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By **Anthony J. Oncidi**

Ninth Circuit Affirms Certification Of Class In Wal-Mart Gender Discrimination Case

Dukes v. Wal-Mart Stores, 2010 WL 1644259 (9th Cir. 2010) (*en banc*)

The district court certified a class encompassing all women employed by Wal-Mart at any time after December 26, 1998 who claimed gender discrimination under Title VII and who sought injunctive and declaratory relief, back pay and, in a separate opt-out class, punitive damages. Among other things, plaintiffs claim they received lower pay and fewer and slower promotions than did their male counterparts. In this *en banc* decision, the Ninth Circuit affirmed the district court in a narrow 6-5 ruling. The class includes as many as 1.5 million women who worked at over 3,400 stores throughout the United States. The Court affirmed certification under Fed. R. Civ. P. 23(b)(2), which imposes less stringent requirements for class certification and applies to cases in which the injunctive relief sought predominates over the monetary relief sought. *See also Porter v. Winter*, 2010 WL 1780864 (9th Cir. 2010) (federal courts have subject matter jurisdiction over claims brought solely to recover attorney's fees incurred in Title VII administrative proceedings); *United Steel, Paper & Forestry, etc. v. Shell Oil Co.*, 2010 WL 1571190 (9th Cir. 2010) (denial of Rule 23 class certification in removed action does not divest district court of jurisdiction).

Company Whose General Counsel Was Responsible For $4 Million Default Judgment Was Relieved Under CCP § 473

Gutierrez v. G&M Oil Co., 2010 WL 1818904 (Cal. Ct. App. 2010)

Maria Gutierrez filed a wage-and-hour class action lawsuit against G&M Oil Company, an operator of a chain of gas stations throughout California. Michael Gray was G&M's vice president and general counsel and its registered agent for service of process. Gray agreed to accept service of the complaint from Gutierrez's attorney and decided to handle the defense of the case himself. Gray did not send a copy of the pleadings to anyone else at G&M and kept the existence of the lawsuit to himself. Over the course of the next 12 months, there were no fewer than three separate requests for default, based on a lack of response to the operative complaint. Finally, a default judgment of $4 million was obtained against G&M. After Gray was removed from his position and outside counsel was retained to defend G&M, the company filed a motion to vacate the default judgment, relying upon Code Civ. Proc. § 473 (relieving a party from a default based upon an attorney's "mistake, inadvertence, surprise or neglect"). The trial court granted G&M's motion to vacate the default, holding that Section 473 applies to in-house counsel such as Gray as well as outside counsel. The Court of Appeal affirmed even though Gray was not only G&M's general counsel but also one of its corporate officers.

Start-Up Company Owned Source Code That Was Developed By Employee

JustMed, Inc. v. Byce, 600 F.3d 1118 (9th Cir. 2010)

Michael Byce developed the source code used in the software of a digital audio larynx device that JustMed owned. JustMed contended that Byce was its employee when he developed the code and that the code, therefore, belonged to JustMed under the work-for-hire doctrine of the federal Copyright Act. Byce, however, contended he was an independent contractor and that he expected to receive shares in JustMed upon transferring ownership of the source code to JustMed. The district court found that Byce was an employee of JustMed when he wrote the software and that JustMed owned the copyright to the software under the work-for-hire doctrine. The district court also found Byce liable for misappropriation of JustMed's trade secrets. The Ninth Circuit affirmed the district court's judgment regarding violation of the Copyright Act, noting that although "JustMed [as a start-up company] did not comply with federal and state employment or tax laws… the remedy for these failings lies not with denying the firm its intellectual property but with enforcing the relevant laws." However, the Court reversed the judgment insofar as the district court had determined Byce had violated Idaho's version of the Uniform Trade Secrets Act because Byce had neither "used" nor "disclosed" JustMed's trade secrets. The Ninth Circuit remanded the case for the district court to determine whether and in what amount JustMed could recover damages on its conversion and breach of fiduciary duty claims and whether an injunction to prevent further misappropriation was warranted. *See also Thomas Weisel Partners LLC v. BNP Paribas*, 2010 WL 1267744 (N.D. Cal. 2010) (company's director breached fiduciary duty by facilitating en masse defection of 26 employees to competitor).

Employment Screening Business Had Right To Republish Megan's Law Information

Mendoza v. ADP Screening & Selection Servs., Inc., 182 Cal. App. 4th 1644 (2010)

William Mendoza sued ADP Screening and Selection Services, Inc. ("SASS") for violations of Penal Code §§ 290.4 and 290.46, the Investigative Consumer Reporting Agencies Act and declaratory relief based upon SASS's apparent disclosure to a prospective employer of information uncovered during a background check conducted on Mendoza, indicating his status as a registered sex offender listed on the Megan's Law website. (Mendoza's complaint implied these facts but did not affirmatively allege them.) In response to Mendoza's complaint, SASS filed a special motion to strike pursuant to California's anti-SLAPP statute. The trial court granted SASS's motion to strike the complaint after concluding the conduct alleged by Mendoza arose in furtherance of SASS's First Amendment rights of commercial speech on a matter of public interest and that Mendoza could not establish a probability that he would prevail on the merits. The trial court's decision also included a mandatory award of attorney's fees in the amount of $42,593.75 in favor of SASS. The Court of Appeal affirmed, holding that the anti-SLAPP statute is available to SASS even though it is a commercial enterprise and that providing employee screening reports is a "protected activity" under the statute.

