Ct. 1204 (2006).

⁵⁰ 9 U.S.C. §10. The manifest disregard of the law standard is not contained in the text of the FAA and has not been directly ruled upon by the U.S. Supreme Court. Some Circuit Courts of Appeals have adopted this standard wherein it was found that the arbitration decision established this violation. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998).

⁵¹ *State ex rel. Davis v. Public Employees Retirement Board*, 111 Ohio St.3d 118, 855 N.E.2d 444 (2006).

In a final case for review in the area of class actions the Tennessee Supreme Court was faced with the issue of whether a prior class action matter had tolled the statute of limitations for a new purport class of replacement workers who had been terminated when a union and employer had resolved a labor dispute and returned striking union members to work.⁵² In July of 1994 the union employees went on strike against their employer. The company hired replacement workers that were promised permanent employment. The strike ended in March of 1995 and the company started to hire back the strikers and lay off the replacement workers, all of who were laid off by September of 2005. In October of 1995, three replacement workers brought a class action against the company for breach of contract and retaliatory discharge and against the union for “procurement of breach of an employment contract.” The matter was removed to federal court which remanded it back to the state court six month later in April of 1996.

Over six years later, in May of 2002, the three plaintiffs settled their individual claims with the defendants without ever having sought to have the class certified. The instant action was filed four months later in August of 2002. The defendants sought dismissal of the action based upon the six year statute of limitations for breach of contract and the three year statute of limitations for interference with contracts. The trial court granted the motion to dismiss, but the court of appeals reversed based upon the concept of tolling the statute of limitations when a class action complaint is pending. The Supreme Court reversed and dismissed the complaint.

For those of you who enjoy a discussion of the difference between the concepts of cross-jurisdictional tolling and intra-jurisdictional tolling I recommend the case to you. For those of you who desire a listing of state rules allowing equitable tolling during the pendency of class action in the different state courts this case is for you. Suffice to say for my purposes here, the court found that since no class was ever certified prior to the dismissal of the matter in 2002 the pending action did not toll the current plaintiffs claims for any period after the time the original plaintiffs should have sought certification of the class. In this case was it was sixty days after the filing of the complaint pursuant to a local court rule.⁵³

⁵² Tigg v. Pirelli Tire Corp., ___ S.W.3d ___, 2007 WL 2330840 (Tenn. 2007).

⁵³ This does leave me wondering whether the prior plaintiffs had any duty to the present plaintiffs to have sought originally a certification of the class in the first case back in 1996. Since they didn't seek class certification are they liable to individuals who were included within the ambit of the requested class, but are now barred by the statute of limitations? Another case that may be of interest for those of you heavily into class actions was decided by an Indiana appellate court. It found that while an employer could seek summary judgment on a wage dispute prior to any certification of the class such a judgment would not preclude possible members of the class who might otherwise have been bound by a favorable decision for employer if the class had been certified first. Reel v. Clarian Health Partners, Inc., 885 N.E.2d 343 (Ind.App. 2006).

Whistleblowers' Decisions

There were numerous decisions since January of 2006 involving the various state whistleblowers' statutes. The Michigan Supreme Court in *Brown v. Mayor of Detroit* addressed the issue of whether that state's Whistleblowers' Protection Act (WPA) provided protection to two police officers who reported to their superiors what they thought were violations of the law by the Mayor of Detroit and fellow police officers.⁵⁴ The issue presented to the court was whether the WPA covered only an employee of a public employer who had reported violations or suspected violations to an outside agency or higher authority. The court in a unanimous decision found that the plain language of the WPA did not require this before protection was afforded the employee and remanded the case for trial on the merits of the case.

One of the two officers had been a detective in the Executive Protection Unit of the police department which provided personal protection to the mayor and the executive staff. He had reported what he thought was illegal conduct and misconduct by fellow officers, the mayor and his wife to the Professional Accountability Bureau. The other individual was the deputy chief of that bureau. Both individuals shortly thereafter left the police force although it was disputed whether one of them quit or was fired. They then filed an action asserting the violation of the WPA.

