Employee Retaliation Claims: 
Growing Litigation Threat

Minimizing Litigation Exposure and Defending Lawsuits and EEOC Charges

TUESDAY, AUGUST 21, 2012

1pm Eastern    |    12pm Central   |   11am Mountain    |    10am Pacific

Today’s faculty features:

Anthony J. Oncidi, Partner, Proskauer Rose, Los Angeles
Arlene Switzer Steinfeld, Shareholder, Cox Smith Matthews, Dallas

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Class Of 1.5 Million Female Wal-Mart Employees Was Improperly Certified


By Anthony J. Oncidi*

The United States Supreme Court held that this class of as many as 1.5 million current and former female Wal-Mart employees was improperly certified by the lower court. The three lead plaintiffs claimed they were discriminated against on the basis of their gender and that Wal-Mart's policy of providing deference to local managers' subjective pay and promotion decisions satisfied the commonality test for certifying a class action under Fed. R. Civ. P. 23(a)(2). Plaintiffs sought injunctive and declaratory relief, punitive damages and backpay for the class members. In a 5-to-4 majority opinion, the Court rejected plaintiffs' showing of commonality, including the fact that they submitted only 120 affidavits (one for every 12,500 class members) purportedly evidencing gender discrimination. In the second part of the opinion, the Court unanimously held that plaintiffs' claims for backpay were improperly certified under Fed. R. Civ. P. 23(b)(2) because the monetary relief was not incidental to the injunctive or declaratory relief sought.

Arizona Law Requiring Use Of E-Verify Is Upheld

Chamber of Commerce v. Whiting, 563 U.S. ___, 131 S. Ct. 1968 (2011)

In 1996, Congress created E-Verify, which is “an internet-based system that allows an employer to verify an employee's work-authorization status.” In 2007, Arizona enacted the Legal Arizona Workers Act, which allows Arizona to suspend or revoke the licenses necessary to do business in the state if an employer knowingly or intentionally employs an unauthorized alien. Among other things, the Arizona law also requires that “every employer, after hiring an employee, shall verify the employment eligibility of the employee” by using E-Verify. In this case, the Chamber of Commerce challenged the

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Arizona law on the ground that it is expressly and impliedly preempted by federal immigration law, but the Supreme Court rejected those claims, upholding the statute.

U.S. Court Has Jurisdiction Over Argentinean Employees’ Claims Against Mercedes-Benz Argentina

**Bauman v. Daimler Chrysler Corp., 2011 WL 1879210 (9th Cir. 2011)**

In this case, 22 Argentinian residents (including a Chilean national) sued DaimlerChrysler Aktiengesellschaft (“DCAG”) in federal court in California, alleging that one of DCAG’s subsidiaries, Mercedes-Benz Argentina (“MBA”), collaborated with state security forces to kidnap, detain, torture and kill plaintiffs and their relatives during Argentina’s “Dirty War” in the 1970s. (Some of the plaintiffs are former employees of MBA.) In an opinion by Judge Reinhardt, the Ninth Circuit held that the district court has personal jurisdiction in California over DCAG through the contacts of its subsidiary and agent, Mercedes-Benz USA, in view of the “interest of California in adjudicating important questions of human rights…. See also McCollum v. California Dep’t of Corrections and Rehabilitation, 2011 WL 2138221 (9th Cir. 2011) (court has no jurisdiction over Wiccan chaplain’s claim that he should be eligible for employment in the paid-chaplaincy program).

Employee Was Not Sexually Harassed By His Male Supervisor, But Could Proceed With Retaliation Claim


Patrick Kelley, an apprentice ironworker, complained to his employer, Conco, that he had been subjected to a “barrage of sexually demeaning comments and gestures by his male supervisor” (David Seamen). After Kelley’s union suspended him from its apprenticeship program, he was not rehired by Conco. Kelley sued for sexual harassment and retaliation in violation of the Fair Employment and Housing Act. The trial court granted summary judgment to the employer, but the Court of Appeal reversed the dismissal of Kelley’s claim of retaliation. However, with respect to the claim of sexual harassment, the Court affirmed dismissal: “Unquestionably, the language used by both Seaman and by one of Kelley’s coworkers… was graphic, vulgar, and sexually explicit. The literal statements expressed sexual interest and solicited sexual activity. There was however, ‘no credible evidence that the harasser was homosexual’ or that the harassment was ‘motivated by sexual desire.’” The Court further held that Kelley had failed to establish he was subjected to harassment that was so severe and pervasive as to alter the conditions of his employment or that he suffered severe emotional distress as a result of Seaman’s conduct. With respect to the retaliation claim, the Court held that Kelley’s evidence established a clear inference that he was subjected to retaliation by at least some of his coworkers as a result of his complaints about Seaman.
ADA “Impliedly Amended” The National Bank Act’s Termination-at-Pleasure Clause


Robert Quinn, a former senior vice president of U.S. Bank, alleged he was denied accommodation, harassed and terminated because of a physical disability in violation of the Fair Employment and Housing Act. U.S. Bank obtained summary judgment from the trial court on the ground that Quinn’s FEHA claims were preempted by the dismissal-at-pleasure clause of the National Bank Act, 12 U.S.C. § 24. The Court of Appeal determined that the “seminal California case” on the subject, Peatros v. Bank of America, 22 Cal. 4th 147 (2000), is not “binding precedent” because the lead opinion was a plurality, not a majority opinion. Consequently, the Court held that “to the extent FEHA is not inconsistent with section 24 as impliedly amended by the ADA, it is not preempted” and, therefore, FEHA’s longer statute of limitations applies, but Quinn's claims against his supervisor are preempted because there is no individual supervisor liability under the ADA. See also People ex rel. Harris v. Pac Anchor Transp., Inc., 195 Cal. App. 4th 765 (2011) (California’s Unfair Competition Law is not preempted by the Federal Aviation Administration Authorization Act).

