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California Employment Law Notes

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by Anthony J. Oncidi

Mr. Oncidi is a partner in and the Chair of the Labor and Employment Department of Proskauer Rose LLP in Los Angeles, where he exclusively represents employers and management in all areas of employment and labor law. His telephone number is 310.284.5690 and his e-mail address is aoncidi@proskauer.com

Law & the Workplace℠

$200,000 Verdict Affirmed In Favor Of Disabled Albertsons Employee

A.M. v. Albertsons, LLC, 178 Cal. App. 4th 455 (2009)

A.M., an 18-year employee of Albertsons, worked for the market in various capacities, including in the meat and deli department and as a check-out clerk. In January 2003, she had cancer of the tonsils and larynx, the treatment for which affected her salivary glands, which left her mouth very dry. To counter this symptom, A.M. drank large volumes of water, which caused her to have to go to the bathroom frequently to urinate. On one particular night in February 2005, A.M. was working with only two other employees in the store. She repeatedly notified Kellie Sampson (the person in charge of the store that evening) that she needed to be relieved at the checkstand. A.M. said nothing to Sampson about her disability – and there was no evidence that Sampson knew anything about A.M.'s medical condition. Sampson, who was busy unloading a delivery truck at the back of the store, refused to relieve A.M., who proceeded to urinate on herself while standing at the checkstand. (She was having her menstrual cycle at the time, so she became very wet with both urine and blood.) A.M. felt shaky and humiliated by the situation and, after cleaning herself in the bathroom, left the store. Following the incident, A.M. became depressed and withdrawn, contemplated suicide, took frequent showers to clean herself of odors she imagined she had, shaved off all of her body hair and was committed to a psychiatric hospital for several days. Then her brother died unexpectedly. She remained away from Albertsons for a number of months but eventually returned and as of the time of trial was receiving regular bathroom breaks from the store.

A.M. sued Albertsons for failure to accommodate her disability and for failing to engage in the interactive process when she tried to return to work. The jury reached a verdict in favor of A.M., awarding her $200,000 for lost wages, future medical expenses and past emotional distress. The trial court denied Albertsons' motion for nonsuit, which was based on the fact that Albertsons had accommodated A.M.'s disability for many years and on the night of the incident, A.M. failed to communicate with Sampson about her disability or management's having granted an accommodation to her. The trial court and the Court of Appeal, which affirmed the judgment, determined, however, that after a reasonable accommodation is reached (as it was in this case) the employee does not have a continuing obligation to engage in the interactive process. The Court also rejected Albertsons' contention that a single failure to accommodate could not support a finding of a failure to accommodate under the Fair Employment and Housing Act.

Employer's Physical Capacity Evaluation Test Was A Medical Exam Under The ADA

Indergard v. Georgia-Pacific Corp., 582 F.3d 1049 (9th Cir. 2009)

Kris Indergard, after 19 years of employment with Georgia Pacific, took a medical leave to undergo surgery for work-related and non-work-related injuries to her knees. When she was ready to return to work 15 months later, GP told her she would have to participate in a physical capacity evaluation ("PCE") before returning to work. During the PCE, Indergard was required to lift and carry various amounts of weight over various distances and was asked to engage in manual muscle testing, hip rotation, leg raises, etc. She also was required to climb stairs, stand, sit, kneel, squat, and crawl. After the PCE, Indergard was informed that she could not return to work and that there were no other positions available

for which she was qualified. She was terminated shortly thereafter pursuant to a provision of the collective bargaining agreement that permitted GP to terminate employees who had been on leave for more than two years. Indergard sued GP under the Americans with Disabilities Act and Oregon disability law contending that the PCE was improper and discriminatory. GP filed a successful motion for summary judgment, contending that the PCE was not a medical examination and, therefore, that it did not violate the ADA. The Ninth Circuit reversed the summary judgment, holding that the PCE is a medical examination (citing an EEOC Enforcement Guidance as support) and that there was a triable issue of fact as to whether the PCE was job related and consistent with business necessity.