The court reviewed the language of the statute and found it unambiguous. The court noted that there was not any requirement that the act of reporting had to be to an outside agency or higher authority. The court also found that the report by the employee does not have to be acting outside the regular scope of his employment, but that it may as a part of his assigned or regular duties. The court remanded the matter for trial on the merits of the case.⁵⁵

The Supreme Court of Maine issued three recent decisions involving that state's WPA.⁵⁶ In the first case the employee alleged that his employer discriminated against him due a perceived disability and a letter he sent protesting the medical assessment made by his employer that he should not carry a weapon in his job as a security guard. The court found that the notice the employee received from employer that its psychological testing established that he did not meet the company's criteria to carry a weapon was a discrete act triggering the statute's six month statute of limitations. Since Plaintiff's action was not filed within that six month period it was time barred. The court also found that Plaintiff had failed to establish a prima facie case under the WPA because the action of his supervisor that he "would give him hell" for hiring an attorney did not constitute a threat against the Plaintiff's "compensation, terms, conditions, location or privileges of employment" as required by the statute.⁵⁷ While the Plaintiff may have felt

⁵⁴ 478 Mich. 589, 734 N.W.2d 514 (2007).

⁵⁵ On remand a three-week trial was conducted which resulted in a jury verdict for the two individuals for a combined sum that exceeded \$6 million. At the time of the preparation of this paper the City of Detroit and its mayor were contemplating an appeal of the jury verdict.

⁵⁶ *LePage v. Bath Iron Works Corp.*, 909 A.2d 629 (2006); *Currie v. Industrial Security, Inc.*, 915 A.2d 400 (2007); and *Batchelder v. Realty Resources Hospitality*, 914 A.2d 1116 (2007).

⁵⁷ 909 A.2d at 636.

that this was a threat concerning his job it did not amount to a treat based upon an object standard. The court affirmed the summary judgment dismissal of the claims.

The employee fared better in the second case considered by the Maine Supreme Court. In *Currie* the court decided that an employee did establish a prima facie case under the WPA that precluded a grant of summary judgment. In this case, also involving a security guard, the Plaintiff alleged he was fired for filing a report to the Border Patrol about unauthorized workers, internal reports he made regarding unsafe driving at the mill where he was working and the disposal of paint thinner. After a careful review of the facts alleged in the three instances the court concluded that a prima facie case was established that entitled the Plaintiff to a trial on the merits of the case. The court also concluded that Plaintiff had established sufficient facts that a third party may have engaged in such activities, if believed by the jury, could constitute tortious interference with a prospective economic advantage. The court vacated the judgment for the employer and remanded the matter to the trial court for a trial on the issues.

In the third case the Plaintiff had obtained a jury verdict for \$50,000 on her claim of violation of the WPA, but the jury had declined to award punitive damages. The Plaintiff had been terminated from her job as a waitress at Denny's after making several complaints to management about various company practices. The employer consisted of eighteen enterprises that had interrelations over various aspects of the enterprise. The jury had been instructed on Maine's test for integrated enterprises. The court reviewed the instruction based upon obvious error and found none.⁵⁸ It then decided that the trial court had properly instructed the jury that to award punitive damages the jury must find clear and convincing evidence of such actions, not the preponderance of evidence standard. The court affirmed that the more strenuous standard has long been settled law in Maine. It declined to adopt the federal standards, finding that the plain language of the statute and the absence of any legislative history indicating that the Maine common law standard in such cases should not be followed.⁵⁹

The New Hampshire Supreme Court decided two cases during this time frame involving employees' complaints that resulted in their discharge. The first case did not involve the New Hampshire WPA, but the First Amendment.⁶⁰ In this case the employee, who had been the city assessor, claimed he was fired when a newspaper article was published in which he had criticized the city tax system. The jury had awarded him \$151,000 in past wages and benefits, \$50,000 for mental and emotional distress, \$151,200 in enhanced compensatory damages, and \$3,780 in punitive damages. The jury did not award him anything for future lost wages and benefits.

The Supreme Court extensively discussed the First Amendment rights of public officials and found that the employee was not speaking pursuant to his official duties when he spoke with the reporter, he spoke on a matter of public concern, and his right of

⁵⁸ The court noted that the defendants had not preserved other objections they had to the instruction in the trial court so did not consider these arguments on appeal. 914 A.2d at 1121.

⁵⁹ 914 A.2d at 1123-24.

