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Law & the Workplace℠

City Violated Title VII By Discarding Results Of Test That Disparately Impacted Minorities

Ricci v. DeStefano, 557 U.S. ___, 2009 WL 1835138 (2009)

One hundred eighteen firefighters took written examinations administered by the city of New Haven, Connecticut in order to qualify for promotion to the rank of lieutenant or captain. When the examination results showed that white candidates had outperformed minority candidates, the mayor and other local politicians opened a public debate that "turned rancorous." Some firefighters argued the tests should be discarded because the results proved the tests were discriminatory; others argued the exams were neutral and fair. The City sided with those who protested the results and threw out the examinations. Several white and Hispanic firefighters challenged that decision under Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Constitution, asserting they had been discriminated against on the basis of their race. In reversing the United States Court of Appeals for the Second Circuit, the Supreme Court held that the City had violated Title VII: "We conclude that race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." *Cf. AT&T Corp. v. Hulteen*, 556 U.S. ___, 129 S. Ct. 1962 (2009) (employer did not violate Pregnancy Discrimination Act by paying pension benefits calculated in part under an accrual rule that gave less retirement credit for pregnancy than for medical leave generally).

Plaintiff Must Prove That Age Was The "But-For" Cause Of Challenged Employment Action

Gross v. FBL Fin. Servs., Inc., 557 U.S. ___, 129 S. Ct. 2343 (2009)

Jack Gross worked for FBL as a claims administration director until he was reassigned to the position of claims project coordinator. At the time of his reassignment, many of Gross's job responsibilities were transferred to a newly created position (claims administration manager) that was filled by Lisa Kneeskern, one of Gross's former subordinate employees who was then in her early 40's. Gross was 54 years old at the time. Although Gross and Kneeskern received the same

compensation after the reassignment, Gross considered the job action to be a demotion because of FBL's reallocation of some of his job responsibilities to Kneeskern. At trial, the jury returned a verdict for Gross in the amount of $46,945 in lost compensation after receiving a "mixed motive" instruction from the judge (i.e., that Gross was required to prove that "age was a motivating factor" in FBL's decision to demote him). The Supreme Court vacated the lower court opinion and held that under the Age Discrimination in Employment Act the plaintiff must prove by a preponderance of the evidence that age was the "but-for" cause of the challenged adverse employment action, and the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in the employer's decision. *Compare Browning v. United States*, 567 F.3d 1038 (9th Cir. 2009) (district court did not err in failing to give jury instruction explicitly addressing pretext in race discrimination case).

Employer Was Entitled To Summary Judgment In Disability Discrimination Case

Scotch v. Art Inst. of Cal.-Orange County, Inc., 173 Cal. App. 4th 986 (2009)

Carmine Scotch sued his former employer, the Art Institute of California-Orange County, Inc. ("AIC") for discrimination based on his disability (HIV), failure to make reasonable accommodation, failure to engage in the required interactive process, failure to maintain a workplace free of discrimination, and retaliation. The Court of Appeal affirmed summary judgment in favor of AIC on all counts, holding that Scotch had failed to prove a causal link between his revelation that he was HIV-positive and the challenged adverse employment decision (assigning him to teach fewer than five course sections during an academic term). The Court further held the accommodation that Scotch sought (giving him priority in assignment of courses to ensure that he would teach five courses during the term) was not reasonable. Finally, the Court held that Scotch had failed to identify a reasonable accommodation that would have been available at the time the interactive process should have occurred, so any failure on AIC's part to engage in that process was not "material." The Court also found no evidence of constructive termination of Scotch's employment or illegal retaliation. *Cf. Knappenberger v. City of Phoenix,* 566 F.3d 936 (9th Cir. 2009) (plaintiff failed to allege facts which, if true, would establish his early retirement from police department was involuntary and a violation of 42 U.S.C. § 1983).

Trustee Of Estate Did Not Sexually Harass Widow

Hughes v. Pair, 2009 WL 1886877 (Cal. S. Ct. 2009)

Suzan Hughes, the third wife of Herbalife founder Mark Hughes, sued Christopher Pair, one of the three trustees of Mark's estate, for sexual harassment under Civil Code § 51.9 (which prohibits sexual harassment in certain business, service and

professional relationships) and for intentional infliction of emotional distress. (Although this case does not involve an employment relationship, the California Supreme Court held that the Legislature intended Section 51.9 to be applied in a fashion consistent with the FEHA and Title VII.) The Court affirmed summary judgment in favor of Pair after concluding that Hughes had failed to establish either quid pro quo sexual harassment or conduct that was so severe or pervasive as to constitute sexual harassment. As for the latter form of harassment, the Court noted that Pair had not physically touched Hughes and that Pair's "vulgar and highly offensive" comments to Hughes were ambiguous and part of an isolated incident. Similarly, the Court held that Pair's actions were not sufficiently extreme or outrageous and Hughes's alleged emotional injuries were not severe enough to result in liability for intentional infliction of emotional distress.

