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By **Anthony J. Oncidi***

Late-Payment Penalty Claim Is Subject To Three-Year Statute Of Limitations

Pineda v. Bank of America, 50 Cal. 4th 1389 (2010)

Although plaintiff Jorge A. Pineda gave two weeks' notice of his resignation from Bank of America, the bank did not pay him his final wages on his last day of employment, as required by Cal. Labor Code § 202, but instead paid him four days late. In this putative class action, Pineda sued for waiting-time penalties under section 203 and also sought restitution of the unpaid penalties under the Unfair Competition Law (the "UCL"). The trial court dismissed the action on the grounds that it was barred by a one-year statute of limitations and that section 203 penalties are not recoverable as restitution under the UCL. The court of appeal affirmed dismissal, but the California Supreme Court reversed, holding that a three-year statute of limitations applies even though plaintiff was seeking only penalties and not payment of any unpaid wages. However, the Supreme Court affirmed dismissal of the UCL claim on the ground that an employee may not recover section 203 penalties as restitution under the UCL because those penalties are not designed to compensate employees for work performed (as wages are), but instead are intended to punish employers who fail to pay such wages.

Employer Could Proceed With Defamation And Interference Claims Against Employees Who Protested Their Termination

Overhill Farms, Inc. v. Lopez, 2010 WL 4619906 (Cal. Ct. App. 2010)

After the IRS notified Overhill Farms that 231 of its then-current employees had provided invalid social security numbers, Overhill contacted the employees identified by the IRS, advised them that their social security numbers were invalid according to the IRS, and provided them with the opportunity to correct the erroneous information in order to avoid termination of their employment. All but one of the employees either ignored Overhill's repeated requests for information

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or admitted they had submitted an invalid social security number and that they were not authorized to work in the United States. Overhill terminated the 230 employees. Thereafter, several of the terminated employees, led by Nativo Lopez (a self-described "community activist"), participated in protests outside of Overhill's two plants and outside of one of Overhill's customer's place of business. They asserted Overhill had used a "supposed discrepancy" in social security numbers as a pretext for "racist firings" and a targeted attack on older and more senior employees and that Overhill had exploited part-time workers "visciously [sic] as if modern slavery were in place."

In response, Overhill sued the protestors for defamation, intentional interference with contractual relations, extortion and unfair competition. The defendants filed a special motion to strike Overhill's lawsuit against them under the anti-SLAPP law, asserting their statements and actions were taken in furtherance of their right of free speech in connection with a public issue. The trial court denied the protestors' motion, except as it related to the unfair competition claim because there was no evidence the protestors were engaged in a business act or practice in connection with their protests. As for the other claims, the trial court determined Overhill had established a probability of prevailing on the merits of its claims against the protestors and on that basis denied the motion to strike. The Court of Appeal affirmed the order.

Ministerial Exception Barred Seminarians' Claims For Unpaid Overtime

Rosas v. Corporation of the Catholic Archbishop, 2010 WL 5029533 (9th Cir. 2010) (en banc)

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. A three-judge panel of the Ninth Circuit affirmed, holding that the Religion Clauses of the First Amendment require a "ministerial exception" to the employment statutes if the statute's application would interfere with a religious institution's employment decisions concerning its ministers. Sitting *en banc*, the Ninth Circuit affirmed the judgment of the three-judge panel, but vacated that part of the earlier opinion in which the court announced a new test for determining whether a person is a "minister" for purposes of the ministerial exception. The *en banc* Court held that "we need not and do not adopt a general test for determining whether a person is a 'minister' because, on the facts as alleged, Rosas is a minister under any reasonable interpretation of the exception." *See also Stahl v. U.S.*, 2010 WL 4840090 (9th Cir. 2010) (a member of a "religious or apostolic" corporation, which is subject to 26 U.S.C. § 501(d), may be considered a common law employee of the entity for tax purposes).

Employee May Proceed With PAGA Claim Based Upon Lack Of Suitable Seating

Bright v. 99¢ Only Stores, 189 Cal. App. 4th 1472 (2010)

One of the requirements of the wage orders promulgated by the Industrial Welfare Commission is that "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats…" Cashier Eugina Bright filed this putative class action against 99¢ Only Stores based on its alleged failure to provide suitable seating for her and similarly situated employees. Bright sued under the Private Attorneys General Act of 2004 ("PAGA") and sought civil penalties pursuant to that statute. The trial court sustained the employer's demurrer and dismissed the case, but the Court of Appeal reversed, holding that suitable seating is a standard condition of labor encompassed by Cal. Labor Code § 1198 and is, therefore, subject to the civil penalties provided under PAGA ($100 for each aggrieved employee per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation). *See also Home Depot v. Superior Court*, 2010 WL 5175194 (Cal. Ct. App. 2010) (same).