Auto Sales Consultants’ Class Action Was Properly Dismissed


Leena Areso, who worked as a commissioned sales consultant for CarMax, filed this class action lawsuit, asserting that she and the members of the putative class were owed unpaid overtime. Areso argued that CarMax’s uniform payment of approximately $150 per vehicle is piece-rate compensation rather than a commission because it is not based on a percentage of the sale amount. The Court of Appeal affirmed summary judgment in favor of CarMax, concluding that the payment system was a commission within the meaning of Labor Code § 204.1 because “[p]aying salespeople a uniform fee for each vehicle is proportionate – a one to one proportion. The compensation will rise and fall in direct proportion to the number of vehicles sold.” See also Flores v. Lamps Plus, Inc., 195 Cal. App. 4th 389 (2011) (yet another opinion concluding that the “provide” rather than “ensure” standard governs an employer’s obligation with respect to meal and rest breaks); United Parcel Service, Inc. v. Superior Court, 196 Cal. App. 4th 57 (2011) (employees who miss both meal and rest breaks in a single workday may be entitled to up to two premium payments under Labor Code § 226.7).
California Overtime Rules Apply To Out-of-State Residents Who Work In The State


In this case, the California Supreme Court answered three questions certified to it by the United States Court of Appeals for the Ninth Circuit as follows: (1) California’s overtime law applies to work performed in California for a California employer by nonresident workers; (2) the Unfair Competition Law (“UCL”) applies to violations of the overtime law; and (3) the UCL does not apply to claims brought under the federal Fair Labor Standards Act (“FLSA”) for overtime work performed in other states by nonresidents. See also *Probert v. Family Centered Servs. of Alaska, 2011 WL 2473954 (9th Cir. 2011)* (FLSA does not cover homes where “severely emotionally disturbed” children reside).

Unlicensed Junior Accountants May Be Exempt From Overtime

*Campbell v. PricewaterhouseCoopers, 2011 WL 2342740 (9th Cir. 2011)*

Two thousand unlicensed junior accountants brought this wage-and-hour class action against PwC, alleging they were improperly classified as exempt from overtime. The parties filed cross-motions for partial summary judgment, and the district court granted the employees’ motion, holding as a matter of law that they were not exempt under the professional or administrative exemptions. The Ninth Circuit reversed on the ground that a material question of fact existed as to whether the employees’ duties met the requirement of a “learned” or “artistic” profession (and are therefore exempt) even though they are not licensed. The Court also held there were “numerous factual disputes in the record” that precluded summary judgment with respect to the administrative exemption.

Attorney Who “Excessively Reviewed” Privileged Documents Misappropriated By His Client Was Properly Disqualified


While he worked as VeriSign’s chief administrative officer, Grant Clark signed VeriSign’s nondisclosure agreement, which included a provision that he would not remove VeriSign’s confidential or privileged information and that he would return any such documents in his possession upon termination of his employment. Clark was terminated effective December 31, 2008, and in January 2009 he filed a lawsuit against VeriSign through his attorneys, Higgs, Fletcher & Mack LLP. The trial court disqualified the Higgs firm from continuing to represent Clark after Clark conceded in his deposition that he used privileged VeriSign documents as the basis for his securities fraud and breach of contract claims. The Court of Appeal denied Clark’s petition for a writ of mandate after determining that Higgs received and “excessively reviewed” privileged documents from Clark. See also *Moody v. Staar Surgical Co., 195 Cal. App. 4th 1043 (2011)* (employer’s
attorney was properly sanctioned $1,500 for asking a question of a witness at trial after being instructed by the judge not to inquire into a particular area).

$22.5 Million Verdict Reversed Where Employer Admitted Its Vicarious Liability For Employee’s Negligence


Jose Carcamo, a truck driver for defendant Sugar Transport, caused Dawn Renae Diaz to suffer severe permanent injuries as a result of a traffic accident on Highway 101. Diaz sued Carcamo and Sugar Transport, alleging that Sugar Transport was both vicariously liable for Carcamo’s negligent driving and directly liable for its own negligence in hiring and retaining Carcamo. At trial, Sugar Transport offered to admit vicarious liability if Carcamo were found negligent. Sugar Transport contended that such an admission should bar Diaz from further pursuing her claims for negligent entrustment, hiring and retention of Carcamo. Over Sugar Transport’s objection, the trial court admitted evidence of Carcamo’s two prior accidents; that he was in the U.S. illegally; that he had used a phony Social Security number to obtain employment; that he had been fired from or quit without good reason three of his last four driving jobs; that he had lied on his application; and that the only reference from his prior employers consisted of a “very negative evaluation.” The California Supreme Court reversed the judgment (over $22.5 million in damages) after concluding Sugar Transport was prejudiced by admission of evidence concerning Carcamo after it admitted to vicarious liability for his actions.