⁶⁰ *Snelling v. City of Claremont*, ___ N.H. ___, ___ A.2d ___, 2007 WL 2050654.

speech outweighed any disruption in the city's work environment. It found that the defendants' objections to the trial were not sufficient to cause a new trial, but it did find that defendants' attorney's comments to the jury during closing argument were unnecessary and were designed to appeal to the bias or prejudice of the jury. Accordingly, the court vacated the jury's failure to award plaintiff any future wages and benefits and remanded the case to the trial court on this issue.

In the second case, the New Hampshire Supreme Court was faced with claim under its WPA and whether it provided statutory authority to award attorney's fees and expenses for a successful action.⁶¹ The plaintiff had been the general manager of an association that ran the county fair and supported other seasonal businesses. He had become concerned when the association had failed to comply with the requirement that it adopt conflict of interest policies. In November of 2004, he sent an email to the state office of charitable trusts expressing concern over this noncompliance. Two days later he was advised that his position had been eliminated. He filed a claim with the state department of labor (DOL) under the WPA asking for reinstatement, back pay and attorney's fees and expenses. The hearing officer conducted a hearing and granted the remedy requested, except he denied the award of attorney's fees and expenses which he concluded was not authorized by the statute. The plaintiff complied with the appropriate notices for rehearing and appealed.

The court found that the employer's cross-appeal was not properly before the court since it had not followed the requirement of first requesting a re-hearing of the matter. The court decided that the WPA, while silent on attorney's fees and expenses, does provide for appropriate injunctive relief. The court found that this reference was sufficient to enable the DOL to grant the relief. Two justices dissented from this finding that attorney's fees are not indispensable to the DOL's injunctive power.

Several other states also decided case involving their respective state's whistleblower's statutes. The Minnesota Supreme Court found that its WPA did not preclude common law wrongful discharge claims and that an employee terminated for exercising member voting rights in an association for which he was also employed did not state a claim on which relief could be granted.⁶² The Missouri Supreme Court held that a former city employee did state a cause of action for wrongful discharge and retaliation as a contract action that was not barred by the doctrine of sovereign immunity.⁶³ The court found that he did not have to exhaust the administrative procedures of the city since they were only advisory in nature. Any tort claims of the plaintiff would be barred by sovereign immunity, however, unless the city maintained liability insurance that covered the claim. The Supreme Court of New Jersey held that its WPA provided protection for a former public defender and that he could bring an action against the city under Section 1983 based upon the mayor's termination of his employment.⁶⁴ The South Dakota Supreme Court found that an executive vice president

⁶¹ *In re Hardy*, 154 N.H. 805, 917 A.2d 1237 (2007).

⁶² *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452 (Minn. 2006).

⁶³ *Kunzie v. City of Olivette*, 184 S.W.3d 570 (Mo.banc 2006).

⁶⁴ *Stomel v. City of Camden*, 192 N.J. 137, 927 A.2d 129 (2007).

who complained to the chair of the board about suspected activities of the chief executive officer did not rise to level of constructive discharge when the individual quit his employment after he perceived nothing was being done about the matter and that he had not given the employer a reasonable opportunity to investigate the charges before he quit.⁶⁵ The court also found that there was no evidence establishing a prima facie case of intentional infliction of emotional distress.

In an interesting case arising out of the District of Columbia the Court of Appeals held that the jury's finding that a former general counsel of the taxicab commission would have been discharged notwithstanding any protected disclosures precluded declaratory and injunctive relief.⁶⁶ The trial court had provided special interrogatories to the jury that found that (1) the former employee made disclosures protected by the D.C. WPA, (2) a supervisor took or threaten to take prohibited personnel actions against the former employee, (3) the protected disclosure was a contributing factor to his removal from the position of General Counsel, and (4) the former employee would have been removed for legitimate, independent reasons even if the former employee had not made the protected disclosure.⁶⁷ The former employee argued that since the jury had found that prohibited actions had been taken against him he was entitled to injunctive relief as well as attorney's fees. The court noted that the D.C. statute did not contain the language provided in the federal statutes that might have provided for equitable relief even though he was not entitled to compensatory relief because of the jury's findings of independent grounds for his dismissal.