Appellate Court Reverses Grant Of "Most Oppressive Summary Judgment Motion Ever"

Nazir v. United Airlines, Inc., 178 Cal. App. 4th 243 (2009)

Iftikhar Nazir, a man of Pakistani ancestry, worked for United Airlines for over 16 years and eventually became a mechanic supervisor for the airline. He was terminated in 2005 allegedly for violating United's zero tolerance policy in an incident with a female employee of an outside service provider. Among other things, he sued United and his former supervisor for harassment, discrimination and retaliation based on religion, color, ancestry, national origin, etc. Defendants' motion for summary judgment consisted of more than 1,056 pages. Nazir's opposition was almost three times as long as the moving papers and defendants' reply papers were 1,150 pages. Altogether, more than 5,400 pages of material were filed in support of and in opposition to the motion for summary judgment, which the trial court granted. The Court of Appeal reversed the summary judgment, finding triable issues of fact with respect to Nazir's claims for harassment (rejecting defenses based on the failure to exhaust administrative remedies and the statute of limitations); discrimination (rejecting defenses based on the same-actor defense and the existence of a pre-termination investigation); retaliation; failure to prevent discrimination and harassment; and intentional infliction of emotional distress. The Court affirmed summary adjudication of the claims for perceived disability, fraud and battery. *Compare Myers v. Trendwest Resorts, Inc.*, 2009 WL 3418560 (Cal. Ct. App. 2009) (defendant's statement of undisputed facts filed in support of its motion for summary judgment did not constitute a judicial admission of facts contained therein).

Employee Was Not Liable For Accessing Company's Computers

LVRC Holdings LLC v. Brekka, 581 F.3d 1127 (9th Cir. 2009)

LVRC filed this lawsuit in federal court against Christopher Brekka and his wife and their two consulting businesses, alleging that Christopher (a former employee) and the other defendants had violated the Computer Fraud and Abuse Act ("CFAA") by accessing LVRC's computer "without authorization" during Brekka's employment but after Brekka allegedly was acting in pursuit of his own personal interests and not those of LVRC. The district court granted defendants' summary judgment motion, and the Ninth Circuit affirmed, holding that "an employer gives an employee 'authorization' to access a company computer when the employer gives the employee permission to use it…. No language in the CFAA supports LVRC's argument that authorization to use a computer ceases when an employee resolves to use the computer contrary to the employer's interests." The Court also found no evidence that Brekka had accessed LVRC's computers after his employment had ended. *Cf. Perlan Therapeutics, Inc. v. Superior Court*, 2009 WL 3644832 (Cal. Ct. App. 2009) (plaintiff was properly barred from obtaining discovery with respect to trade secrets claim where it failed sufficiently to identify the allegedly misappropriated trade secrets as required by Cal. Code Civ. Proc. § 2019.210).

Forfeiture Provision In Incentive Compensation Plan Did Not Violate California Labor Code

Schachter v. Citigroup, Inc., 2009 WL 3522454 (Cal. S Ct. 2009)

During his employment, David B. Schachter, a former securities salesperson for Salomon Smith Barney, participated in Smith Barney's voluntary Capital Accumulation Plan, which allowed him to direct Smith Barney to pay him five percent of his total compensation in the form of restricted stock; the stock was purchased at a 25% discount below its then-current market price. Pursuant to the Plan, if the participating employee remained employed for two years from the time the shares issued, title to the shares fully vested with the employee. However,

employees who voluntarily terminated their employment or were terminated for cause during the two-year period forfeited the shares as well as the money that was used to purchase them. When Schachter later voluntarily terminated his employment, he forfeited the shares and filed suit, alleging the forfeiture violated Labor Code §§ 201 and 202 (requiring immediate payment of all wages due upon termination of employment). The trial court granted defendants' motion for summary judgment, and the Court of Appeal and the California Supreme Court affirmed, holding that Schachter was paid all the wages he was owed and that in any event the Plan's forfeiture provisions were lawful.

Female Pilot May Proceed With Sex Discrimination Lawsuit

Nicholson v. Hyannis Air Serv., 580 F.3d 1116 (9th Cir. 2009)

Tiffany Anne Nicholson sued her former employer, Hyannis Air Service, Inc., d/b/a Cape Air, for sex discrimination after it suspended her from flying a two-pilot airplane on Cape Air's Guam and Micronesia routes. Nicholson was the only woman among eight pilots who had been selected to fly new service routes between Guam and Micronesia. The group included Chuck White, a captain with whom Nicholson had previously had a year-long sexual relationship, and was overseen by Russell Price – Price and Nicholson had been the subject of rumors suggesting they, too, were sexually involved. The district court granted Cape Air's motion for summary judgment, finding that Nicholson could not establish a prima facie case because her lack of communication and cooperation skills made her unqualified to fly the aircraft. The district court further determined that Nicholson had not provided evidence of pretext sufficient to rebut the legitimate, non-discriminatory explanation for its actions that Cape Air provided. The Ninth Circuit reversed, holding that Nicholson was "clearly qualified" to fly, that similarly situated male employees were treated more favorably than was she and that she had produced sufficient evidence of a discriminatory motive (i.e., that Cape Air "wanted to remove an object of sexual competition, and therefore, discord, from the pilot group on Guam"). *Compare Harris v. City of Santa Monica*, 2009 WL 3466352 (Cal. Ct. App. 2009) (trial court erred in failing to provide jury instruction involving mixed-motives defense to pregnancy discrimination claim).