Manager’s Defamation Action Against Striking Union Could Proceed


During the course of a strike, members of the union placed copies of a flyer on the doors and cars of the neighbors of the employer’s vice president and general manager Jim Price that said: “Neighbors, beware of this man: Jim Price”; “protect your family, safeguard your property”; and “complain to [his apartment complex] about the sort of person they’ve let in your community.” The flyer listed Price’s business cell phone number and his apartment number and encouraged Price’s neighbors to complain to him directly. Another flyer stated: “Resident Jim Price tried to take away workers’ pension benefits”; “threatened workers with arrest for publicizing their fight for workplace justice”; and “threatened to use armed guards against the workers to shut down their strike.” In response to Price’s lawsuit against the union for defamation and violation of Civil Code §§ 51.7 and 52.1, the union moved to strike the complaint under the anti-SLAPP statute (Cal. Code Civ. Proc. § 425.16). The trial court denied the motion on the ground that the union’s disparaging statements about Price involved an issue of private as opposed to public interest. The Court of Appeal affirmed the judgment. See also Fox v. Vice, 563 U.S. ___, 131 S. Ct. 2205 (2011) (when a lawsuit involves both frivolous and non-
frivolous claims, a court may grant reasonable fees to the defendant, but only for fees the defendant incurred as a result of the frivolous claims).

**Termination Of Employee On FMLA Leave Who Submitted Inadequate Medical Information Did Not Violate Federal Law**

*Lewis v. United States*, 641 F.3d 1174 (9th Cir. 2011)

Janet Lewis worked for the United States Air Force as the director of a child development center on the Elmendorf Air Force Base. In 2006, Lewis requested 120 days of leave without pay pursuant to the Family Medical Leave Act (“FMLA”). The employer requested a medical certification to support Lewis’s request for FMLA leave. In response, Lewis submitted three documents: (1) a prescription from her psychiatrist; (2) a letter from her psychiatrist; and (3) a WH-380 (medical leave form). Although Lewis’s supervisor told her the documents she had submitted were insufficient to support her request for FMLA leave, Lewis refused to submit more information. The employer converted Lewis’s status to absent without leave (“AWOL”) and subsequently terminated her employment. Lewis sued for unlawful removal from employment pursuant to 5 U.S.C. § 7702. The district court granted summary judgment to the employer, and the Ninth Circuit affirmed, holding that because Lewis’s WH-380 form stated only that she was diagnosed with “Post-Traumatic Stress Disorder and needed therapy, medical treatment, bed rest, two prescription medications, and 120 days off work,” she had failed to provide a “summary of the medical facts that support the diagnosis.” The Court noted that “the form contains no explanation as to why Lewis was unable to perform her work duties and no discussion about whether additional treatments would be required for her condition. When Lewis refused to submit any further documentation, her medical certification remained deficient.” *See also Davis v. Superior Court*, 196 Cal. App. 4th 669 (2011) (granting petition for writ of mandate directing trial court to enter its final judgment so that employee could file a notice of appeal).

**False Claims Act Lawsuit Was Barred By Public Disclosure Of Records**


Daniel Kirk, a former employee of Schindler Elevator Corporation, filed this lawsuit under the False Claims Act (“FCA”), alleging Schindler had submitted false or fraudulent claims for payment to the United States. Kirk alleged the company had falsely certified its compliance with the Vietnam Era Veterans’ Readjustment Assistance Act of 1972. To support his allegations, Kirk relied upon information that his wife had received from the Department of Labor (“DOL”) in response to three Freedom of Information Act (“FOIA”) requests she had made. Schindler moved to dismiss Kirk’s lawsuit on a number of
grounds, including that the FCA’s public disclosure bar deprived the district court of jurisdiction. The Supreme Court resolved a conflict among the circuit courts of appeals and held that a “report” as used in the FCA’s public disclosure bar carries its ordinary meaning and that the DOL’s written responses to Mrs. Kirk’s FOIA requests were therefore “reports.” See also County of Kern v. Jadwin, 2011 WL 2611819 (Cal. Ct. App. 2011) (employer’s state law FCA claim that was filed against former employee who had successfully sued for violation of his employment rights was frivolous and brought to harass employee).
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Insurance Claims Adjusters May Be Exempt Administrative Employees

Harris v. Superior Court, 2011 WL 6823963 (Cal. S. Ct. 2011)

 Plaintiffs in this case are claims adjusters employed by two insurance companies. They filed four putative class actions, claiming they had been erroneously classified as exempt administrative employees and seeking damages based upon unpaid overtime. The court of appeal held as a matter of law that plaintiffs were non-exempt employees who were entitled to overtime pay. In this opinion, the California Supreme Court reversed the court of appeal and remanded the action with directions that the appellate court apply the appropriate legal standard. The Supreme Court stated that “[t]he precise question here is whether plaintiffs’ work as claims adjusters is encompassed by the expanded language of the statute, wage orders, and federal regulations that delineate what work qualifies as administrative.” The Court further held that while the “administrative/production worker dichotomy” (cited by the lower court) may be used as an “analytical tool,” it was improperly applied in this case as a “dispositive test.” Finally, the Supreme Court noted that it was “express[ing] no opinion on the strength of the parties’ relative positions.”

Attorney Was Properly Denied Precertification Discovery To Find A New Class Representative

Pirjada v. Superior Court, 201 Cal. App. 4th 1074 (2011)

Putative class representative Obaidul H. Pirjada filed a complaint on behalf of himself and a putative class of all security guards who had been employed in California by Pacific National Security, Inc. during the preceding four years. The complaint alleged a failure to provide meal-and-rest periods and various other wage-and-hour violations as well as a claim under the Unfair Competition Law. After Pirjada settled his individual claims through direct negotiations with Pacific National’s CEO, Pirjada’s counsel was granted leave to amend the complaint to name a new class representative but his motion to compel precertification discovery in order to identify a suitable class representative was denied.

