Proskauer

newsletter

California Employment Law Notes

November 2010
Vol. 9, No. 6

For the latest news, insight and analysis on **California Employment Law**, visit our blog at: http://calemploymentlawupdate.proskauer.com.

By **Anthony J. Oncidi***

Sales Reps Could Proceed With Breach Of Contract And Age Discrimination Claims

McCaskey v. California State Auto. Ass'n, 2010 WL 4261437 (Cal. Ct. App. 2010)

Charles Luke, Francis McCaskey and John Mellen filed this lawsuit against CSAA, alleging breach of contract and age discrimination. The contract claim was based on an alleged breach by CSAA of a promise to permit senior sales agents to continue in their employ under relaxed sales quotas (minimum production requirements or "MPR's"). Plaintiffs also alleged that CSAA's elimination of the policy permitting the relaxation of MPR's for senior agents had a disparate impact on employees over age 40. The trial court granted summary judgment to CSAA, but the Court of Appeal reversed, finding a triable issue of fact regarding whether CSAA honored the policy for an agreed time (or in the absence of an agreed time, for a reasonable time). The Court rejected CSAA's statute of limitations defense, holding the alleged breach occurred not when CSAA first adopted a compensation plan omitting the MPR reductions (2001), but when CSAA in fact applied the policy to plaintiffs (2002). The Court also held there was "no basis to conclude CSAA had honored the policy for a reasonable time when it renounced its undertaking, denied plaintiffs its benefits and ultimately discharged them for invoking it." As for the age discrimination claim, the Court of Appeal found sufficient evidence in the record to raise a triable issue of fact concerning CSAA's "real motivation" for terminating plaintiffs' employment. The Court did, however, affirm summary adjudication of plaintiffs' disparate impact and retaliation claims.

Stroke Victim Could Proceed With Disability And Age Discrimination Claims

Sandell v. Taylor-Listug, Inc., 188 Cal. App. 4th 297 (2010)

Robert Sandell began his employment as vice president of sales with Taylor-Listug in February 2004. Six months later, while on a six-month sabbatical from work, Sandell suffered a stroke (following a chiropractic adjustment). When Sandell returned to work in October, he was using a cane and had noticeably slower speech. Taylor-Listug terminated Sandell's employment three years later (when he was 60 years old) because of his "lack of leadership in providing direction to the sales team and in producing satisfactory sales results." Sandell sued for age and disability discrimination. The trial court granted summary judgment to Taylor-Listug, but the Court of Appeal reversed,

*Anthony J. Oncidi is a partner in and the Chair of the Labor and Employment Department of Proskauer in Los Angeles, where he exclusively represents employers and management in all areas of employment and labor law. His telephone number is 310.284.5690 and his email address is aoncidi@proskauer.com.

finding evidence of pretext for the termination given Sandell's relatively favorable performance evaluations. The Court also discounted declarations from employees who criticized Sandell's management because none of these employees had ever brought those complaints to the attention of management while Sandell was still working for the company. Relying upon *Reid v. Google, Inc.*, 50 Cal. 4th 512 (2010), the Court of Appeal refused to label as "stray remarks" certain comments management personnel made directly to Sandell about his disability. As for the age claim, the Court determined the delay in replacing Sandell with a significantly younger employee (18 months after Sandell's termination) and the fact that Sandell was hired and fired by the same person within a short period of time did not entitle the employer to summary adjudication of this claim. *See also Steller v. Sears, Roebuck & Co.*, 2010 WL 4010602 (Cal. Ct. App. 2010) (parties' settlement of disability discrimination claim impliedly included settlement of outstanding workers' compensation claims but also was impliedly conditioned upon the WCAB's approval of the settlement of the workers' compensation claim).

Employee Could Proceed With Disability Discrimination And Harassment Claims

Stiefel v. Bechtel Corp., 2010 WL 4273357 (9th Cir. 2010)

James Richard Stiefel worked for Bechtel as an ironworker at a power plant. Five weeks before he was laid off, Stiefel injured his left hand while on the job. In his lawsuit, Stiefel alleged Bechtel laid him off as part of a "medical reduction in force," which would result in cost savings to Bechtel under its workers' compensation plan. Stiefel further alleged that during his employment, Bechtel harassed, discriminated and retaliated against him because of his disability and that it failed to reasonably accommodate his disability. He also claimed he was laid off and not subsequently rehired because of his disability. The district court granted Bechtel's motion for summary judgment, but the Ninth Circuit reversed as to the pre-termination claims. The Court held that contrary to the lower court's ruling, Stiefel had not failed to exhaust administrative remedies by not filing a separate complaint with the EEOC because there was a worksharing agreement in effect at the time he filed a complaint with the DFEH. The Court affirmed summary judgment of Stiefel's post-termination claims on the ground that he failed to take the steps necessary to give Bechtel a chance to rehire him and thereby rejected Stiefel's argument that attending roll calls at the union hall would have been a "futile gesture."