Wage and Hour, Prevailing Wage and Other Compensation Issues

As with the topic of class actions and arbitration, the California Supreme Court has provided us recently with a closely divided decision in this area of the law. Three weeks after the court decided the *Gentry*⁶⁸ case it decided a case concerning an employer's profit sharing plan for its employees. It was another 4-3 decision, but this time Chief Justice George aligned with the dissenting justices in *Gentry* to form the majority and found that the employer's profit sharing plan did not violate certain provisions of the state's labor code.⁶⁹

At issue was a the grocery chain's profit-based incentive compensation plan (ICP) that provided additional compensation to individual store employees based upon profits of the store. The company in figuring the profits deducted certain costs that included such items as workers' compensation charges, storewide cash and merchandise losses, as well as some other items that are precluded to be deducted from individual's compensation. Each employee received the normal salary or wage for the respective position and the ICP was an additional amount that was added to the compensation

⁶⁵ Anderson v. First Century Federal Credit Union, ___ N.W.2d ___, 2007 WL 1953166.

⁶⁶ Crawford v. District of Columbia, 891 A.2d 216 (D.C. 2006)

⁶⁷ 891 A.2d at 217-18.

⁶⁸ Supra, note 40.

⁶⁹ Prachasaisoradej v. Ralphp Grocery Co., Inc., 42 Cal.4th 217, 165 P.3d 133, 64 Cal.Rptr.3d 407 (2007)

package if the individual store was profitable. While there were issues of preemption under the National Labor Relations Act in the courts below, the petition for review to the Supreme Court limited the issue to be:

Does an employee bonus plan based upon a profit figure that is reduced by a store's expenses, including the cost of workers' compensation insurance and cash and inventory losses violate [certain state statutes and regulations]?⁷⁰

The majority held that the ICP did not violate those provisions.

While both the majority and the dissent discussed extensively the positive and negative aspects of the ICP, previous decisions of the court and whether the particular statutes and regulations should be interpreted literally or in the context of the facts in the case, I think that it is fair to describe the majority's decision as stating that nothing was ever taken away from the employees; rather these disputed deductions were never in the amount provided for the bonus pool. The dissent, on the other hand, would have found that the case only involved a statutory interpretation and judicial concerns over the reasonableness and desirability of such plans were irrelevant. A simplistic way of looking at the two sides is that the majority feels that the employer may fill the profit-sharing glass from the bottom up as far as it desires, while the dissent feels that the employer had filled-up the glass to the top and then poured out from the glass certain costs that are prohibited by statute for the employer to consider.

The same court earlier in the year came to a unanimous decision that a store manager who the employer felt was exempt from overtime pay in fact was entitled to that pay for a one hour period each day. The employee waited until he resigned his position and filed a charge with the Labor Commissioner pursuant to the applicable statute. The Labor Commissioner ruled in favor of the employee and awarded overtime pay, interest, and waiting time penalties. The employer appealed the matter to the appropriate superior court which conducts the review de novo. The former employee then sought to add additional claims for meals, rest periods and itemized pay statement violations. The trial court considered these additional claims even though they had not been presented to the Labor Commissioner. It also applied a three year statute of limitations instead of the one year statute applicable for penalties. The Court of Appeals reversed a part of this award finding that the one year period applied for payments for the meal and rest periods and held that the new claims could not be raised for the first time on appeal.

The Supreme Court reversed finding that additional claims were for wages under the statute and had a three year statute of limitations. It did an extensive review of the statutory language, the legislative and administrative history, and a functional analysis that all indicated this conclusion. The court also held that since the trial in the superior court was de novo the former employee could include additional related wage claims in the trial court. This was discretionary with the trial court which discretion was properly exercised in this case.

⁷⁰ Id., 42 Cal.4th ____, 165 P.3d ____, 64 Cal.Rptr.3d ____.

The Kansas Supreme Court decided that an undocumented worker was entitled to the hourly wage agreed to in his contract of employment even though he was not lawfully in the country and that the Kansas wage payment statute was not preempted by the federal Immigration Reform and Control Act.⁷¹ The court additionally found that the former employee was entitled to the statutory penalty set forth in the statute because the employer did not timely, and willfully failed to pay the individual his earned wages. The court reversed the lower court's decision that because the individual was an undocumented worker he was not entitled to enforce his contract of employment, but was entitled only to minimum wages for the time that he had worked for the employer.