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The Court of Appeal denied Pirjada’s counsel’s petition for a writ of mandate challenging the discovery order and vacated the previously ordered stay of the order to show cause regarding dismissal. In so ruling, the Court held that the trial court did not abuse its discretion to deny precertification discovery to Pirjada’s counsel in light of the trial court’s granting leave for counsel to use “informal means to identify potential replacement class representatives.”

**Employee-Attorney’s $440,000 Verdict Against LA Housing Authority Is Affirmed**

*Cordero-Sacks v. Housing Authority of Los Angeles, 200 Cal. App. 4th 1267 (2011)*

Ada Cordero-Sacks was terminated from her position as an attorney in the Los Angeles Housing Authority’s Office of Internal Control following her investigation of alleged internal misconduct and fraud within the Authority. Cordero-Sacks’s claim for retaliatory discharge under the California False Claims Act (the “FCA”) was tried to a jury, which resulted in a verdict in her favor in the amount of $440,000. The Court of Appeal affirmed the judgment on the grounds that Cordero-Sacks was a proper plaintiff under the FCA even though she was not pursuing a *qui tam* action when she was subjected to retaliation. The Court further held that Cordero-Sacks had not wrongfully disclosed confidential attorney-client information in prosecuting this case or that there was insufficient evidence in the absence of such privileged information. The Court further held that the Authority was properly barred from offering evidence of Cordero-Sacks’s alleged poor performance because the Authority had refused to produce such information during discovery based upon the attorney-client privilege. The Court also held that Cordero-Sacks’s self-employment was a reasonable, good faith exercise of diligence in attempting to mitigate her damages. Finally, the Court affirmed the trial court’s award of $415,000 in attorney’s fees to Cordero-Sacks.

**$160,000 Sexual Harassment Verdict And Attorney’s Fee Award Of $677,000 Affirmed**


Marcela Fuentes worked as a part-time customer service representative (cashier) for AutoZone. Fuentes alleged that two managers (Melvin Garcia and Gonzalo Carrillo) had spread rumors that Fuentes had sexually transmitted herpes; that she and a coworker were engaged in a sexual relationship; and that she could make more money working as a stripper. On one occasion, Garcia physically moved Fuentes to turn her around and display her buttocks to customers, while laughing and clapping and commenting that Garcia and Fuentes would be rich if they owned the store because all that Fuentes had to do was “just turn around and show them her butt.” Fuentes asked for and received a transfer to another store before quitting two years later for unrelated reasons. Garcia and Carrillo were terminated. At trial, the jury awarded Fuentes $160,000, and the trial court
awarded her $677,000 in attorney’s fees. The Court of Appeal affirmed the judgment, finding substantial evidence to support the jury’s verdict in favor of Fuentes.

Supervisors Cannot Be Held Individually Liable For Military Leave Discrimination/Retaliation


While employed by Safway Services, Inc., Lieutenant Mario Pantuso was called to active duty with the United States Navy. When Pantuso returned from his six-month deployment in Iraq and asked for his job back, his immediate supervisor and the regional manager informed him that he was terminated from employment. Pantuso sued Safway and the two managers for discrimination and retaliation in violation of Cal. Military & Veterans Code § 394. The two managers demurred to the complaint on the ground that only an employer could be held liable under the statute. The trial court overruled their demurrers, but the Court of Appeal granted the managers’ petition for writ of mandate, ordering the trial court to enter a new order sustaining the demurrers without leave to amend based on a similar interpretation of the California Fair Employment and Housing Act exempting supervisors from liability for discrimination and retaliation.

Teacher With Expired Teaching Certificate Was Not “Qualified” Within The Meaning Of The ADA

_Johnson v. Board of Trustees_, 2011 WL 6091313 (9th Cir. 2011)

Patricia Johnson, who had a history of depression and bipolar disorder, taught special education for a school district in Idaho for a decade. Before her teaching certificate expired in 2007, Johnson failed to take sufficient college courses to obtain a renewal of the certificate because she experienced a “major depressive episode.” As a result, the school district terminated Johnson’s employment. Johnson sued for discrimination under the Americans with Disabilities Act, claiming that her disability led to her inability to timely obtain the appropriate certification. The Ninth Circuit held that because Johnson was not a “qualified individual with a disability” under the ADA (because of her failure to obtain the certificate), the school district had no obligation to reasonably accommodate her alleged disability.
Injunction Against Workplace Violence May Be Supported By Hearsay Evidence


The trial court considered hearsay evidence in issuing injunctions under Cal. Code Civ. Proc. § 527.8, prohibiting Jeff Wilson (the husband of a terminated Kaiser employee) from committing acts of violence or making threats of violence against two Kaiser employees. The trial court considered hearsay evidence that Wilson had threatened to “put [the Kaiser employees] down” and that he had threatened to shoot one of them. The Court of Appeal affirmed, holding that it was not error for the trial court to consider hearsay in determining whether to issue an injunction under this statute.

Claims For Reporting Time Pay And Split Shifts Were Properly Dismissed


Daniel Krofta and Mary Katz filed this putative class action against their employer, alleging reporting time pay violations and seeking additional compensation for working split shifts. Krofta sought reporting time pay for days he attended meetings at work even though he was furnished work (and was paid) for at least half of the scheduled work time. (All of the meetings in question were listed on Krofta’s schedule, had certain start times, expected topics and durations and lasted at least half of the expected duration.) The trial court granted summary judgment to AirTouch because “when an employee is scheduled to work, the minimum two-hour pay requirement applies only if the employee is furnished work for less than half of the scheduled time.” The trial court also dismissed Krofta’s claim for split-shift compensation because every time Krofta worked a split shift (a work schedule interrupted by “non-paid, nonworking periods”), he was paid a total amount greater than the minimum wage for all hours worked plus one additional hour. The Court of Appeal affirmed summary judgment of Krofta’s claims (on the grounds relied upon by the trial court) and of Katz’s claims on the ground that she had entered into an enforceable settlement agreement and release. The appellate court reversed the award of $286,000 in attorney’s fees to AirTouch because plaintiffs’ claims were subject to Labor Code § 1194 (not section 218.5) and thus only a prevailing *plaintiff* could recover his or her fees.
Ministerial Exception Barred School Employee’s Wrongful Termination Claims Against Church