Employer Did Not Violate FLSA By Changing Pay Rates For Nurses Working Alternative Workweeks

Parth v. Pomona Valley Hosp., 2010 WL 5064380 (9th Cir. 2010)

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 failed to adduce any evidence or authority to support her claim that PVHMC's pay plan violates the FLSA. We conclude that PVHMC was justified in responding 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." *See also Gordon v. City of Oakland*, 2010 WL 4673695 (9th Cir. 2010) (city employer did not violate FLSA by withholding from police officer's vacation accrual and compensatory time off, sums necessary to partially repay city for training costs owed due to officer's resignation after only two years on the job).

UPS Manager/Supervisor Was Exempt From Overtime

In re United Parcel Service Wage & Hour Cases, 2010 WL 4983586 (Cal. Ct. App. 2010)

At various times during his employment with UPS, David Taylor held three different jobs, including hub supervisor, on-road supervisor and center manager/business manager, in which he supervised numerous hourly employees and lower level supervisors. In all three jobs, Taylor worked in excess of eight hours per day and often skipped breaks and took "working lunches." The trial court granted summary judgment to UPS, and the Court of Appeal affirmed, holding that even though Taylor did not perform some traditional management duties, he was primarily engaged in performing management or supervisory duties or work directly related thereto. The Court also concluded that Taylor customarily and regularly exercised discretion and independent judgment in performing his duties and thus was subject to the administrative exemption.

Payroll Company Was Not Joint Employer Of TV Commercial Production Company Employee

Futrell v. Payday Cal., Inc., 2010 WL 5117629 (Cal. Ct. App. 2010)

Payday provides payroll processing and related services for companies that produce television commercials. In this putative class action, the employees were "freelance crewmembers" whom Reactor Films retained to complete its production activities. John Futrell worked in a private police capacity, providing traffic and crowd control services on various commercials produced by Reactor. On behalf of the putative class, Futrell alleged that Reactor and Payday were his joint employers and that they had failed to pay statutorily required double-time wages when he worked more than 12 hours in a day, failed to pay him within the statutorily prescribed time periods and failed to provide pay stubs that conformed to the statutory requirements. The trial court granted summary adjudication to Payday, and the Court of Appeal affirmed, holding that Payday was not Futrell's employer because it did not control wages, hours or working conditions, and it did not have the power to cause Futrell to work or prevent him from doing so. The Court further concluded that the existence of payroll documents was not sufficient to establish a triable issue of fact as to whether Payday was a joint employer along with Reactor. *See also Employment Dev. Dep't v. California Unemployment Ins. Appeals Bd.*, 190 Cal. App. 4th 178 (2010) (EDD properly issued assessment against employer for underpaying its unemployment insurance contributions by "dumping" employees into another (commonly owned) employer's unemployment insurance account).

Employer Granted Leave To Appeal Remand Of Wage-and-Hour Case

Coleman v. Estes Express Lines, Inc., 2010 WL 4925407 (9th Cir. 2010)

Bradford Coleman sued his employer, Estes Express Lines and its regional division Estes West, in state court for alleged violations of California wage and hour statutes. Estes Express removed the action to federal court under the Class Action Fairness Act of 2005 ("CAFA"), and Coleman filed a successful motion to remand it back to state court on the ground that the case was a "local controversy" in which at least one of the primary defendants was from the same state as more than two-thirds of the members of the proposed class. Estes Express (not a citizen of California) argued that its employees, and not Estes West's, would have been responsible for the alleged violations and that only it had the ability to satisfy any judgment, and, therefore, this was not a "local controversy." The district court granted Coleman's motion to remand based on the pleadings alone, and Estes Express sought leave from the Ninth Circuit to appeal the remand order, which the Ninth Circuit granted given the "presence of an important CAFA-related question"– namely, whether the district court must rely only upon the pleadings as the district court did in this case or whether it can consider extrinsic evidence in deciding a motion to remand the case to state court. *Compare Dalton v. Lee Publ'ns*, 625 F.3d 1220 (9th Cir. 2010) (dissent from order denying petition for permission to appeal district court order granting class action certification).

