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By **Anthony J. Oncidi**

Supreme Court Approves Denial Of Employee's Request For $871,000 In Attorney's Fees

Chavez v. City of Los Angeles, 47 Cal. 4th 970 (2010)

Over the course of six years, Robert Chavez, a Los Angeles Police Department officer, and his wife filed multiple lawsuits against the LAPD and other members of the LAPD, alleging a variety of claims involving discrimination, harassment and retaliation. In this particular lawsuit, Chavez alleged the city and three of his supervisors had harassed, discriminated and retaliated against him based upon a perceived mental disability and for filing previous state and federal discrimination claims. The jury determined that Chavez's protected activity was a motivating factor in the decision to rescind his transfer and awarded him $1,500 in lost wages and $10,000 for emotional distress. After the trial, Chavez's attorney submitted a request for $871,000 in attorney's fees incurred during five years of litigation against the city on Chavez's behalf. Even though Chavez was technically the "prevailing party" in the litigation, the trial court denied the fee request on the ground that the court has discretion to deny fees and costs if the matter could have been but was not brought as a "limited civil case" in which the amount in controversy does not exceed $25,000. Although the court of appeal reversed on the ground that the limited civil case rules are inapplicable to a claim filed under the Fair Employment and Housing Act, the Supreme Court reversed the court of appeal and reinstated the trial court's order denying the recovery of fees "in light of plaintiff's minimal success and grossly inflated attorney fee request."

$178,000 Judgment In Favor Of Pregnant Probationary Bus Driver Is Reversed

Harris v. City of Santa Monica, 181 Cal. App. 4th 1094 (2010)

During her six-month tenure as a bus driver for the City of Santa Monica, Wynona Harris had two preventable traffic accidents and two "miss-outs" (tardies or unexcused absences). The city decided to terminate Harris (who was still a probationary driver) before she had informed her supervisor she was pregnant, but it did not communicate the decision to Harris until four days later. Harris sued for pregnancy discrimination under the Fair Employment and Housing Act. At trial, the city requested that the court instruct the jury on the city's "mixed motive" defense, relying upon BAJI No. 12.26, which provides that the employer must establish that a "legitimate reason was present [for the employment decision], and standing alone, [it] would have induced the employer to make the same decision." The court refused to give the city's requested instruction, and the jury awarded Harris $178,000 in damages. The Court of Appeal reversed the judgment, holding that the jury instruction the trial court did give (CACI No. 2500) was deficient because it permitted Harris to prevail by showing her pregnancy led to her termination, even if other factors contributed to it. *See also Wells v. CIR*, T.C. Memo. 2010-5, 2010 WL 23333 (2010) (payment received for alleged emotional distress in settlement of sex discrimination and retaliation claims was not excludable from income).

"Kin Care" Statute Is Inapplicable To Uncapped Sick Leave Policies

McCarther v. Pacific Telesis Group, 48 Cal. 4th 104 (2010)

Plaintiffs in this case worked as service representatives for different Pacific Telesis companies, which are signatories to various collective bargaining agreements ("CBAs"). The applicable CBA in this case provides employees with paid time off for any day in which they miss work due to their own illness or injury for up to five consecutive days in any seven-day period so long as the employee returns to work (even for a partial day) following any period of absence. The employer did not pay employees for absences to care for ill family members. In 1999, California enacted the so-called "kin-care" statute (Labor Code § 233), which requires employers that provide sick leave to permit the employees to use up to half of their annual accrued and available sick leave entitlement to attend to an illness of a child, parent, spouse, or domestic partner of the employee. The legal question in this case was whether the statute applied to policies that provide for an uncapped number of days off, and the Supreme Court held that it

does not. *See also Traxler v. Multnomah County*, 2010 WL 669251 (9th Cir. 2010) (the court not the jury should determine the amount of front pay damages in an FMLA action).