Henry v. Red Hill Evangelical Lutheran Church, 201 Cal. App. 4th 1041 (2011)

Sara Henry taught preschool children at the Red Hill Evangelical Church of Tustin; she was also the director of the preschool. Henry, who is Catholic, was not required to be Lutheran (only a practicing Christian) and was aware of the “Christian-based, Bible-based values of the school.” Henry was married when she was hired but later divorced and gave birth to a child fathered by her boyfriend. The church terminated Henry’s employment because her “living arrangements were contrary to the religious beliefs of the church and school.” Henry sued the church for marital status discrimination under the Fair Employment and Housing Act and for violation of the public policy embodied in that statute, Title VII and the state constitution. The trial court bifurcated the trial and, after hearing the church’s defenses first, entered judgment in favor of the church because Henry was terminated for violating a church precept. The Court of Appeal affirmed, holding that the church is exempt from the FEHA and that the termination did not violate any public policy rooted in Title VII. The Court also held the ministerial exception doctrine barred Henry’s claims.

Nonexclusive Insurance Agent Was An Independent Contractor


Kimbly Arnold filed a complaint against Mutual of Omaha on her behalf and on behalf of a putative class of similarly situated “licensed agents” and “sales representatives” of the company, alleging violations of the California Labor Code, including provisions governing expense reimbursement of employees and timely payment of final wages to employees who have quit their employment. Mutual argued that Arnold was an independent contractor under the common law test, and the trial court agreed, granting Mutual’s summary judgment motion. The Court of Appeal affirmed, holding that the common law test (not the test found in Labor Code § 2750) is to be used to determine if a worker is an independent contractor or an employee. The Court further held that the trial court properly applied the common law test in determining that Arnold was an independent contractor (e.g., Arnold used her own judgment in determining whom to solicit as well as the time, place and manner of the solicitation; her appointment was nonexclusive, and she in fact solicited for other insurance companies during her appointment with Mutual; her Mutual manager did not evaluate her performance or monitor or supervise her work; training was voluntary except as required by law; and agents who used Mutual’s office were required to pay a fee for the workspace and telephone service).
Hirer Of Independent Contractor May Not Be Sued For Injuries Sustained By Worker


Gary Gravelin was injured while installing a satellite dish on the roof of a residence. Although Gravelin received workers’ compensation benefits from his employer, he sued the homeowners. The trial court granted summary judgment to the homeowners on the ground that in the absence of an exception to the doctrine enunciated in Privette v. Superior Court, 5 Cal. 4th 689 (1993), Gravelin was limited to the remedy provided by workers’ compensation. Gravelin argued that the “preexisting hazardous condition” exception applied, but the trial court disagreed. The Court of Appeal affirmed dismissal on summary judgment. Cf. Castillo v. Toll Bros., Inc., 197 Cal. App. 4th 1172 (2011) (minimum wage – not the prevailing wage – is the standard for determining whether hirer of independent contractor is liable for violating Labor Code § 2810).

California Overtime Requirements Apply To Work Performed By Non-Resident Employees

Sullivan v. Oracle Corp., 2011 WL 6156942 (9th Cir. 2011)

Three Oracle instructors (all non-residents of California) filed this class action to recover allegedly unpaid overtime under California law for work they performed while in California. Two of the instructors were residents of Colorado and one was a resident of Arizona; all of them worked in their home states and, from time to time, in California. The district court granted Oracle’s motion for summary judgment, but the Ninth Circuit reversed in part, holding that the California overtime requirements (which are stricter than the overtime requirements of Arizona and Colorado) apply to work performed in California by residents of other states. The Court of Appeals affirmed dismissal of the claim made by two of the plaintiffs who asserted a violation of California’s Unfair Competition Law (Bus. & Prof. Code § 17200) for alleged violations of the federal Fair Labor Standards Act outside California on the ground that Section 17200 does not have extraterritorial application. (The Ninth Circuit cited and adopted the California Supreme Court’s determination of these legal issues in Sullivan v. Oracle Corp., 51 Cal. 4th 1191 (2011).)
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By Anthony J. Oncidi*

Teacher/Minister’s Disability Discrimination Claim Is Barred By The First Amendment

*Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. ___, 132 S. Ct. 680 (2012)*

Cheryl Perich was a “called” teacher for the church and also had the formal title of “Minister of Religion, Commissioned.” After Perich developed narcolepsy, the church replaced her with a lay teacher and eventually terminated her employment for “insubordination and disruptive behavior.” Perich filed a claim with the EEOC, claiming she had been terminated in violation of the Americans with Disabilities Act. Invoking the “ministerial exception,” the church argued the lawsuit was barred by the First Amendment because Perich’s claims concerned the employment relationship between the church and one of its ministers. The district court agreed and granted the church’s summary judgment motion, but the Sixth Circuit Court of Appeals reversed. In this opinion, the Supreme Court reversed the Sixth Circuit, holding that Perich was a minister within the meaning of the “ministerial exception” and that an award of relief to Perich would operate as a penalty on the church for terminating an unwanted minister. *See also White v. City of Pasadena, 2012 WL 118569 (9th Cir. 2012)* (employee’s prior litigation against the city in state court precluded this action alleging disability discrimination).

