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California Employment Law Notes

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Employee Who Was Interviewed During Internal Investigation Was Protected From Retaliation

Crawford v. Metropolitan Gov't of Nashville & Davidson County, 555 U.S. ___, 129 S. Ct. 846 (2009)

Vicky Crawford was interviewed during the course of an investigation into "rumors of sexual harassment" involving the Metro School District's employee relations director, Gene Hughes. Crawford described several instances of sexually harassing behavior that Hughes allegedly directed at her; two other employees also reported being sexually harassed by Hughes. Although Metro took no action against Hughes, it fired Crawford and the two other accusers soon after completing the investigation, saying in Crawford's case that she was terminated for embezzlement. Crawford filed suit under Title VII, which prohibits retaliation against an employee who "opposes" an unlawful employment practice or who "participated" in an investigation thereof. The district court granted summary judgment in Metro's favor on the ground that Crawford had not "instigated or initiated any complaint" and that she had "merely answered questions by investigators in an already-pending internal investigation initiated by someone else." The Court of Appeals for the Sixth Circuit affirmed the judgment. The Supreme Court unanimously reversed, holding that "[t]here is… no reason to doubt that a person can 'oppose' [within the meaning of the statute] by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question." *Cf. Lakeside-Scott v. Multnomah County*, 2009 WL 331460 (9th Cir. 2009) (final decision maker's wholly independent, legitimate decision to terminate employee is insulated from liability even though lower-level supervisor who was involved in the process had a retaliatory motive to have the employee fired).

Law & the Workplace℠

Diabetic Employee Was Protected Under Americans With Disabilities Act

Rohr v. Salt River Project Agric. Improvement & Power Dist., 2009 WL 349798 (9th Cir. 2009)

Larry Rohr, an insulin-dependent type 2 diabetic, brought suit for employment discrimination under the Americans with Disabilities Act ("ADA"). The district court granted the employer's motion for summary judgment on the grounds that he failed to raise a material issue of fact concerning whether he had a disability within the meaning of the ADA and because of his inability to complete a certification test, which rendered him unqualified for his position as a welding metallurgy specialist. The Court of Appeals for the Ninth Circuit reversed the judgment, holding that "diabetes is a 'physical impairment' because it affects the digestive, hemic and endocrine systems, and eating is a 'major life activity.'" Further, the Court held that Rohr had raised a genuine issue of material fact as to whether he is "significantly restricted as to the condition, manner or duration" in which he can eat, compared to the general population. (Although the Court did not have to decide whether the ADA Amendments Act ("ADAAA"), which became effective on January 1, 2009, applied to this case, it noted that the ADAAA "sheds light on Congress' original intent when it enacted the ADA.") Finally, the Court held that Rohr also raised a genuine issue as to whether he was "qualified" for his position within the meaning of the ADA, "since with the exception of the respirator certification requirement, which may itself be found to be discriminatory, he provided sufficient evidence that he satisfied all of Salt River's job-related requirements and could perform the essential functions of his position."

County Did Not Discriminate Against Employee With Rare Blood Disease

Wilson v. County of Orange, 169 Cal. App. 4th 1185 (2009)

Julie Ann Wilson worked as a radio dispatcher for the Orange County Sheriff's Department's emergency communications system. Wilson sued the County for disability discrimination under the Fair Employment and Housing Act ("FEHA") on the ground that it allegedly had failed to make reasonable accommodation for her medical condition (antiphospholipid antibody syndrome or "thick blood") that necessitated she avoid the most stressful aspects of her job. Although the County accommodated Wilson in precisely the manner she sought, she contended it had violated the FEHA by not providing her the accommodation earlier and by not initiating an "interactive process" with her sooner. The case was tried to a jury, and the jury returned a verdict for the County. The Court of Appeal affirmed the judgment in favor of the County, holding that "the record demonstrates the County engaged in a process aimed at trying to accommodate Wilson. Indeed, the success of its process is borne out by the fact that in the end, Wilson got exactly what she wanted – albeit after a series of temporary accommodations."

Patient Could Proceed With Lawsuit Against Hospital Based On Employee's Alleged Sexual Abuse

C.R. v. Tenet Healthcare Corp., 169 Cal. App. 4th 1094 (2009)

In this class action, C.R. sued Tenet Healthcare for sexual harassment in violation of Civil Code § 51.9 (prohibiting sexual harassment by a health care provider), negligence and intentional infliction of emotional distress based upon nursing assistant Ramon Eduardo Gaspar's alleged sexual touching of her and other patients while they were in a state of diminished capacity due to their illness and were unable to resist his assaults. The trial court sustained Tenet's demurrer to the complaint and ruled that Tenet's motion to strike was moot. The Court of Appeal reversed the judgment, holding that certain business licenses (of which Tenet asked the trial court to take judicial notice because they purportedly established Tenet did not employ or supervise Gaspar) did not negate the allegations that Tenet was legally responsible for Gaspar's actions. The Court similarly rejected Tenet's other arguments that the statute could not apply to its actions vis-à-vis the plaintiff.