Court Affirms $1.1 Million Verdict In Favor Of Terminated Preschool Director

Scott v. Phoenix Schools, Inc., 2009 WL 1877532 (Cal. Ct. App. 2009)

Jennifer Scott was terminated from her position as director of one of Phoenix Schools' preschools. Her responsibilities included assigning personnel in compliance with the state regulations that set the minimum teacher-student ratios for child care centers. Scott was terminated shortly after she informed the parents of a prospective student that the school had no room for the child. Scott sued Phoenix Schools for wrongful termination in violation of the public policy embodied in the state regulations setting teacher-student ratios. A jury awarded Scott more than $1.1 million in compensatory and $750,000 in punitive damages. The Court of Appeal affirmed the compensatory damages award, but reversed the award of punitive damages on the ground that there was insufficient evidence of malice or oppression on the school's part. *Cf. McConnell v. Innovative Artists Talent & Literary Agency, Inc.*, 2009 WL 737714 (Cal. Ct. App. 2009) (employer's anti-SLAPP motion to strike former employees' retaliation and wrongful termination claims was properly denied because the claims did not arise from employer's protected First Amendment activity).

Court Overturns $86 Million Judgment Awarded In Favor Of Starbucks Baristas

Chau v. Starbucks Corp., 174 Cal. App. 4th 688 (2009)

Jou Chau, a former Starbucks "barista," brought a class action against the company, challenging Starbucks' policy of permitting shift supervisors to share in tips that customers place in a collective tip box. Chau alleged the policy violated California's Unfair Competition Law based on a violation of Labor Code § 351. The trial court certified a class consisting of thousands of current and former baristas from 1,350 Starbucks stores in California and, after finding liability, awarded the class $86 million in restitution. The Court of Appeal reversed the judgment, concluding that

Starbucks had not violated the statute by allowing the shift supervisors (who spent more than 90 percent of their time performing the same service tasks as the baristas) to keep a portion of the collective tips merely because those employees also had limited supervisory duties.

Employer Is Permitted To Deny Employees Vacation Benefits That Had Not Yet Vested

Owen v. Macy's, Inc., 2009 WL 1844338 (Cal. Ct. App. 2009)

Lisa Owen worked as a sales associate at Robinsons-May until it was acquired by Macy's in August 2005. In January 2006, employees at the Arcadia store where Owen worked were informed that the store would close by April. After the store closed on March 18, 2006, Owen received her final pay, which included no pay for unused vacation benefits. The somewhat unconventional Robinsons vacation policy provided that employees would not earn or vest vacation benefits until they had completed six months of continuous employment and, thereafter, employees earned vacation during the "vacation year" that ran from May 1 through April 30 – with 50 percent of the annual benefits accruing and vesting on May 1 and the remaining 50 percent accruing and vesting on August 1. According to a Robinsons executive, this meant that employees' annual vacation benefits vested before they were actually earned. However, employees like Owen who left the company before May 1 would not receive the first half of their vacation entitlement for the vacation year beginning on May 1. Owen challenged this policy under Labor Code § 227.3 on the ground that new employees were denied vacation benefits for six months and because she was terminated just six weeks before vesting in the 50% of the vacation benefits that she would have earned between May 1, 2006 and April 30, 2007. The Court of Appeal affirmed summary judgment in favor of the employer, finding no violation of the statute.

Sales Representative Was Not Entitled To Post-Termination Commissions

Nein v. HostPro, Inc., 174 Cal. App. 4th 833 (2009)

Randy Nein was employed by HostPro as a salesperson. In December 2000, he approached AT&T and suggested that HostPro provide web-hosting services to some of AT&T's business customers. The transaction was still being negotiated a year later when Nein's employment was terminated. He filed this lawsuit to recover commissions associated with the AT&T transaction, which was completed shortly after Nein's termination. The trial court granted summary judgment to HostPro on the ground that Nein was not a licensed business opportunity broker and because his termination cut off his right to receive any additional commission payments under the plain language of the written employment agreement. The Court of Appeal affirmed summary judgment on the second but not the first ground, holding that the employment agreement clearly provided that Nein would "be eligible for commission

pay…so long as [he] remains employed with the Company as a Sales Representative." Accordingly, the Court affirmed dismissal of Nein's claims for breach of contract, breach of the implied covenant of good faith and fair dealing, violation of Labor Code §§ 2926, 206 and the Unfair Competition Law. Finally, the Court affirmed an award of attorney's fees in favor of HostPro.