Community College Employee Is Entitled To New Trial On Whistleblower Claims


Pamela Mize-Kurzman, who had been promoted to Dean of Enrollment Services as part of a settlement of a previous lawsuit against the district, claimed the district retaliated against her for disclosing what she believed to be violations of the law or regulations to various individuals and entities. Mize-Kurzman went to trial against the district on claims alleging violation of the whistleblower protection provisions codified in Cal. Labor Code § 1102.5 and the Education Code. The jury deliberated two days before finding against Mize-Kurzman on all of her claims. In this appeal, Mize-Kurzman asserted instructional error on the part of the trial court. The Court of Appeal reversed the judgment and ordered a new trial after concluding the trial court had erroneously instructed the jury.

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Specifically, the Court held the trial court had erroneously instructed the jury that a plaintiff must prove that any disclosure was made in good faith and for the public good and not for personal reasons, holding that “it may often be the case that a personal agenda or animus towards a supervisor or other employees will be one of several considerations motivating the employee whistleblower to make a disclosure regarding conduct that the employee also reasonably believes violates a statute or rule or constitutes misconduct.” The Court also held that it was error to instruct the jury that “debatable differences of opinion concerning policy matters are not protected disclosures” and “information passed along to a supervisor in the normal course of duties is not a protected disclosure.” However, the Court found no error in the instructions that “reporting publicly known facts is not a protected disclosure” and “efforts to determine if a practice violates the law are not protected disclosures.” The Court did find error in the trial court's admission of evidence of Mize-Kurzman's retirement eligibility and income with respect to the issue of mitigation of her damages. See also Chaaban v. Wet Seal, Inc., 203 Cal. App. 4th 49 (2012) (prevailing party that served Cal. Code Civ. Proc. § 998 may recover fees paid to opposing party’s expert witness).

**LAPD Officer’s $2.1 Million Jury Award For Retaliation Is Reversed**

*Joaquin v. City of Los Angeles, 202 Cal. App. 4th 1207 (2012)*

Richard Joaquin alleged his employment as an LAPD officer was terminated in retaliation for his having filed a sexual harassment complaint against his supervisor, Sgt. James Sands. The case was tried to a jury and Joaquin was awarded more than $2.1 million in damages. On appeal, the city asserted that Joaquin had failed to introduce substantial evidence that its decision to terminate his employment was motivated by retaliatory animus or intent. The Court of Appeal agreed and reversed the judgment, holding that “in appropriate circumstances, an employer may discipline or terminate an employee for making false charges, even where the subject matter of those charges is an allegation of sexual harassment.” Specifically, the Court held that although Sands may have wanted Joaquin disciplined for having alleged sexual harassment, there was no evidence that Sands played a role in or had the power to effect the termination of Joaquin’s employment. Although not part of its holding in this case, the Court identified a “significant flaw” in CACI No. 2505 because it does not clearly state that retaliatory intent is a necessary element of a FEHA retaliation claim.

**Army Corps Of Engineers Employee Could Proceed With Age Discrimination Claim**

*Shelley v. Geren, 666 F.3d 599 (9th Cir. 2012)*

After Devon Scott Shelley applied for but was not promoted to be Chief of Contracting for the Army Corps of Engineers, he filed this lawsuit alleging age discrimination in violation of the Age Discrimination in Employment Act. The district court granted summary judgment to the Corps based upon the Supreme Court’s opinion in Gross v. FBL Fin. Serv., Inc., 557 U.S. 167 (2009). However, the Ninth Circuit reversed the summary judgment, refusing to apply Gross in the summary judgment context and applying instead the burden-shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
Because Shelley had provided both direct and indirect evidence that the proffered reason for his termination was pretextual, the Ninth Circuit reversed the summary judgment that had been entered in favor of the Corps.

**PAGA Judgment Is Mostly Affirmed In Employee’s Favor**


Leander Thurman sued Bayshore for alleged violations of the Private Attorneys General Act of 2004 (“PAGA”) and the Unfair Competition Law and, following a bench trial, a judgment was entered imposing civil penalties, including unpaid wages, against Bayshore in the total amount of $358,588 and awarding Thurman restitution in the amount of $28,605. Both sides appealed, and the Court of Appeal generally affirmed the judgment except it reversed the trial court’s award for missed meal periods after July 2003 because Thurman’s complaint contained judicial admissions that defendants had provided meal periods as required since that date. The Court of Appeal affirmed the trial court’s orders denying a continuance of the trial; denying Thurman’s motion to certify the case as a class action; denying PAGA penalties under a wage order (as opposed to a statute); reducing defendants’ civil penalties by 30 percent because they had attempted to comply with the law; awarding underpaid wages as part of a civil penalty; and permitting PAGA penalties for missed rest periods. *See also Bridgeford v. Pacific Health Corp.*, 202 Cal. App. 4th 1034 (2012) (unnamed putative members of a class that was never certified are not bound by collateral estoppel, and PAGA claims should not have been dismissed); *Pickett v. Superior Court*, 2012 WL 556314 (Cal. Ct. App. 2012) (two related PAGA cases were not “one action” for purposes of a Cal. Code Civ. Proc. § 170.6 peremptory challenge to the judge).