Employee's Defamation Suit Was Properly Dismissed

Dible v. Haight Ashbury Free Clinics, Inc., 170 Cal. App. 4th 843 (2009)

Leah Dible, who was employed by the Haight Ashbury Free Clinics as a psychiatric counselor, was terminated after a jail inmate as to whom she had some level of responsibility committed suicide. Dible alleged that when she was terminated, she was told that her negligence had resulted in the inmate's suicide and that statements to that effect were made to the Employment Development Department ("EDD") in connection with her claim for unemployment benefits. In response to Dible's defamation claim, defendants filed a demurrer and an anti-SLAPP (strategic lawsuits against public participation) motion. The trial court granted the motion, and the Court of Appeal affirmed, holding that defendants' statements to the EDD were "protected activity" within the meaning of the anti-SLAPP statute and that Dible could not establish a probability of success on her defamation claim because there was no alleged publication or republication to a third person as is required to establish such a claim. *See also Miller v. City of Los Angeles*, 169 Cal. App. 4th 1373 (2008) (employee's claims of intentional infliction of emotional distress and defamation arose out of protected activity and were properly dismissed under the anti-SLAPP statute).

$700,000 Verdict Affirmed In Favor Of Wrongfully Terminated Therapist

Boston v. Penny Lane Centers, Inc., 170 Cal. App. 4th 936 (2009)

LaToya Boston worked as a therapist and treatment coordinator for Penny Lane, a social services agency that operates group homes for juveniles and offers therapy for children and families. When Boston was first hired, Penny Lane maintained staffing ratios of one staff member for every three clients, but in time the number of clients increased, making it difficult for Boston to do her job and adhere to safety guidelines. After Boston was injured when a fight broke out between clients in her group therapy, she complained that "my work environment is no longer safe." Following Boston's termination a month later (ostensibly for poor performance), she sued for tortious termination in violation of the public policy contained in Labor Code §§ 6310-6312 (prohibiting retaliation for refusal to work in violation of health and safety standards, among other things). At trial, the jury awarded Boston $500,000 in compensatory damages and $200,000 in punitive damages. The Court of Appeal affirmed the judgment in Boston's favor, rejecting Penny Lane's assertion that she was limited to an exclusive remedy under Health & Safety Code § 1596.882 (protecting from discrimination employees who make a good faith complaint to a regulatory agency or the employer regarding violations of the Health & Safety Code). The Court also held the trial court did not abuse its discretion by admitting testimony from Boston's expert witnesses, whose expert reports and writings Penny Lane contended had not been timely produced prior to trial. *Cf. Rankin v. Longs Drug Stores Cal., Inc.*, 169 Cal. App. 4th 1246 (2009) (federal Combat Methamphetamine Epidemic Act operated to abate any action against employer for its alleged violation of Labor Code § 432.7, which prohibits an employer from asking applicants about convictions for certain drug offenses more than two years old); *Gibson v. Office of the Attorney Gen.*, 2009 WL 174915 (9th Cir. 2009) (California OAG did not violate attorney-employee's First Amendment rights or breach its contract with her by insisting that she cease to represent another OAG employee in a private legal malpractice case).

Postal Inspectors May Be Entitled To Overtime Pay Under The Fair Labor Standards Act

Nigg v. United States Postal Serv., 2009 WL 251950 (9th Cir. 2009)

Robert Nigg, a postal inspector currently employed by the United States Postal Service ("USPS"), and Keith Lewis, a retired postal inspector, sued the USPS alleging postal inspectors are entitled to overtime pay under the Fair Labor Standards Act ("FLSA"). The district court granted summary judgment to the USPS after concluding that another federal statute (39 U.S.C. § 1003(c)) governs the pay of postal inspectors. The Court of Appeals for the Ninth Circuit reversed the judgment, holding that the FLSA and § 1003(c) are not in "irreconcilable conflict" and ordering the district court to further analyze the two statutes. The Ninth Circuit also ordered the district court to determine on remand whether postal inspectors are administratively exempt from the requirements of the FLSA. *Cf. Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241 (9th Cir. 2009) (Railway Labor Act did not completely preempt Oregon state-law claims for failure to pay all wages due to customer service agent and other members of the class).

Employee May Not Recover Penalties As Restitution Under Unfair Competition Law

Pineda v. Bank of Am., N.A., 170 Cal. App. 4th 388 (2009)

Jorge Pineda filed this class action against Bank of America for unpaid wages and for "waiting-time" penalties under Labor Code § 203. Although Pineda gave the bank two weeks' advance notice of his resignation, the bank failed to pay him his final pay until four days after his employment had ended. Pineda acknowledged that all wages due to him were paid before this action was filed. The trial court granted the bank's motion for judgment on the pleadings after applying a one-year statute of limitations, but Pineda asserted that a four-year statute of limitations should be applied pursuant to the Unfair Competition Law. The trial court and the Court of Appeal disagreed with Pineda, holding that "continuation wages made payable by section 203 are a penalty, rather than wages, the recovery of which does not constitute restitution within the meaning of Business and Professions Code section 17203." *Cf. Blanks v. Seyfarth Shaw*, 2009 WL 417261 (Cal. Ct. App. 2009) (in this legal malpractice action involving the Talent Agencies Act, the Court held the plaintiff should have filed his case with the Labor Commissioner within the Act's one-year statute of limitations); *Lu v. Hawaiian Gardens Casino, Inc.*, 2009 WL 325544 (Cal. Ct. App. 2009) (Labor Code § 351 does not prohibit tip pooling in casinos, but triable issue of fact existed as to whether some tip pool recipients were "agents" of the employer within the meaning of the statute).