Flight Engineer's Whistleblower Claim Was Not Preempted By Federal Law

Ventress v. Japan Airlines, 2010 WL 1729705 (9th Cir. 2010)

Martin Ventress, a flight engineer for Japan Airlines ("JAL"), alleged his employment was terminated in violation of the California whistleblower statute (Labor Code § 1102.5(b)) for allegedly reporting safety violations six months after they occurred. JAL moved for judgment on the pleadings, asserting complete federal preemption by the Federal Airline Deregulation Act of 1978, as amended by the Whistleblower Protection Program. The Ninth Circuit held

that because Ventress did not interrupt "service" (i.e., "the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo or mail"), his claim was not preempted by federal law. *Compare Wise v. Verizon Communications Inc.*, 600 F.3d 1180 (9th Cir. 2010) (employee's claims arising from denial of disability benefits were preempted by ERISA).

Porsche Dealer May Owe "Finder's Fee" To Salesperson

Wald v. Truspeed, 2010 WL 1744893 (Cal. Ct. App. 2010)

Alex Wald, who is in the business of "finding, buying and then selling again used Porsches," found 11 Porsches for Truspeed (a car dealer), which Truspeed sold without paying Wald the finder's fee. In response to Wald's lawsuit against Truspeed alleging breach of contract, unjust enrichment and fraud, Truspeed asserted that Wald lacked a dealer's license and a salesperson's license and, therefore, he was barred from recovering against Truspeed. Wald argued that he was really a salesperson and not a dealer and that he should be able to recover against Truspeed. The trial court sustained Truspeed's demurrer without leave to amend, but the Court of Appeal reversed, holding that Wald was "in substance a salesperson" for Truspeed. As for the fact that Wald also lacked a salesperson's license, the Court held that the licensing requirement exists to protect the public from unscrupulous dealers and not dealers from their own salespeople. The Court also held that Wald could proceed with his fraud claim.

Trial Court Properly Denied Class Certification To Restaurant Managers

Arenas v. El Torito Restaurants, Inc., 183 Cal. App. 4th 723 (2010)

The plaintiffs in this case are salaried managers at El Torito, El Torito Grill and GuadalaHarry's restaurants in California from May 2002 to the present. Plaintiffs alleged they were misclassified as employees exempt from overtime because they routinely spent more than half of their working hours performing duties delegated to non-exempt employees such as operating and closing cash registers, preparing food products, cooking, preparing drinks, tending bar, etc. In support of their motion to certify the class, plaintiffs alleged common questions of law and fact, including that all managers share the same or similar employment duties and activities, are automatically classified as exempt, and are denied the benefits and protections of the employment laws and regulations in the same manner. Plaintiffs moved for certification of three subclasses of employees: kitchen managers, department managers and general managers. The trial court denied class certification after determining that resolution of the common issues would require mini-trials concerning the circumstances of each individual's job duties. The Court of Appeal affirmed, agreeing with the trial court's conclusion that "managers, based solely on their job descriptions, were as a rule misclassified was not amenable to common proof." *See also Weigele v. FedEx Ground Package Sys.*, 2010 WL 1337031 (S.D. Cal. 2010) (granting FedEx's motion to decertify class of former managers).

Police Officers Were Properly Denied Compensation For Donning And Doffing Uniforms

Bamonte v. City of Mesa, 598 F.3d 1217 (9th Cir. 2010)

The plaintiffs in this case are employed as police officers for the City of Mesa, Arizona. They contended that the city violated the Fair Labor Standards Act ("FLSA") by failing to compensate them for the time spent donning and doffing their uniforms and accompanying gear. The district court dismissed the lawsuit on summary judgment, and the Ninth Circuit affirmed, holding that because "[n]o requirement of law, rule, the employer, or the nature of the work mandates donning and doffing at the employer's premises" rather than at home, the time spent doing so was not compensable under the FLSA.

Ministerial Exception Barred Seminarians' Claims For Unpaid Overtime

Rosas v. The Corporation of the Catholic Archbishop of Seattle, 598 F.3d 668 (9th Cir. 2010)

Cesar Rosas and Jesus Alcazar were Catholic seminarians who sued the Corporation of the Catholic Archbishop for, among other things, failure to pay them overtime wages under Washington state law. Based on the ministerial exception, the district court dismissed the case on the pleadings. The Ninth Circuit affirmed, holding that the Religion Clauses of the First Amendment require a "ministerial exception" to employment statutes if the statute's application would interfere with a religious institution's employment decisions concerning its ministers.

Trainee/Interns Of Non-Profit Organization Are Exempt From Minimum Wage Law

The California Division of Labor Standards Enforcement opined that an intensive educational and training program designed for young urban adults (18-24 years old) that places these individuals in internships with non-profit and for-profit businesses is exempt from the minimum wage law (interns receive a stipend but not a salary or wages). DLSE Opinion Letter (Apr. 7, 2010), *available at* http://www.dir.ca.gov/dlse/OpinionLetters-byDate.htm.

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