**Employer Was Deprived Of Due Process By Trial Court’s Erroneous Use Of Representative Sampling**


U.S. Bank (“USB”) appealed a $15 million judgment that was entered against it following a bifurcated bench trial. The plaintiffs are 260 current and former business banking officers who claimed they were misclassified by USB as outside sales personnel exempt from overtime pay. The Court of Appeal agreed with USB that the trial management plan prevented it from defending against the individual claims of over 90 percent of the class because the plan erroneously relied on a representative sampling of 21 of the 260 class members. Citing the Supreme Court’s opinion in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Court stated that “While *Wal-Mart* is not dispositive of our case, we agree with the reasoning that underlies the court’s view that representative sampling may not be used to prevent employers from asserting individualized affirmative defenses in cases where they are entitled to do so.” *See also Muldrow v. Surrco Solutions Corp.*, 202 Cal. App. 4th 1232 (2012) (trial court properly determined that recruiters were exempt commissioned employees).
California Law Should Have Been Applied To Determine If Drivers Were Employees Or Independent Contractors

_Ruiz v. Affinity Logistics Corp., 2012 WL 388171 (9th Cir. 2012)_

Fernando Ruiz and similarly situated drivers filed a class action against Affinity alleging violations of the Fair Labor Standards Act and California law for failure to pay overtime, failure to pay wages, improper charges for workers’ compensation insurance and unfair business practices. To work for Affinity, the drivers had to enter into an “Independent Truckman’s Agreement and Equipment Lease Agreement” with Affinity, which stated that the parties were entering into an independent contractor relationship and that Georgia law applied to any disputes. The district court applied Georgia law and ruled in favor of Affinity, but the Ninth Circuit vacated the judgment and remanded the case after concluding that the parties’ choice of Georgia law was unenforceable and that California (not Georgia) law applied. On remand, the district court was ordered to apply California law in order to determine whether the drivers are employees or independent contractors.
By Anthony J. Oncidi*

Medical Group Partner Could Proceed With FEHA Retaliation Claim


Mary Fitzsimons is an emergency physician and a member of the California Emergency Physicians ("CEP") partnership. After Fitzsimons’s appointment as a regional director was terminated, she filed suit alleging she had been removed in retaliation for reports she had made to her supervisors that certain officers and agents of CEP had sexually harassed female employees of CEP’s management and billing subsidiaries. At trial, the jury determined that Fitzsimons was a partner and not an employee of CEP, and the trial court then entered judgment in favor of CEP on the ground that a partner has no standing to assert a claim under the Fair Employment and Housing Act ("FEHA"). The Court of Appeal reversed, holding that FEHA makes it unlawful for CEP to retaliate against "any person" for opposing harassment, including a partner. See also _Rickards v. United Parcel Serv._, 206 Cal. App. 4th 1523 (2012) (employee’s attorney’s verification of the online complaint to the DFEH is sufficient to exhaust administrative remedies).

Pharmaceutical Sales Reps Are Exempt From FLSA As Outside Salespeople


Plaintiffs in this case are pharmaceutical sales representatives for SmithKline Beecham whose primary objective was to obtain nonbinding commitments from physicians to prescribe the company’s products. Each week, the employees spent approximately 40 hours in the field calling on physicians and an additional 10 to 20 hours attending events and performing miscellaneous business-related tasks. The employees received a base salary and incentive pay, but no overtime for hours worked in excess of 40 per week because they were classified as exempt outside salespeople. In this lawsuit, the employees claimed they had been misclassified as outside salespeople and that they were entitled to overtime pay. The district court granted summary judgment to the employer, which the employees challenged on the ground that the court had failed to accord controlling deference to the U.S. Department of Labor’s interpretation of the pertinent regulations, which the DOL had announced in 2009 in an _amicus_ brief filed in a similar action. The district court and the Ninth Circuit Court of Appeals rejected the employees’ contention and determined that the DOL’s interpretation is not entitled to controlling deference. The United States Supreme Court affirmed the judgment of the Ninth Circuit.

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Employee Terminated For Refusing To Sign Disciplinary Memo Was Disqualified From Unemployment Benefits


Craig Medeiros was terminated by his employer Paratransit for refusing to sign a disciplinary memorandum that was issued in connection with a prior incident of misconduct involving a customer. Medeiros (who was a member of a union) refused to sign the disciplinary memo without a union representative being present (which he had requested and was denied) even though the signature line indicated only “Employee signature as to Receipt.” The employer’s representative informed Medeiros that the collective bargaining agreement required him to sign the disciplinary memo and that if he failed to sign, it would be treated as insubordination and his employment would be terminated. Medeiros refused to sign the memo, and Paratransit terminated his employment. Paratransit subsequently opposed Medeiros’s application for unemployment benefits, and the administrative law judge concluded Medeiros’s “deliberate disobedience of a reasonable and lawful directive of the employer, to sign the memorandum notifying him of disciplinary action, where obedience was not impossible or unlawful and did not impose new or additional burdens upon him, constituted misconduct.” Although the CUIAB reversed the ALJ, the trial court granted the employer’s petition for writ of administrative mandamus, concluding “this was misconduct rather than a good faith error in judgment.” The Court of Appeal affirmed the trial court’s judgment.

Employee Of Franchisee Could Proceed With Sexual Harassment Claim Against Franchisor


Taylor Patterson was an employee of Sui Juris, LLC (a franchisee of Domino’s Pizza) where she alleged she had been sexually harassed and assaulted by assistant manager Renee Miranda. Patterson sued Miranda, Sui Juris and Domino’s, but Domino’s filed a motion for summary judgment on the grounds that Sui Juris was an independent contractor pursuant to the terms of a written franchise agreement and that there was no principal-agency relationship between Sui Juris and Domino’s. The trial court granted Domino’s motion for summary judgment, but the Court of Appeal reversed, finding triable issues of fact regarding the degree of control that Domino’s exercised over Sui Juris and its employees.