Investor Permitted To Proceed With Breach Of Fiduciary Duty Claim Against NY Life

Oravecz v. New York Life Ins. Co., 95 Cal. Rptr 3d 1 (Cal. Ct. App. 2009)

Paul Oravecz sued Steve Roth and New York Life (which was allegedly Roth's employer) after losing money in an investment in an offshore foreign currency trading fund, which Oravecz alleged was a "Ponzi scheme." Among the claims Oravecz alleged against New York Life were negligent misrepresentation, failure to adequately train Roth, breach of fiduciary duty, securities law violations, negligent hiring (Roth was a convicted criminal) and negligent interference with prospective economic advantage. The trial court dismissed all of Oravecz's claims against New York Life on demurrer and summary judgment after determining that Roth was an independent contractor and not an employee, that New York Life was unaware of Roth's sale of non-approved investment products or that he was unfit for his position, that New York Life had no duty to supervise Roth, and that the securities fraud claims were barred by the applicable two-year statute of limitations. The Court of Appeal affirmed dismissal of all claims against New York Life except the claim for breach of fiduciary duty because the company relied exclusively on inapplicable federal authority rather than controlling California law to support its demurrer. *Cf. Zaragoza v. Ibarra*, 174 Cal. App. 4th 1012 (2009) (worker who was hired by an unlicensed contractor was not limited to workers' compensation remedy but could not recover from homeowner because his injuries were entirely his own fault).

Class Action Pleading Requirements Need Not Be Satisfied To Assert Private Attorneys General Act Claim

Arias v. Superior Court, 2009 WL 1838973 (Cal. S. Ct. 2009)

Jose Arias sued his former employer, Angelo Dairy, for a number of alleged violations of the California Labor Code, including five claims that he asserted on behalf of himself as well as other current and former employees under the Unfair Competition Law ("UCL"). The trial court granted the employer's motion to strike all five claims that Arias purported to assert on behalf of himself and others on the ground that he had failed to comply with the pleading requirements of a class action (Code Civ. Proc. § 382). The Court of Appeal held that all causes of action brought in a representative capacity alleging violations of the UCL (with the exception of the claim asserting a violation of the Labor Code Private Attorneys General Act of 2004 ("PAGA")) were subject to the class action pleading requirements. The California Supreme Court

affirmed, holding that although Proposition 64 (passed by the voters in 2004) requires that a private party asserting a UCL claim in a representative capacity satisfy the class action requirements, an aggrieved employee need not satisfy those requirements in order to assert a representative action under PAGA. *Cf. Amalgamated Transit Union v. Superior Court,* 2009 WL 1838972 (Cal. S. Ct. 2009) (labor union could not bring a representative action under PAGA either as an assignee or association whose members had suffered actual injury); *In re Tobacco II Cases,* 46 Cal. 4th 298 (2009) (class action standing requirements for UCL claim need only be satisfied by class representatives and not unnamed class members); *Sanders Constr. Co. v. Cerda*, 2009 WL 1844280 (Cal. Ct. App. 2009) (employees of unlicensed subcontractor may assert wage claims against general contractor pursuant to Labor Code § 2750.5).

Class Member Who Failed To Timely Submit Claim Form Could Not Recover Unpaid Wages

Martorana v. Marlin & Saltzman, 2009 WL 1875681 (Cal. Ct. App. 2009)