Teacher Had Standing To Sue Under Anti-Retaliation Provisions Of Federal Law

Barker v. Riverside County Office of Ed., 2009 WL 3401986 (9th Cir. 2009)

Susan Lee Barker was employed by the Riverside County Office of Education as a Resource Specialist Program teacher for students with disabilities. Barker sued her employer for alleged constructive termination arising out of an intolerable work environment that she experienced after voicing concerns that the Office was not complying with requirements of federal and state law regarding how properly to provide educational services to disabled students. The district court dismissed Barker's lawsuit for lack of standing, but the Ninth Circuit reversed the dismissal, holding that Barker does have standing to sue under the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act even though she herself is not disabled. *Cf. EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951 (9th Cir. 2009) (district court properly denied employer's motions for judgment, which were based on purportedly insufficient evidence that employee engaged in protected activity or that he was terminated for such activity).

Employer Did Not Violate FLSA By Changing Pay Rates For Those Working Alternative Workweek

Parth v. Pomona Valley Hosp., 2009 WL 3381116 (9th Cir. 2009)

The Fair Labor Standards Act required Pomona Valley Hospital Medical Center ("PVHMC") to pay its employees 1-1/2 times the employees' regular rate for any employment in excess of eight hours in any workday and in excess of 80 hours in a 14-day period. However, many of PVHMC's nurses preferred working 12-hour shifts in order to have more days away from the hospital. In response to the nurses' requests to work 12-hour shifts, PVHMC developed and implemented an optional 12-hour shift schedule that lowered the base hourly salary so that nurses who worked overtime (in excess of eight hours in a day) would end up making approximately the same amount of money as they would make working an eight-hour shift (i.e., without any overtime). In this putative class action, Louise Parth alleged that PVHMC's use of different base hourly rates violated the FLSA. Although the district court found that Parth met the requirements for conditional class certification to bring the FLSA claim, the court

granted the hospital's motion for summary judgment. The Ninth Circuit affirmed, holding that "Parth cannot cite any relevant case law to support her argument that PVHMC cannot respond to its employees' requests for an alternative work schedule by adopting the sought-after schedule and paying the employees the same wages they received under the less-desirable schedule."

Lawsuit To Rescind Contingency Fee Agreement Was Not Subject To Dismissal Under Anti-SLAPP Law

Hylton v. Frank E. Rogozienski, Inc., 177 Cal. App. 4th 1264 (2009)

Eldon Hylton filed a complaint against his former attorney, Frank E. Rogozienski, seeking damages and rescission of a contingency-fee contract based on Rogozienski's alleged misfeasance in connection with his professional representation of Hylton in litigation filed against Hylton's former employer. In response to Hylton's lawsuit to rescind the contingency fee contract, Rogozienski filed an anti-SLAPP motion to strike Hylton's complaint on the ground that the underlying conduct at issue constituted protected petitioning activity within the meaning of the anti-SLAPP statute. The trial court ruled that Hylton's complaint did not arise from protected activity and denied the attorney's motion. The Court of Appeal affirmed the order. *Cf. Li v. Majestic Indus. Hills, LLC*, 177 Cal. App. 4th 585 (2009) (CCP § 128.7 sanctions were improperly awarded against plaintiff who sought to vacate the voluntary dismissal of his wrongful termination action where plaintiff was denied the full 21-day safe harbor period mandated by the statute).

California Employment Law Notes

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

The following Los Angeles attorneys welcome any questions you might have.

Los Angeles Partners

Harold M. Brody
310.284.5625 — hbrody@proskauer.com

Anthony J. Oncidi
310.284.5690 — aoncidi@proskauer.com

Mark Theodore
310.284.5640 — mtheodore@proskauer.com

Los Angeles Counsel

Mylene J. Brooks
310.284.5674 — mybrooks@proskauer.com
(Special Employment Counsel)

Los Angeles Associates

Adam Abrahms
310.284.5641 — aabrahms@proskauer.com

George Samuel Cleaver
310.284.4588 — scleaver@proskauer.com

Enzo Der Boghossian
310.284.4592 — ederboghossian@proskauer.com

Alex Grodan
310.284.4576 — agrodan@proskauer.com

David G. Gross
310.284.5680 — dgross@proskauer.com

Dawn M. Irizarry
310.284.5698 — dirizarry@proskauer.com

Jeremy M. Mittman
310.284.5634 — jmittman@proskauer.com

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