In a series of cases the supreme courts of Washington, Nevada, and Ohio discussed their respective prevailing wage statutes for work performed on public projects.⁷² These cases do not appear to involve major changes in these respective states' prevailing wage laws, or in the general area of prevailing wages that are to be paid on public projects. Rather, they appear to resolve the particular issues presented that the courts had not had to address in prior cases on these statutes.

During the applicable time of this review there were several cases from various state supreme courts resolving a myriad of issues concerning minimum wages, overtime pay and various wage payment statutes. The Supreme Court of Washington in *Cerrillo v. Esparza* found that truck drivers for a trucking company who hauled crops from various farms to packers and shippers were exempt from the state overtime statute since they were agricultural workers.⁷³ The court found that the state's administrative interpretation of the provision was not binding since the statute was free from ambiguity. In *Morin v. Harrell* the same court held that a constitutional challenge to an amendment of the types of employees entitled to protection of the overtime provisions of the minimum wage law was not properly raised since the statute subsequently had been amended to cure any claimed defect in its adoption.⁷⁴ In *City of Louisville v. Fire Service Managers Association* the Supreme Court of Kentucky held that district chiefs in the fire department were paid on a salary basis and were supervisors not entitled to overtime pay under the state statute.⁷⁵

⁷¹ *Coma Corp. v. Kansas Dep't of Labor*, 283 Kan. 625, 154 P.3d 1080 (2007).

⁷² *Silverstreak, Inc. v. Washington State Department of Labor and Industries*, 159 Wash.2d 868, 154 P.3d 891 (2007)(end-dump truck drivers were entitled to prevailing wages for work done on a public project); *Carson-Tahoe Hospital v. Building & Construction Trades Council*, ___ Nev. ___, 128 P.3d 1065 (2006)(private hospital construction project funded through public economic development revenue bonds did not require payment of prevailing wages); *Municipal Construction Equipment Operators' Labor Council v. City of Cleveland*, 114 Ohio3d 183, 870 N.E.2d 1174 (2007)(certain deductions and defenses of City were not available and union and employees were not entitled to prejudgment interest, but were entitled to post-judgment interest on award of prevailing wages). See also *Allied Mechanical and Electrical, Inc., v. Prevailing Wage Appeals Board*, 923 A.2d 1220 (Pa. Cmwlth. 2007) and *Worth & Company, Inc. v. Prevailing Wage Appeals Board*, 928 A.2d 1142 (Pa. Cmwlth 2007) on Pennsylvania's prevailing wage laws and its procedures.

⁷³ ___ Wash.2d ___, 142 P.3d 155 (2006).

⁷⁴ ___ Wash.2d ___, 164 P.3d 495 (2007).

⁷⁵ 212 S.W.3d 89 (Ky.2007).

The Alaska Supreme Court in *Public Employees' Retirement System v. Gallant* found that the retirement system's payment of a cost-of-living adjustment for retired public employees who lived in Alaska, but not to those who left the state after retirement and moved to other places, did not violate the equal protection clause of the Alaska Constitution.⁷⁶ The Montana Supreme Court in *Sands v. Town of West Yellowstone* decided that emergency medical technicians should be given the opportunity to prove that they should be paid for their on-call hours when they were not actually working.⁷⁷ The trial court's grant of summary judgment to the employer was reversed and the matter was remanded for trial. In *Naugle v. Beech Grove City Schools* the Supreme Court of Indiana held that, while the statute did apply to public school districts, a wage payment statute requiring payment of wages within ten days meant business days, not calendar days, so that a change in the day of the week of when employees of a school district received their pay checks did not violate the statute.⁷⁸

In *ACAS Acquisitions (Precitech), Inc., v. Hobert*, the New Hampshire Supreme Court examined covenants not to compete and non-disclosure, found them valid and held that the employee subject to them had violated their provisions when he took a job with a competitor.⁷⁹ As a result, his former employer was found to have properly terminated contractual severance benefits, those benefits were not considered to be wages that had to be timely paid pursuant to the wage statute and their suspension did not violate the consumer protection statute. Finally, the court found that the former employee was liable to his former employer for its attorney's fees in the matter.