News Reporters’ Age Discrimination Lawsuit Was Properly Dismissed

*Schechner v. KPIX-TV*, 2012 WL 1922088 (9th Cir. 2012)

William Schechner (age 66) and John Lobertini (age 47) were television news reporters for KPIX-TV in San Francisco who alleged age discrimination when they were laid off after a network directive was issued, requiring each of its affiliates to reduce its annual budget by 10 percent. The district court granted the employer’s motion for summary judgment, and the Ninth Circuit affirmed. However, the appellate court held, contrary to the district court, that a plaintiff’s statistical evidence need not necessarily account for an employer’s proffered non-discriminatory reason for the adverse employment action in order to make out a prima facie case of discrimination. The Court nevertheless affirmed summary judgment because KPIX had met its burden of offering a legitimate non-discriminatory reason for the layoffs (i.e., it laid off general assignment reporters based on the date of their contract expiration) and because Schechner and Lobertini had failed to show the proffered reason was mere pretext for age discrimination. The Court also held that KPIX was entitled to a “favorable same-actor inference because [it was the same managers who] signed Schechner and Lobertini to new contracts not long before they laid [them] off.”
California (Not Delaware) Law Governs CEO’s Wrongful Termination Claim


Alexander Lidow, the former CEO of International Rectifier Corporation (“IR”), sued his former employer for wrongful termination in violation of public policy and several other claims arising from the termination of his employment. In response, IR moved for summary adjudication of Lidow’s wrongful termination claim on several grounds, including that pursuant to the “internal affairs doctrine,” Delaware not California law governed the claim. The trial court granted summary adjudication to IR, but in response to Lidow’s petition, the Court of Appeal issued a peremptory writ of mandate directing the trial court to vacate its order dismissing the claim and to enter a new order denying IR’s motion. The appellate court reasoned that where there are allegations made by a corporate officer that he was removed for complaining about possible illegal or harmful activity, the internal affairs doctrine is inapplicable and California law governs the claim.

$480,000 In Fees And Costs Was Properly Awarded Against Employer For Prosecuting Trade Secrets Claim In Bad Faith


SASCO sued three of its former senior managers and their new employer (Rosendin Electric) for, among other things, misappropriation of trade secrets under the California Uniform Trade Secrets Act. More than two years after it filed the litigation (in which the “parties engaged in fierce discovery battles”), SASCO voluntarily dismissed the action without filing an opposition to defendants’ motion for summary judgment. Defendants then filed a motion for attorney’s fees and costs pursuant to Cal. Civ. Code § 3426.4, asserting the lack of evidence of any trade secret misappropriation by defendants. The trial court granted defendants’ motion and awarded them the total amount of $484,943.46 because there was no evidence of misappropriation of any trade secret – “instead, SASCO sued defendants based on the suspicion that they must have misappropriated trade secrets because the individual defendants left the employ of SASCO to work for a competitor.” The Court of Appeal affirmed.

Bank’s Defamation Action Against Former Employee Was Properly Dismissed


Summit Bank sued its former employee Robert Rogers for posting allegedly defamatory statements about the bank in the “Rants and Raves” section of Craigslist. In response to the bank’s lawsuit, Rogers filed an anti-SLAPP motion to strike the complaint on the ground that the suit was brought for the illegitimate purpose of chilling Rogers’s right to speak freely about the bank. The trial court denied Rogers’s motion, but the Court of Appeal reversed, holding that Rogers had met his burden of showing that the bank’s defamation action arose from an act in furtherance of his constitutional right of free speech in connection with an “issue of public interest” and that the bank had failed to satisfy its burden of showing a probability of success on the merits.

Employer’s Chargeback Provision Did Not Violate Labor Code


Verizon’s sales representatives received commissions on the sale of cell phone service, which were not earned until the expiration of a chargeback period during which the customer could cancel the service. Although Verizon advanced commission payments to its employees, the plan stated: “Your commission is not earned and the sale does not ‘vest’ until your customer satisfies his or her contract during the applicable chargeback period.” If a customer disconnected service during the chargeback period, the employee’s future commission...
advances would be reduced by the amount previously advanced. In this class action lawsuit, Deleon alleged violations of the Private Attorneys General Act (“PAGA”) on various grounds including that the chargebacks constitute a “secret underpayment of wages.” The trial court granted summary judgment to Verizon, and the Court of Appeal affirmed, holding that the commission payments are advances and not wages until the specified conditions have been satisfied. See also Sotelo v. MediaNews Group, Inc., 2012 WL 1955054 (Cal. Ct. App. 2012) (trial court properly denied class certification to workers who fold, bag and deliver newspapers and their managers all of whom were allegedly misclassified as independent contractors); People ex rel. Harris v. Sunset Car Wash, LLC, 205 Cal. App. 4th 1433 (2012) (liability was properly determined against successor car wash employer).

California Supreme Court Modifies Attorney Work Product Rules


Although this case does not involve the employment relationship, it has significant implications for all California attorneys who litigate civil matters. The Supreme Court held that (1) recordings of witness interviews conducted by investigators employed by a party’s counsel are entitled to at least qualified work product protection and possibly absolute protection if the party can show that disclosure would reveal its attorney’s “impressions, conclusions, opinions, or legal research or theories”; and (2) the identity of witnesses from whom a party’s counsel has obtained statements (as called for by Form Interrogatory No. 12.3) is not automatically entitled as a matter of law to absolute or qualified work product protection.

Proskauer’s nearly 200 Labor and Employment lawyers address the most complex and challenging labor and employment law issues faced by employers.

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