$23 Million Judgment Affirmed Against Company For Employee's Negligent Driving

Diaz v. Carcamo, 2010 WL 654346 (Cal. Ct. App. 2010)

Dawn Diaz was seriously injured when she was struck by a car that jumped a freeway center divider following its collision with a truck that was driven by Jose Carcamo (a truck driver who was employed by Sugar Transport). Diaz sued both drivers as well as Sugar Transport and obtained a jury verdict in the amount of approximately $23 million. Diaz alleged that Sugar Transport was vicariously liable for Carcamo's negligence as well as for its own direct negligence in hiring Carcamo, who had been involved in other accidents before Sugar Transport hired him and who had been terminated from his prior employment. On appeal, Sugar Transport argued that the jury should not have been permitted to find it liable for negligent hiring after it conceded at trial that it was vicariously liable for Carcamo's negligence. The Court of Appeal affirmed the judgment in favor of Diaz and held that the jury was permitted to find Sugar Transport liable on both negligence theories. In addition, the Court held that the trial court properly instructed the jury about Sugar Transport's willful suppression of evidence involving a missing tachograph chart which would have shown whether Carcamo sped up immediately before the accident. *See also Lobo v. Tamco*, 2010 WL 625805 (Cal. Ct. App. 2010) (employee who was on his way home may have been acting within the course and scope of his employment when his negligent driving resulted in the death of a deputy sheriff who was on a motorcycle).

Injured Gardener Was Not An Employee Covered By Workers' Compensation

Lara v. WCAB, 2010 WL 654379 (Cal. Ct. App. 2010)

The Metro Diner hired Luis Lara as a gardener twice during a 12-month period to prune the bushes around the diner. Lara fell off the roof of the diner while pruning the bushes and injured his head, back, neck and other parts of his body. After the fall, Lara filed a workers' compensation claim against Metro and its owner and also joined the Uninsured Employers Benefits Trust Fund in the action because Metro had no workers' compensation insurance. The Workers' Compensation Judge determined that Lara was an employee of Metro and that

he was entitled to benefits. However, the Workers' Compensation Appeals Board (the "WCAB") determined that Lara was an independent contractor who paid his own taxes and contracted with numerous individuals to perform different types of jobs. Further, the Board found "no evidence that Metro had the power to control the details of [Lara's] work in pruning the bushes or the method by which he performed the task." The Court of Appeal affirmed the WCAB's decision. *See also Merchandising Concept Group, Inc. v. CUIAB*, 181 Cal. App. 4th 1274 (2010) (company improperly challenged determination that workers were employees subject to unemployment insurance deductions rather than independent contractors by failing to exhaust administrative remedies).

Class Representative's Settlement And Dismissal Of His Own Claims Did Not Bar His Appeal On Behalf Of The Class

Narouz v. Charter Communications, LLC, 591 F.3d 1261 (9th Cir. 2010)

Hani Narouz filed a complaint against Charter Communications in which he alleged causes of action for wrongful termination in violation of public policy, as well as statutory violations of the California Labor Code for failure to pay wages, provide meal periods, maintain accurate itemized wage statements, and unfair competition under Business & Professions Code § 17200. The wage claims were asserted as a putative class action on behalf of Charter's non-exempt employees. Following extensive discovery and a mediation, Narouz settled his individual claims. After settling his own claims, Narouz filed a motion to certify the class for settlement purposes, which was denied by the district court because it could not "ascertain a class." Narouz subsequently appealed the denial of class certification, and the Ninth Circuit reversed the district court, holding that when a class representative voluntarily settles his or her individual claims but specifically retains a personal stake in a putative class action, he or she retains jurisdiction to appeal the denial of class certification. The Ninth Circuit also held the district court erred by failing to certify a class for settlement purposes. *See also Hertz Corp. v. Friend*, 559 U.S. ___, 2010 WL 605601 (2010) ("nerve center" approach used to determine company's principal place of business for purposes of establishing diversity in removed case).

Trial Court Improperly Denied Class Certification To Route Sales Reps

Jaimez v. DAIOHS U.S.A., Inc., 181 Cal. App. 4th 1286 (2010)

Alex Jaimez, a former Route Sales Representative (RSR) for DAIOHS U.S.A., Inc., dba DAIOHS First Choice Services (First Choice), filed this putative class action alleging that First Choice deliberately misclassified employees as exempt from overtime, failed to provide them with meal and rest break periods, and failed to provide legally compliant paystubs. The trial court denied the motion to certify the class on the ground that Jaimez's claims were not typical, that common issues of law and fact did not predominate, and that Jaimez was not an adequate class representative because he had lied on his First Choice employment application about his felony conviction and incarceration and had purportedly falsified time records and other documents. The Court of Appeal reversed the trial court's order denying class certification on the ground that nine of the RSR declarations that Jaimez provided were sufficient to demonstrate certification was appropriate – and the 25 declarations First Choice submitted only suggested that the potential damages to individual RSRs might vary. The Court did, however, affirm the trial court's determination that Jaimez was not an adequate class representative and ordered that a new class representative be appointed. *See also United Steel Workers v. ConocoPhillips Co*., 593 F.3d 802 (9th Cir. 2010) (district court improperly denied class certification on claims arising from alleged failure to provide duty-free meal periods despite possibility that plaintiffs could not satisfy requirement that questions of law and fact common to class members predominated over individual questions).