Limousine Drivers' Class Action Should Have Been Certified

Ghazaryan v. Diva Limousine, Ltd., 169 Cal. App. 4th 1524 (2009)

Sarkis Ghazaryan filed this class action lawsuit alleging that Diva Limousine had failed to pay wages, overtime compensation, and to provide meal periods and rest breaks in violation of California law. Diva followed a policy of paying its drivers an hourly rate of pay for assigned trips but it failed to pay them for on-call time between assignments (referred to by the drivers as "gap time"). During gap time, the drivers were not permitted to use the vehicles for personal use and were required to stay near the vehicle (to be available for assignments) and to remain in uniform. Drivers also were required to use gap time for their rest and lunch breaks, which could be interrupted if they were dispatched on an assignment. The trial court denied class certification after determining there were too many individualized issues. The Court of Appeal reversed the order, holding that Ghazaryan's proposed subclass consisting of all Diva drivers would satisfy the ascertainability, numerosity, community of interest and superiority requirements of a class action. *Cf. Deleon v. Verizon Wireless*, 88 Cal. Rptr. 3d 29 (Cal. Ct. App. 2009) (trial court properly dismissed Labor Code Private Attorneys General Act claims, which had been settled in a prior class action, but the court should not have denied plaintiff leave to amend his complaint to state claims that accrued after the date of the earlier action).

Messengers Were Independent Contractors And Not Employees

Cristler v. Express Messenger Systems, Inc., 2009 WL 154801 (Cal. Ct. App. 2009)

James Cristler and others sued Express Messenger, a parcel delivery service, for violations of California law based upon Express' allegedly illegal classification of its workers as independent contractors and not employees. Among other things, plaintiffs alleged violations of the California overtime requirements, as well as requirements to properly itemize wages and to reimburse employees for business expenses. The trial court granted plaintiffs' motion to certify the class, but the jury determined that plaintiffs were independent contractors and not employees. The trial court entered judgment in favor of Express. On appeal, plaintiffs alleged abuse of discretion by the trial court for failing to amend the class definition as well as other legal errors. The Court of Appeal affirmed the judgment in favor of Express.

Employee Was Properly Convicted Of Grand Theft

People v. Tabb, 88 Cal. Rptr. 3d 789 (Cal. Ct. App. 2009)

Edward Nathaniel Tabb, Sr. was convicted by a jury for grand theft of his employer's property. Tabb worked as a "runner or helper for pipe fitters" at BAE Systems. Over a period of approximately two months, Tabb brought new or used ship parts to A to Z Auto Dismantling, a recycling company, and sold them as scrap metal. During this period, Tabb's daily recycling income increased from approximately $10 to $100 per day. A to Z's office manager kept a log of all of the items Tabb brought in, and she calculated that A to Z had paid Tabb more than $31,000 for the materials he brought in for recycling. The jury convicted Tabb, and the Court of Appeal affirmed, concluding that the evidence at trial "amply warrants an inference that the items Tabb brought to A to Z were materials he stole from BAE." *Cf. People v. Scott*, 2009 WL 397966 (Cal. S. Ct. 2009) (all employees on the premises have constructive possession of the employer's property and thus may be separate victims of a robbery of the employer's business); *United States v. SDI Future Health, Inc.*, 553 F.3d 1246 (9th Cir. 2009) (an employee who challenges the government's search of workplace areas must generally show some personal connection to the places searched and the materials seized).

Three Wage & Hour Questions Certified To The California Supreme Court

Sullivan v. Oracle Corp., 2009 WL 367626 (9th Cir. 2009)

The Ninth Circuit has withdrawn its published opinion in this case and certified the following questions to the California Supreme Court: (1) Does the California Labor Code apply to overtime work performed in California for a California-based employer by out-of-state plaintiffs in the circumstances of this case, such that overtime pay is required for work in excess of eight hours per day or in excess of forty hours per week? (2) Does Business & Professions Code § 17200 apply to the overtime work described in question one? and (3) Does Section 17200 apply to overtime work performed outside California for a California-based employer by out-of-state plaintiffs in the circumstances of this case if the employer failed to comply with the overtime provisions of the FLSA?

California Employment Law Notes

Proskauer's nearly 200 Labor and Employment lawyers are capable of addressing the most complex and challenging labor and employment law issues faced by employers.

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