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By **Anthony J. Oncidi***

Ninth Circuit Applies Supreme Court's "Rigorous Analysis" Test And Vacates Certification Of Class Action

Ellis v. Costco Wholesale Corp., 657 F.3d 970 (9th Cir. 2011)

In this appeal, Costco challenged the district court's order granting class certification in an action in which Costco's promotional practices were alleged to have discriminated against female employees. The district court's order granting class certification preceded the United States Supreme Court's opinion in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011). In this opinion, the Ninth Circuit recognized that the *Wal-Mart* opinion "altered existing law" and, accordingly, vacated the lower court's order granting class certification. Specifically, the Court: (i) vacated and remanded the district court's ruling as to commonality under Fed. R. Civ. P. 23(a) because the lower court had failed to conduct the required "rigorous analysis" to determine whether there were common questions of law or fact among the class members' claims; (ii) vacated and remanded the district court's ruling as to "typicality" under Fed. R. Civ. P. 23(a) because the district court failed to consider the effect that defenses unique to the named plaintiffs' claims might have on that question; (iii) affirmed the district court's ruling as to the adequacy of the one class representative who was a current employee allegedly being denied promotion; and (iv) vacated and remanded the district court's certification of the class pursuant to Rule 23(b)(2) based upon the Supreme Court's unanimous rejection of the predominance test for determining whether monetary damages may be included in a 23(b)(2) class certification.

Employee Failed To Prove Existence Of Severe Or Pervasive Sexual Harassment

Brennan v. Townsend & O'Leary Enter., Inc., 199 Cal. App. 4th 1336 (2011)

Stephanie Crowley Brennan sued her former employer and a manager who was not her supervisor (Scott Montgomery) for sexual harassment. A jury awarded Brennan $200,000 against the agency and $50,000 against Montgomery, but the trial court granted defendants' motion for judgment notwithstanding the verdict and entered a judgment in their favor. The Court of Appeal affirmed, holding that insufficient evidence supported the jury's finding that Brennan had been subjected to severe or pervasive sexual harassment

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in the workplace. Specifically, the Court held that an email that Montgomery sent but did not direct to Brennan (referring to her as "big-titted" and "mindless") did not constitute "severe" sexual harassment. The Court also reviewed the trial evidence as to the nature, timing, frequency and context of each of the incidents Brennan claimed supported a finding of "pervasive" sexual harassment and found there to be a lack of substantial evidence to support the jury's verdict. Specifically, the Court noted that Brennan saw the email only after Montgomery inadvertently sent it to another employee who was leaving the agency and that employee in turn forwarded it to Brennan. The Court also found insufficient to prove pervasiveness, evidence of several sex-based comments and activities over the course of a number of years, as well as evidence of alleged retaliation following Brennan's complaint about the email.

Employee Was Not Entitled To Indemnity For Fees Incurred In Defending Against Employer's Lawsuit

Nicholas Labs., LLC v. Chen, 2011 WL 4823329 (Cal. Ct. App. 2011)

Nicholas Labs sued its former employee, Christopher Chen, for breach of contract, conversion, negligence, money had and received, unjust enrichment, etc., after discovering that, while employed by Nicholas Labs, Chen had engaged in a business that made him a competitor of Nicholas Labs and that Chen had diverted business opportunities away from Nicholas Labs, stolen personal property of the company and misused company credit cards. Chen responded with a cross-complaint in which he claimed he had incurred and would continue to incur damages, including attorney's fees and costs, in defending himself against Nicholas Labs' claims. Chen invoked the indemnity provisions of Cal. Labor Code § 2802 and Cal. Corp. Code § 317 as the basis for his cross-complaint. On the eve of trial, the parties filed a stipulation in which Nicholas Labs dismissed its complaint without prejudice and Chen submitted his cross-complaint (in which he sought $90,000 in attorney's fees) to be determined by the trial court exclusive of a jury and without the presentation of live testimony. The trial court rejected Chen's claim for indemnity, holding that Section 2802 is applicable to third-party claims against an employee and not claims by an employer against its own employee. The Court of Appeal affirmed and further held that Chen was not entitled to indemnity under the Corporations Code because Nicholas Labs is an LLC and not a corporation. *See also CDF Firefighters v. Maldonado*, 2011 WL 5079589 (Cal. Ct. App. 2011) (union member was entitled to recover his attorney's fees as prevailing party in breach of contract action prosecuted against him by union).

Social Workers May Not Be "Learned Professionals" Who Are Exempt From The FLSA

Solis v. State of Washington, 656 F.3d 1079 (9th Cir. 2011)

The U.S. Secretary of Labor filed a complaint against the State of Washington's Department of Social and Health Services ("DSHS"), alleging a violation of the Fair Labor Standards Act of 1938 ("FLSA") based upon the DSHS's classification of its social workers as "learned professionals" exempt from the FLSA's overtime pay requirements. The district court granted DSHS's motion for summary judgment, but the Ninth Circuit reversed. In order to satisfy the "learned professional" exemption, an employer must show that a position requires advanced knowledge customarily acquired by a prolonged

course of specialized intellectual instruction. The Ninth Circuit held that because the social worker positions at issue in this case require only a degree in one of several diverse academic disciplines or sufficient coursework in any of those disciplines, DSHS had failed to meet its burden of showing the social work positions "plainly and unmistakably" met the regulatory requirement. *See also Kairy v. SuperShuttle Int'l*, 2011 WL 5222891 (9th Cir. 2011) (federal district court has subject matter jurisdiction to determine whether passenger stage corporation drivers are employees or independent contractors under California law).

Ninth Circuit Recognizes Priests' Privacy Interest In Their Personnel Files

In re Roman Catholic Archbishop of Portland, 2011 WL 5304130 (9th Cir. 2011)

Documents that were produced in discovery and filed in the bankruptcy court contained allegations that Fathers "M" and "D" (two priests who were not parties to the Portland Archdiocese's bankruptcy case) had sexually abused children. The bankruptcy court held that the discovery documents could be disclosed to the public because the public's interest in disclosure outweighed the priests' privacy interests and that the documents filed in court could be disclosed to the public because they did not contain "scandalous" allegations for purposes of 11 U.S.C. § 107(b). The district court affirmed, but the Ninth Circuit reversed in part, holding that the bankruptcy court should have redacted the name of one of the two priests (who is 88 years old and has been retired since 1989). However, the Court upheld disclosure of the information relating to the other priest, who is not retired and who continues to work as a priest in his community, where his clerical duties may bring him into contact with children.

City Of Redondo Beach's Day Laborer Ordinance Is Unconstitutional

Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936 (9th Cir. 2011) (en banc)

In May 1987, the City of Redondo Beach adopted an ordinance that prohibits any person to "stand on a street or highway and solicit…employment, business, or contributions from an occupant of any motor vehicle." In 2004, the city initiated the "Day Labor Enforcement Project" in which undercover officers, posing as potential employers, arrested 35 day laborers "for soliciting from stopped vehicles." In response to the arrests, the Comite de Jornaleros and the National Day Laborer Organizing Network filed suit, alleging that the ordinance is a facially unconstitutional restriction on day laborers' and others' first amendment rights. The Ninth Circuit affirmed the district court's judgment (over a "deep dissent" from Chief Judge Kozinski and Judge Bea), holding the ordinance to be facially unconstitutional because it was not narrowly tailored to achieve the city's goals.

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The following Los Angeles lawyers welcome any questions you might have.

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