opined that her failure to prepare the affirmative action plans did not harm the university because no fines or sanctions would be imposed on it under the circumstances. The court rejected the expert's testimony, noting that it was prepared more than four years after Serri's termination and that university officials certainly believed at the time they decided to terminate her that the lack of a plan exposed it to a potential audit from the federal government, which is what Serri herself had told her supervisors. In sum, the court concluded that Serri did not meet her evidentiary burden of proving that the university's stated reasons for her termination were false or pretextual. *Serri v. Santa Clara University* (California Court of Appeal, 6th Appellate District, 5/28/14).

Bottom line

Certain employees—such as Serri in this case—attempt to deter employers from taking action in response to poor performance by filing preemptive complaints, which raise the stakes by setting up potential claims of retaliation. In anticipation of a potential lawsuit, it is critical that employers in these situations develop clear, incontrovertible evidence of legitimate business reasons for taking an adverse employment action.

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LITIGATION

Employee who recovered nothing deemed 'prevailing party'

by Jeff Sloan and Eugene Park
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In California, the prevailing party in a lawsuit can recover costs of litigation, including various filing and witness fees and, in some circumstances, attorneys' fees. Like a baseball game, determining the winner in something as polarizing as a lawsuit is usually straightforward. But when the parties settle a case without clarifying the issue of costs, the situation is more akin to a close boxing match, with both camps claiming victory before the decision is announced. Through a recent decision by the California Court of Appeal, one employer learned the hard way the cost of not specifying in a settlement who pays litigation costs.

Apparent victory for employer

Maureen deSaulles, a part-time patient business services registrar, complained about her assignment to the emergency room because of the increased risk of infection to her immune system, which was compromised by cancer. Her employer, Community Hospital of the Monterey Peninsula, placed her on a leave of absence and eventually fired her. DeSaulles sued for, among other claims, failure to accommodate her medical condition and retaliation.

The employer achieved what it considered a substantial victory on all seven of deSaulles' claims. The court threw out one of her claims without a trial and ruled she wouldn't be able to present any evidence on four other claims, which effectively left only two claims for trial. The employer paid $23,500 in exchange for deSaulles' dismissal of the two remaining claims and agreed to draft a judgment for the court's signature that referenced the settlement and provided that deSaulles wouldn't recover anything. With regard to the claims not dismissed by settlement, however, the draft judgment provided that the parties wouldn't seek any litigation costs or attorneys' fees until deSaulles had the opportunity to appeal those claims.

The court signed the judgment, and deSaulles appealed her nonsettled claims, arguing they were inappropriately dismissed before trial. After the court of appeal rejected her appeal, the employer sought and received costs of litigation as the "prevailing party." DeSaulles appealed again solely on the issue of litigation costs, arguing that *she* was actually the prevailing party and therefore should have received those costs.

Why employer wasn't 'prevailing party'

In general, California law allows the prevailing party to obtain costs of litigation. Costs of litigation may include filing fees, cost of transcripts, witness fees, deposition costs, and in some circumstances attorneys' fees that are allowed by contract or by statute. The court must grant costs to any party that fits into one of the definitions of "prevailing party," including defendants who obtain dismissals in their favor, defendants in cases in which the plaintiff doesn't obtain relief, or any party with the "net monetary recovery" at the end of the case. If none of those definitions applies, the court has discretion over to whom it grants costs.

In deSaulles' case, it appeared that both parties could qualify as prevailing parties. On one hand, the employer appeared to prevail because the trial court ruled that deSaulles would "recover nothing." On the other, deSaulles had obtained $23,500 in settlement and therefore appeared to be the party with the "net monetary recovery." Both of those scenarios would have required the trial court to grant costs, but the trial court had ruled that none of the mandatory definitions of "prevailing party" applied. Instead, the trial court had opted to grant costs to the employer under its discretionary powers.

The court of appeal ruled that the settlement money to deSaulles constituted her "net monetary recovery" and therefore the trial court should have automatically

granted her litigation costs. Even though the judgment said that deSaulles would "recover nothing," the court of appeal didn't consider that language conclusive because deSaulles did in fact receive settlement money.

Most important, the court noted that it could have ruled differently *had the settlement agreement specified how litigation costs would be awarded.* But in absence of such language in the settlement, the court was required to automatically designate deSaulles as the prevailing party because of the settlement money. The court also ruled that the judgment didn't specifically state that all of deSaulles' claims were "dismissed," which would have made the employer the prevailing party. *DeSaulles v. Community Hospital of the Monterey Peninsula* (California Court of Appeal, 6th District, 5/2/14).

Bottom line

Settlements are a common and cost-effective means of avoiding the time and expense of litigation. However, settlement agreements—like parachutes and ships—require meticulously checking for holes. This case serves as a warning to employers to specifically mention who will pay litigation costs when settling a case—or else be in for a surprise later. You should also be sure to clarify other big-ticket items, such as attorneys' fees, and obtain a final judicial dismissal of all claims. It isn't always clear who the "prevailing party" is at the conclusion of a case, especially one that involves multiple claims, some of which have been judicially decided and others resolved by settlement.

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WAGE AND HOUR LAW

Suitable seating allegations 'compel' certification of Rite Aid employee class

by Jim Brown
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A perfect storm is brewing between a long-ignored California wage order requirement to provide certain employees with "suitable seating" and California's predilection for allowing wage and hour claims to proceed as class actions. The recent decision by California's 4th Appellate District to permit class certification raises more questions than it answers and highlights the employee-friendly approach taken by many courts. Will your company's policies (or lack of a policy) withstand scrutiny? Will the California Supreme Court provide favorable guidance? Read on to decide.

Rite Aid employees won't take violation sitting down

Kristen Hall worked at Rite Aid as a cashier/clerk. There is no dispute that Rite Aid doesn't provide any type of seating for its cashiers/clerks, who work primarily at the cash register performing checkout duties. Hall claims the company's failure to provide seating at the cash register is a violation of Section 14 of California Wage Order 7-2001, which contains the following language:

> (a) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.
>
> (b) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

Fourteen of California's 17 wage orders contain the same language.

Trial court grants, then denies class certification

Hall filed suit on behalf of herself and other Rite Aid cashiers/clerks, presenting evidence that they all have the same job description, all have similar job duties (including work at the checkout counter), a majority of their time is spent working at the cash register, most of the checkout work can be done while seated (but they were required to stand), and the physical configuration of the checkout counters would allow suitable seating.

Rite Aid opposed the request for class certification based on evidence that the stores were all different in size, amount of sales, number of cashiers/clerks, and the configuration of sales counters. It also presented evidence that when the cashiers/clerks weren't performing checkout counter work, they all did a variety of duties, which differed in content and timing at each store location. In addition, each cashier/clerk spent different amounts of time at the checkout counter.

Hall argued that each of the issues raised by Rite Aid had no relevance to whether the failure to provide suitable seating violated the wage order because the nature of the checkout work itself "reasonably permitted the use of a seat." The trial court sided with Hall and granted class certification.

On the eve of trial, however, Rite Aid, made a request for decertification. It claimed that a violation of the