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By Anthony J. Oncidi

Court Affirms Certification Of Class Consisting Of 1.5 Million Female Wal-Mart Employees

Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir. 2007)

Plaintiffs in this Title VII class-action lawsuit alleged that women employed in Wal-Mart stores are paid less than men in comparable positions, despite having higher performance ratings and greater seniority, receive fewer promotions to in-store management positions, and that those who are promoted must wait longer than their male counterparts to advance. The class, the largest ever certified in an employment case, includes over 1.5 million women who have been employed by Wal-Mart since 1998 at roughly 3,400 stores across the United States. The Ninth Circuit affirmed the trial court's order certifying the class with respect to plaintiffs' equal pay and promotion claims, but denying certification on unmanageability grounds of that portion of the promotion claim seeking lost pay and punitive damages on behalf of class members for whom there were no data available about their interest in the challenged promotions. *Compare Hall v. County of Los Angeles*, 2007 WL 529963 (Cal. Ct. App. Feb. 22, 2007) (class action claims for gender-based wage discrimination in violation of the Equal Pay Act and the Fair Employment and Housing Act were properly dismissed on summary judgment).

Former CEO Violated Federal And State Law By Taking And Deleting Company's Documents And Data

ViChip Corp. v. Lee, 438 F. Supp. 2d 1087 (N.D. Cal. 2006)

ViChip sued Dr. Tsu-Chang Lee, the company's former CEO, president, secretary, CFO and sole director, for breach of contract, breach of fiduciary duty, trade secret misappropriation, violation of the federal Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030, and conversion. Lee asserted counterclaims against ViChip, alleging misappropriation, unjust enrichment, intentional interference with contractual relations and prospective economic advantage and for declaratory relief. Lee admitted that he took several of ViChip's hard copy files, that he deleted certain electronic files from both a desktop and laptop computer owned by the company and that he "tore up" the executed copy of his employee confidentiality agreement as well as the original and a copy of ViChip's patent assignment form. The district court granted ViChip's motion for summary judgment as to Lee's counterclaims and further granted summary judgment in favor of ViChip with respect to its affirmative claims against Lee – ruling that Lee breached his contractual and fiduciary duties to ViChip by removing and destroying the company's confidential and proprietary information. The court further held that Lee violated the CFAA when he deleted ViChip's computer files and data.

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Employer Consented To Government's Warrantless Search Of Office And Computer Used By Employee

United States v. Ziegler, 474 F.3d 1184 (9th Cir. 2007)

After the owner of Frontline Processing contacted the FBI with a tip that an employee, Brian Ziegler, had accessed child pornography on the Internet from a workplace computer, Frontline entered Ziegler's locked office and made a copy of the computer's hard drive, which was provided to the FBI. Forensic examiners at the FBI discovered many images of child pornography on the hard drive. A federal grand jury handed down a three-count indictment charging Ziegler with receipt and possession of child pornography and receipt of obscene material in violation of federal law. Ziegler pled not guilty and filed a motion to suppress the evidence obtained from the hard drive, arguing the FBI had violated his Fourth Amendment rights by directing Frontline to search his computer. The Court concluded that although Ziegler had a reasonable expectation of privacy regarding his office – because he did not share it with any co-workers and because it was kept locked – his employer had the right to give its consent to the government's warrantless search of the office Ziegler used and the company's computer that was located there.

Court Upholds $1.55 Million Sexual Orientation Discrimination Verdict

Jones v. The Lodge at Torrey Pines P'ship, 147 Cal. App. 4th 475 (2007)

Scott Jones was employed by The Lodge at Torrey Pines (LTP) as its outlet manager and was responsible for the restaurant, bar, catering, banquet events and the beverage cart service to golfers. At trial Jones testified that Jean Weiss, LTP's food and beverage director, and another employee directed graphic "gay-bashing" jokes at Jones and made sexual remarks about female employees and Jones. Jones complained to the HR director about sexual orientation discrimination and harassment and about sexual harassment of his female coworkers. The HR director told Jones that he would have to ask Weiss's permission to seek the counseling he had requested and suggested that Jones quit his job because "things like this get worse." Over the next six months, Jones was subjected to retaliation and further acts of harassment. After he resigned, Jones filed a lawsuit. His claims for sexual orientation discrimination and retaliation went to a jury, which awarded Jones compensatory damages in the amount of $1.395 million against LTP and $155,000 against Weiss. The Court of Appeal affirmed the judgment in favor of Jones.