New Trial Ordered In Police Officer's Case Alleging Discrimination and Retaliation

Grobeson v. City of Los Angeles, 2010 WL 4888251 (Cal. Ct. App. 2010)

A jury rejected Mitchell Grobeson's claims against the City of Los Angeles and Daniel Watson for alleged unlawful discrimination, harassment, retaliation and constructive discharge. The trial court granted Grobeson's motion for a new trial based on juror misconduct, and the Court of Appeal affirmed except that it ordered the unlawful retaliation claim that was asserted against Watson to be dismissed under the authority of *Jones v. Lodge at Torrey Pines P'ship*, 42 Cal. 4th 1158 (2008). In support of the motion for a new trial, Grobeson presented a declaration from one of the jurors who said she had heard another juror say during a break in the testimony of Watson that she "liked Watson's voice" and that she had "made up [her] mind already. I'm not going to listen to the rest of the stupid argument." Grobeson submitted another declaration from his lawyer who had interviewed the juror in question over the telephone after the trial concluded. The juror told the lawyer, "I made up my own opinion [to vote against Grobeson] in the second week of trial" and "I was very irritated when you were conducting the case." The Court of Appeal affirmed the grant of a new trial after concluding that the juror's statement during the trial was a "statement of bias" and that the juror's prejudgment of the case improperly influenced the verdict. *See also Turman v. Turning Point of Central Cal., Inc.*, 2010 WL 5158351 (Cal.

Ct. App. 2010) (jury verdict in employer's favor reversed and new trial ordered in absence of substantial evidence that employer took corrective action to alleviate hostile work environment, but punitive damages allegations were properly stricken).

Employee's Lawyer Should Not Be Present During Client's Psych Exam

Toyota v. Superior Court, 189 Cal. App. 4th 1391 (2010)

Steven Braun sued Toyota Motor Sales and his supervisor Randall Bauer for gender discrimination, sexual harassment, defamation, constructive discharge and intentional and negligent infliction of emotional distress. Toyota and Bauer filed a motion to compel Braun to submit to an independent psychiatric examination, which the trial court granted, but it also permitted Braun's attorney to be present during the exam in an adjoining room. Toyota and Bauer challenged in this writ proceeding the trial court's order permitting Braun's attorney to be present at an adjacent location to monitor the exam. The Court of Appeal granted the peremptory writ of mandate after concluding the trial court had erred in permitting Braun's attorney to listen to and monitor the examination: "Braun demonstrated no legitimate need for his attorney to attend the psychiatric examination so as to monitor it from a separate room. Toyota produced evidence that such monitoring might compromise the integrity of the examination." *See also San Francisco Unified School Dist. v. WCAB*, 190 Cal. App. 4th 1 (2010) (employee whose psychiatric injury was not "substantially caused" (35-to-40 percent) by good-faith personnel actions was entitled to workers' compensation benefits).

Non-Union County Employees Must Be Permitted To Object To Disclosure Of Personal Information

County of Los Angeles v. Los Angeles County Employee Relations Comm'n, 190 Cal. App. 4th 178 (2010)

During the course of collective bargaining, the Service Employees International Union asked the county for the personal contact information (names, home addresses and home telephone numbers) of county employees who are in the bargaining unit but who are not members of the union. When the county refused to disclose that information based on the employees' right to privacy, the union filed an unfair employee-relations practice charge with the Los Angeles County Employee Relations Commission. The Commission agreed with the union and ordered the county to release the information. The trial court upheld the Commission's decision but on different grounds. In this opinion, the Court of Appeal considered the non-members' state constitutional right to privacy, reversed the trial court's order and remanded with directions to the trial court to enter a new order directing the county and union to meet and confer on a

proposed notice that includes notice to non-member county employees and an opportunity for them to object to disclosure. *See also Krottner v. Starbucks Corp.*, 2010 WL 5141255 (9th Cir. 2010) (Starbucks employees whose names, addresses and social security numbers were stored on a stolen laptop had standing to sue under Article III of the U.S. Constitution).

SOX Whistle-Blower Claim Was Untimely Filed

Coppinger-Martin v. Solis, 2010 WL 4925414 (9th Cir. 2010)

Carole Coppinger-Martin alleged that Nordstrom, Inc. violated the whistle-blower-protection provision of the Sarbanes-Oxley Act of 2002 ("SOX"), 18 U.S.C. § 1514A, by terminating her employment in retaliation for her reporting to supervisors conduct she believed violated the rules and regulations of the SEC. The United States Department of Labor's Administrative Review Board ("ARB") dismissed Coppinger-Martin's complaint as untimely. The Ninth Circuit denied Coppinger-Martin's petition for review, holding that her complaint was filed more than 90 days after she was notified that her job was being eliminated as well as more than 90 days after her last day of employment. The Court rejected Coppinger-Martin's contention that equitable tolling should extend the 90-day filing period because she was not aware of Nordstrom's retaliatory motive until after her employment ended and she learned for the first time that other Nordstrom employees were performing many of her former job duties. The Court also rejected her assertion that equitable estoppel should prevent Nordstrom from asserting the statute of limitations defense. *See also BBA Aviation PLC v. Superior Court*, 190 Cal. App. 4th 421 (2010) (writ of mandate issued to quash service of summons on English parent company of California employer).

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