Account Executives Were Improperly Classified As Exempt Employees

Pellegrino v. Robert Half Int'l, Inc., 181 Cal. App. 4th 713 (2010)

Maria Pellegrino and other account executives of temporary staffing firm Robert Half International ("RHI") filed this action against RHI for its failure to pay overtime compensation and commissions and to provide meal periods and itemized wage statements and for unfair competition. RHI had classified Pellegrino and the other account executives as administratively exempt employees. Among other things, the account executives' duties included recruiting, interviewing and evaluating candidates to be placed as temporary employees. RHI relied upon two principal affirmative defenses, including an agreement by which the account executives purportedly agreed to limit the time period within which to file any claims against RHI to six months and, secondly, that plaintiffs were exempt from overtime. The trial court bifurcated the unfair competition claims and ordered that those claims first be tried to the court (without a jury). After 17 days of trial and at the end of RHI's case in chief on the exemption defense, plaintiffs moved for judgment pursuant to Cal. Code Civ. Proc. § 631.8, which the trial court granted before entering a judgment in favor of plaintiffs in the amount of $615,000. The Court of Appeal affirmed, holding that the six-month purported limitation on plaintiffs' claims was unenforceable under Labor Code § 219. The Court further held the administrative exemption was inapplicable to plaintiffs because their work did not directly relate to management policies or general business operations of RHI or its customers. *See also Pellegrino v. Robert Half Int'l, Inc.*, 2010 WL 336687 (Cal. Ct. App. 2010) (attorney's fees award of $978,122 remanded to trial court for recalculation); *Villalobos v. Guertin*, 2009 WL 4718721 (E.D. Cal. 2009) (prevailing party employer's motion for $21,000 in attorney's fees granted against *attorney* of former employees in wage-and-hour class action).

Company May Be Liable For Unpaid Wages For Time Spent Transmitting Data

Rutti v. Lojack, Corp., 2010 WL 699946 (9th Cir. 2010)

Mike Rutti filed this putative class action on behalf of all Lojack technicians who installed alarms in customers' automobiles. Rutti sought payment under the Fair Labor Standards Act for time spent on preliminary and postliminary activities performed by technicians in their homes both before and after their shifts. The district court granted summary judgment in favor of Lojack, but the Ninth Circuit vacated the judgment insofar as it precluded Rutti from seeking compensation for his commute time under California law and on his postliminary activity of sending daily portable data transmissions to the company and remanded the matter to the district court for further proceedings. The Court concluded that although Rutti was not entitled to reimbursement for his commute time under federal law or for the preliminary activities spent "receiving, mapping, and prioritizing jobs and routes for assignment," he might be entitled to reimbursement for the postliminary activity of sending a daily transmission to Lojack from his home via a Lojack-supplied portable data terminal – because the evidence "does not compel a finding that the daily transmission of the record of the day's jobs takes less than ten minutes."

Tip-Pooling Is Not Prohibited Under FLSA

Cumbie v. Woody Woo, Inc., 2010 WL 610603 (9th Cir. 2010)

Misty Cumbie worked as a waitress at the Vita Café (owned and operated by Woody Woo, Inc.). Woo required its servers to contribute their tips to a "tip pool" that was redistributed to all restaurant employees, including the kitchen staff (dishwashers and cooks). Cumbie filed this putative collective and class action against Woo, alleging that its tip-pooling arrangement violated the minimum wage provisions of the federal Fair Labor Standards Act ("FLSA"). The district court dismissed Cumbie's complaint for failure to state a claim, and the Ninth Circuit affirmed, holding that "nothing in the text of the FLSA purports to restrict employee tip-pooling arrangements when no tip credit is taken" by the employer.

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.

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