Employer Need Only Provide And Not Ensure Meal And Rest Breaks

Hernandez v. Chipotle Mexican Grill, Inc., 2010 WL 4244583 (Cal. Ct. App. 2010)

Rogelio Hernandez worked as a non-exempt employee at Chipotle Mexican Grill. In this putative class action, Hernandez alleged that Chipotle violated California wage and hour law by failing to *ensure* that its employees took their meal breaks. The trial court granted Chipotle's motion to deny class certification and to strike the class allegations on the ground that individual issues predominated over common issues and class treatment was not superior to individual actions. The trial court determined that individual inquiry was required to determine Chipotle's alleged liability because "even if an employee's time record indicated a break was missed, that in and of itself did not establish that Chipotle failed to provide, authorize or permit the employee to take a meal or rest break." The Court of Appeal affirmed, holding the trial court had applied the proper legal analysis (predicting a similar result from the California Supreme Court in the still pending

Brinker/Brinkley cases) and finding substantial evidence that individual issues predominated. *See also Villacres v. ABM Indus., Inc.*, 2010 WL 4142264 (Cal. Ct. App. 2010) (PAGA claim filed after settlement and dismissal of wage and hour class action was barred by res judicata).

Reporters Were Entitled To Judgment In Wage And Hour Class Action

Wang v. Chinese Daily News, 2010 WL 3733568 (9th Cir. 2010)

Plaintiffs (reporters for the Chinese Daily News) alleged they were non-exempt employees entitled to overtime pay under the Fair Labor Standards Act (FLSA) and California state law. The district court granted summary judgment in favor of the reporters, finding journalists are not subject to the creative professional exemption to the FLSA or California law. The Ninth Circuit affirmed and further held the district court had properly (1) certified a class under FRCP 23(b)(2); (2) invalidated certain opt outs from that class (in light of evidence of coercive behavior by the employer); (3) deferred a second opt out procedure until after trial on the merits; (4) determined the employer had failed to *provide* class members with meal breaks (the Court said it did not need to decide whether the provide or ensure standard applied); (5) held the FLSA does not preempt an unfair competition claim brought under Cal. Bus. & Prof. Code § 17200; (6) exercised supplemental jurisdiction over the 17200 claim; and (7) awarded attorneys' fees to plaintiffs. *See also Lazarin v. Superior Court*, 2010 WL 3912499 (Cal. Ct. App. 2010) (unionized employees subject to Industrial Wage Commission Order No. 16 (governing on-site construction operations, etc.) could proceed with claim for employer's failure to compensate for missed second meal periods).

Asset Purchase Did Not Create Successor Liability Under FMLA

Sullivan v. Dollar Tree Stores, Inc., 2010 WL 3733576 (9th Cir. 2010)

Christina Sullivan was the manager of a Factory 2-U store before it filed for Chapter 11 bankruptcy. Dollar Tree later purchased Factory 2-U's existing leasehold on the store where Sullivan was employed. Prior to the anniversary of her hire by Dollar Tree, Sullivan's mother became ill but Dollar Tree did not provide Sullivan with family leave under the Family Medical Leave Act (FMLA). Following the termination of her employment, Sullivan filed this lawsuit in which she alleged that Dollar Tree was the successor in interest to Factory 2-U and that she was entitled to FMLA leave even though she had worked for Dollar Tree for fewer than 12 months. The district court granted summary judgment to Dollar Tree and the Ninth Circuit affirmed, holding that Dollar Tree was not a successor in interest to Factory 2-U.

Hotel Workers Ordinance Is Not Unconstitutional

Garcia v. Four Points Sheraton LAX, 188 Cal. App. 4th 364 (2010)

In 2006, the City of Los Angeles enacted the Hotel Service Charge Reform Ordinance, which required non-unionized hotels in the Century Boulevard Corridor near LAX to pass along mandatory service charges to the workers who rendered the services for which the charges were collected. (The service workers alleged their income had declined as a result of the hotels' practice of imposing mandatory service charges because patrons assumed the charges would be distributed to the workers, and, as a result, the patrons left fewer and smaller gratuities.) The hotels challenged the Ordinance on the grounds

that it was preempted by Labor Code sections 350 to 356 (regulating gratuities) and that it violated the equal protection clauses of the state and federal constitutions, among other grounds. The trial court sustained the hotels' demurrers, but the Court of Appeal reversed, holding that the Ordinance is not preempted by the Labor Code because the latter does not conflict with the former. The Court of Appeal further held that the Ordinance is not unconstitutional under either the federal or state constitutions.

New Public Disclosure Requirement Regarding Efforts To Eradicate Slavery And Human Trafficking

California has enacted the "California Transparency in Supply Chains Act of 2010" (S.B. 657), which will require retail sellers and manufacturers that do business in California and that have over $100 million in annual worldwide gross receipts to publicly disclose their efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for sale. (The new law becomes effective on January 1, 2012.)

Proskauer's nearly 200 Labor and Employment lawyers 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.

Contacts

Harold M. Brody, Partner
310.284.5625 – hbrody@proskauer.com

Enzo Der Boghossian, Partner
310.284.4592 – ederboghossian@proskauer.com

Anthony J. Oncidi, Partner
310.284.5690 – aoncidi@proskauer.com

Mark Theodore, Partner
310.284.5640 – mtheodore@proskauer.com

If you would like to subscribe to *California Employment Law Notes*, please send an email to Proskauer_Newsletters@proskauer.com. We also invite you to visit our website www.proskauer.com to view all Proskauer publications.

Boca Raton | Boston | Chicago | Hong Kong | London | Los Angeles | New Orleans | New York | Newark | Paris | São Paulo | Washington, D.C.

www.proskauer.com