The last case discussed in this section raised issues of liquidated damages clauses in a medical doctor's agreement with his former employer as well as his claims for back wages and penalties.⁸⁰ The trial court had found that the doctor had breached the contract with his employer and was responsible for the payment of \$25,000 in liquidated damages pursuant to the contract. But it found as well that the employer had not paid wages to the doctor in the sum of over \$18,000 that was owed at the time of termination. Accordingly, the trial court ordered that sum to be paid together with the statutory penalty sum of a like amount together with attorney's fees. The Supreme Court found that the sums due were wages, but that the employer could offset the liquidated damages of \$25,000 since the doctor first breach the agreement by quitting. As a result, the employer had a right to withhold the final wage payment and was not required to pay the statutory penalty or the doctor's attorney's fees.

Issues on the Horizon

For those of you who have persisted and persevered this far I offer you a couple of items for contemplation if you find yourself bored at times with your practice. At the

⁷⁶ 153 P.3d 346 (Alaska 2007)(the named plaintiff had moved to Hawaii after he retired).

⁷⁷ 337 Mont. 209, 158 P.3d 432 (2007).

⁷⁸ 864 N.E.2d 1058 (Ind. 2007)

⁷⁹ ___ N.H. ___, 923 A.2d 1076 (2007).

⁸⁰ *Delaware Bay Surgical Services v. Swier*, 900 A.2d 646 (Del. 2006).

2006 mid-winter meeting of the Employment Rights and Responsibilities Committee of the Section an informative and valuable presentation was made concerning a new area of the law entitled SLAPP actions.⁸¹ The acronym stands for Strategic Lawsuits Against Public Participation. During this year the California Supreme Court faced a case involving SLAPP, anti-SLAPP and SLAPPback concepts.⁸² In the unanimous decision the court decided that the SLAPPback statute that had recently been enacted would apply to pending cases and that the provision that prohibited a motion to strike under the anti-Slapp statute if the prior action was illegal as a matter of law was a narrow exception. It held that the employer's underlying suit was not illegal as a matter of law, but the employee had demonstrated probability of prevailing in her malicious prosecution action so as to result in the reversal and remand of the court of appeals decision.

I also mention to those of you who are not aware of it that The American Law Institute commenced in 2000 a project for the purpose of clarifying and simplifying the area of employment law. The project is entitled Restatement Third, Employment Law.⁸³ A recent Secretary of the Section, Professor Samuel Estreicher, is the Chief Reporter of the project that is expected to take several more years to complete. Numerous members of this Section serve as advisors, liaisons, ex officio or members of consultative groups on the project. There have been several preliminary, council, discussion and interim drafts prepared, but no part of the work has been approved by the Council or by the membership as of this date.

Finally, I direct your attention to proposed legislation in at least thirteen states that would make it illegal for a boss to bully an employee in the course of the employment.⁸⁴ The statutes are meant to expand existing harassment laws in such areas as race, sex and age discrimination. It is reported that in a recent survey of 1000 adults 44% said that they had worked for abusive bosses, 59% have witnessed or experienced bosses criticizing workers in front of co-workers and 50% have been personally insulted by such bosses or witnessed such insults in the work place.⁸⁵ There has even been a website established to gather information on the issue and serve as a sounding board.⁸⁶ So when you have a moment to spare give it a look. You may even find something that you can bill to a client or develop a new cause of action in the appropriate case.

⁸¹ McKanders, State Slapp Statutes: Shield and Sword for Employment Related Tort Claims, Volume 2, Program Materials of the 2006 Employment Rights & Responsibilities Committee Midwinter Meeting, Tab 29.

⁸² Soukup v. Law Offices of Herbert Hafif, 39 Cal.4th 260, 139 P.3d 30, 46 Cal.Rptr.3d 638 (2006).

⁸³ Further information can be obtained from the website of the ALI. www.ali.org. While the project is entitled the Restatement Third, there have not been a first or second restatement of employment as far as I know.

⁸⁴ The states are California, Connecticut, Hawaii, Kansas, Massachusetts, Missouri, Montana, New Jersey, New York, Oklahoma, Oregon, Vermont and Washington. See www.law.com and www.bullybusters.org for more details on the bills that have been introduced.

⁸⁵ Id.

⁸⁶ www.bullybusters.org.