Employee Entitled To New Trial On Disability Claim

Gambini v. Total Renal Care, Inc., 2007 WL 686350 (9th Cir. Mar. 8, 2007)

Stephanie Gambini sued her former employer, Total Renal Care, Inc., d/b/a DaVita, Inc., alleging that it had discriminated against her in violation of Washington state law prohibiting disability discrimination and the federal Family Medical Leave Act. Gambini was terminated from her employment as a contracts clerk after she exhibited a "violent outburst" in response to the presentation to her of a performance improvement plan concerning her "attitude and general disposition." Six months before the incident, Gambini had experienced an emotional breakdown at work and was diagnosed with bipolar disorder. DaVita prevailed at trial, but the Ninth Circuit Court of Appeals reversed the judgment as to the disability claim, finding reversible error in the trial court's refusal to give the following jury instruction: "Conduct resulting from a disability is part of the disability and not a separate basis for termination." The Court found no error in the jury instructions the district court provided regarding the FMLA claim. *Compare Walton v. United States Marshals Serv.*, 476 F.3d 723 (9th Cir. 2007) (federal court security officer was not discriminated against on the basis of a disability for failure to meet audiological standards); *Adams v. State of Cal.*, 2007 WL 446582 (9th Cir. Feb. 13, 2007) (claims duplicative of previously dismissed claims were properly dismissed).

Court Upholds $1.088 Million Verdict In Favor Of Terminated Italian National

Incalza v. Fendi N. Am., 2007 WL 656355 (9th Cir. Mar. 6, 2007)

Giancarlo Incalza, a native and citizen of Italy, was the manager of the Beverly Hills Fendi store, an Italian fashion designer. He had an E-1 visa that was secured with Fendi's assistance. When French nationals purchased a majority interest in Fendi, Fendi's immigration counsel told the company that although the E-1 visas issued to Incalza and Mauricio Graziani, another Italian national, were no longer valid, H1-B visas probably could be obtained in place of the E-1 visas. Although Fendi obtained an H1-B visa for Graziani, it terminated Incalza allegedly because "nothing could be done to remedy his visa problems." Fendi denied Incalza's request to take an unpaid leave of absence during which he planned to marry his fiancée, an American citizen, which would result in his eligibility for a green card. After Fendi terminated Incalza, he filed a lawsuit, alleging breach of implied in fact contract and discrimination on the basis of his Italian heritage. At trial, the jury awarded Incalza $1,088,400 in damages. The Ninth Circuit affirmed, holding that California employment law was not preempted by the federal Immigration Reform and Control Act of 1986, that there was sufficient evidence that Fendi lacked good cause to terminate Incalza and that the reason given for terminating him ("visa problems") was a pretext because Incalza's manager, Robert King, was looking for an excuse to remove him from his position.

Employees Could Assign PAGA Claims To Their Union

Amalgamated Transit Union v. Superior Court, 2007 WL 602519 (Cal. Ct. App. Feb. 28, 2007)

Two labor unions representing mechanics and transit operators filed this lawsuit against several transit company employers, alleging the employers had failed to provide their employees with the meal and rest periods required by law. The unions asserted they had standing to sue under the Unfair Competition Law (UCL) and the Labor Code Private Attorneys General Act of 2004 (PAGA), which authorizes an aggrieved employee to bring a civil action on behalf of himself or herself and other current or former employees to recover civil penalties for violations of any section of the Labor Code. The Court of Appeal held that the unions have standing as assignees to assert the claims of union members who assigned their rights to recover wages owed to them, but not to assert claims on behalf of members who had not assigned their claims to the unions. The Court further held that Proposition 64 requires class certification of representative actions brought under the UCL.

Employer In Class Action Removed To Federal Court Must Prove Amount In Controversy With "Legal Certainty"

Lowdermilk v. United States Bank Nat'l Ass'n, 2007 WL 678221 (9th Cir. Mar. 2, 2007)

Plaintiffs in this class action sought unpaid wages and penalties under Oregon state law as well as costs and attorneys' fees for a total amount of alleged damages that did not exceed $5 million. The Bank removed the action to federal court under the Class Action Fairness Act of 2005 (CAFA), alleging that the actual amount in controversy exceeded $5 million. The Ninth Circuit held that the proponent of federal jurisdiction under CAFA (the Bank) bears the burden of proving with "legal certainty" that the amount in controversy exceeds the statute's $5 million jurisdictional minimum – a burden the Bank failed to meet in this case. Accordingly, the Court affirmed the judgment of the district court and ordered the case remanded to state court. *Cf. Serano v. 180 Connect, Inc.*, 2007 WL 601984 (9th Cir. Feb. 22, 2007) (the party seeking remand of action removed to federal court under CAFA bears burden of proving "home-state controversy" exception to federal jurisdiction).