Ron Martorana was a class member in a wage and hour class action that had been filed against his former employer, Allstate Insurance Company. The Los Angeles Superior Court approved a settlement of the class action, but Martorana did not recover any portion of the settlement because he had failed to timely submit a claim form. Although Martorana received notice of the settlement and the accompanying claim form, he failed to submit the form because he had been diagnosed with prostate cancer and was experiencing the physical effects of his diagnosis and treatment. Martorana subsequently filed this action against Allstate and the various law firms that had prosecuted the class action, alleging that defendants were negligent in failing to take reasonable steps to contact him about his failure to file a claim and to make sure his claim form was timely submitted. The trial court dismissed that action against Allstate and granted Allstate's request for sanctions against Martorana and his attorney. Martorana filed an amended complaint asserting malpractice against class counsel, but the trial court sustained class counsel's demurrer to Martorana's amended complaint as well, finding that "it would defeat the purpose of mass notification to a large number of class members if, after written notice, Class Counsel were required to follow up…with every class member who neglected to file a timely claim." The Court of Appeal affirmed dismissal of Martorana's claims but reversed the award of sanctions to Allstate because of its failure to comply with the safe harbor provisions of Cal. Code Civ. Proc. § 128.7. *Cf. In re Consumer Privacy Cases*, 2009 WL 1863730 (Cal. Ct. App. 2009) (trial court did not abuse its discretion in approving attorney's fees award to class counsel and in using lodestar method); *Hernandez v. Vitamin Shoppe Indus. Inc.*, 2009 WL 1679937 (Cal. Ct. App. 2009) (class counsel's communications with conditionally certified and separately represented class members urging them to opt-out of settlement were properly enjoined by trial court).

FLSA Action Could Not Be Certified Under California Class Action Statute

Haro v. City of Rosemead, 174 Cal. App. 4th 1067 (2009)

Randy Haro and Robert Ballin filed an action against the city of Rosemead alleging a violation of the federal Fair Labor Standards Act ("FLSA"). The trial court denied plaintiffs' motion to have the class certified pursuant to Cal. Code Civ. Proc. § 382 (the California class action statute) on the ground that an FLSA collective action (which requires members of the collective action to affirmatively opt-in) cannot be prosecuted as a class action under California law (which requires class members to opt-out). The Court of Appeal dismissed the appeal from the trial court's orders denying class certification and denying leave to amend the complaint, holding that "an FLSA action has to be litigated according to rules that are specifically applicable to these actions and if litigants do not like these rules, they should not file under the FLSA." *Cf. Smith v. T-Mobile USA Inc.*, 2009 WL 1651531 (9th Cir. 2009) (plaintiffs who had voluntarily settled their FLSA claims before appeal was filed could not continue to prosecute action, rendering appeal moot).

Trade Secret Action Was Prosecuted In Bad Faith, $1.6 Million In Sanctions Upheld

FLIR Sys., Inc. v. Parrish, 2009 WL 1653103 (Cal. Ct. App. 2009)

FLIR Systems purchased Indigo Systems, which manufactures and sells microbolometers (a device used in connection with infrared cameras, night vision and thermal imaging), for $185 million in 2004. William Parrish and Timothy Fitzgibbons were shareholders and officers of Indigo before the company was sold to FLIR; after the sale, they continued working for Indigo. In 2005, Parrish and Fitzgibbons decided to start a new company (Thermicon) to mass produce bolometers, and they gave notice to Indigo that they would quit their employment in January 2006. When Parrish and Fitzgibbons entered into negotiations with Raytheon to acquire licensing, technology and manufacturing facilities for Thermicon, they assured FLIR that they would not misappropriate any of Indigo's trade secrets and that the new company would use an intellectual property filter similar to the one used at Indigo to prevent the misuse of trade secrets. In response, FLIR sued for injunctive relief on the theory that Thermicon could not mass produce low-cost microbolometers without misappropriating FLIR's trade secrets. The trial court found no misappropriation of FLIR's trade secrets and determined that the action had been brought in bad faith on a theory of "inevitable disclosure" – a doctrine not recognized by California courts because "it contravenes a strong public policy of employee mobility that permits ex-employees to start new entrepreneurial endeavors." The trial court awarded Parrish and Fitzgibbons $1,641,261.78 in attorney's fees and costs pursuant to Cal. Civ. Code § 3426.4 (misappropriation of trade secrets claim made in bad faith). The Court of Appeal affirmed and further awarded respondents the costs and attorney's fees they incurred in connection with the appeal.

Ninth Circuit Certifies Questions To California Supreme Court Regarding Pharmaceutical Sales Reps

D'Este v. Bayer Corp., 565 F.3d 1119 (9th Cir. 2009)

The Ninth Circuit has certified two questions of law to be answered by the California Supreme Court pursuant to Cal. Rule of Court 8.548: (1) Does a pharmaceutical sales representative ("PSR") qualify as an "outside salesperson" under Industrial Welfare Commission Wage Orders 1-2001 and 4-2001 if the PSR spends more than half the working time away from the employer's place of business and personally interacts with doctors and hospitals on behalf of drug companies for the purpose of increasing individual doctors' prescriptions of specific drugs? (2) In the alternative, is a PSR involved in duties and responsibilities that meet the requirements of the administrative exemption under California law?

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.

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