Former Employee's Anti-SLAPP Motion Should Have Been Granted

Christian Research Inst. v. Alnor, 2007 WL 602954 (Cal. Ct. App. Feb. 28, 2007)

William Alnor, a former employee of the Christian Research Institute (CRI), maintains a website that reports on the fundraising and spending practices of various Christian organizations. Suspicious of CRI's claims that it had lost a substantial amount of money as a result of the misdirection of certain of its mail by the postal service, Alnor investigated the "mishap" and reported on his website that a federal criminal mail fraud investigation had been launched against CRI and its leader Hank Hanegraaff. After CRI and Hanegraaff filed a defamation lawsuit against Alnor, he responded by filing a special motion to strike under the anti-SLAPP statute. The trial court denied the motion, but the Court of Appeal reversed, holding that although CRI and Hanegraaff had proved by a preponderance of the evidence that Alnor's statements were false, they had failed to demonstrate a probability of prevailing by clear and convincing evidence that Alnor had made the challenged statement with "actual malice."

Union Employees' Tort Claims Against Employer Were Not Preempted By Federal Law

Ward v. Circus Circus Casinos, 473 F.3d 994 (9th Cir. 2007)

During a meeting to distribute leaflets and inform other union members of the progress on contract negotiations, one employee, Al Williams, stood on a chair and spoke about union members' defending their employment rights, which resulted in other participants' chanting and shouting phrases such as "union, yes" and "we want a contract." Soon thereafter, Circus Circus security guards interrupted the meeting and told the participants to leave – in response to which the employees locked arms in a circle around Williams to prevent the guards from getting near him. The guards then allegedly pushed through the participants, handcuffed Williams and pushed and knocked down other employees in the process. The employees sued in Nevada state court for assault and battery, false imprisonment and other related torts. Circus Circus removed the action to federal court and moved for summary judgment under Section 301 of the Labor Management Relations Act. After Circus Circus filed its motion, the employees amended their complaint in order to characterize the "labor union meeting" as an "educational session" or "similar non-meeting event." The Ninth Circuit reversed the summary judgment that the district court had granted in favor of Circus Circus, holding that the employees' tort claims were not preempted by Section 301 and ordered the action remanded to state court.

Physician Was Discharged For Insubordination, Not For Advocating Medically Appropriate Health Care

Sarka v. The Regents of the Univ. of Cal., 146 Cal. App. 4th 261 (2006)

George Sarka, M.D., was employed as a primary care physician at UCLA's student health center. He filed a grievance challenging the university's decision to discharge him for repeatedly refusing to follow the directions of his superior to modify his approach to patient care to be more in accord with that of his colleagues. The administrative hearing officer and the trial court upheld Sarka's termination; Sarka appealed, asserting that the hearing officer and the trial court had committed legal error by refusing to apply Business &

Professions Code § 2056, which makes it a violation of public policy for an employer to penalize a physician "principally for advocating for medically appropriate health care." The Court of Appeal affirmed, holding that the trial court had properly considered the statute and had determined nonetheless that Sarka was not terminated "principally for advocating medically appropriate health care" but for being wasteful of health-service resources and of student time.

Employees' Attorneys Not Disqualified From Prosecuting Lawsuit

Ochoa v. Fordel, Inc., 146 Cal. App. 4th 898 (2007)

The employers in this action filed a motion to disqualify the employees' counsel from prosecuting the action on the ground that one of their attorneys, Shelley G. Bryant, had previously been employed by a law firm representing one of the employers in the lawsuit. The Court applied the "modified substantial relationship test" and determined that confidential information material to the representation in question was not imparted to Bryant before he left the firm, nor was he exposed to any such material during his tenure at the firm.

State Farm Breached Independent Contractor Agreement By Imposing Trade Secret And Non-Solicitation Restrictions

Patricia Adkins Ins. Agency, Inc. v. State Farm Mut. Auto. Ins. Co., 146 Cal. App. 4th 526 (2007)

The Court of Appeal granted declaratory and injunctive relief to independent contractor agents of State Farm who challenged certain trade secret and non-solicitation restrictions that State Farm sought to impose upon the agents' employees. The agents challenged the restrictions on the ground that they constituted a breach of the independent contractor agreement between them and State Farm. The Court agreed with the agents and granted declaratory and injunctive relief in their favor.

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