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newsletter

California Employment Law Notes

March 2012
Vol. 11, No. 2

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By **Anthony J. Oncidi***

Teacher/Minister's Disability Discrimination Claim Is Barred By The First Amendment

Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. ___, 132 S. Ct. 680 (2012)

Cheryl Perich was a "called" teacher for the church and also had the formal title of "Minister of Religion, Commissioned." After Perich developed narcolepsy, the church replaced her with a lay teacher and eventually terminated her employment for "insubordination and disruptive behavior." Perich filed a claim with the EEOC, claiming she had been terminated in violation of the Americans with Disabilities Act. Invoking the "ministerial exception," the church argued the lawsuit was barred by the First Amendment because Perich's claims concerned the employment relationship between the church and one of its ministers. The district court agreed and granted the church's summary judgment motion, but the Sixth Circuit Court of Appeals reversed. In this opinion, the Supreme Court reversed the Sixth Circuit, holding that Perich was a minister within the meaning of the "ministerial exception" and that an award of relief to Perich would operate as a penalty on the church for terminating an unwanted minister. *See also White v. City of Pasadena*, 2012 WL 118569 (9th Cir. 2012) (employee's prior litigation against the city in state court precluded this action alleging disability discrimination).

Community College Employee Is Entitled To New Trial On Whistleblower Claims

Mize-Kurzman v. Marin Cmty. Coll. Dist., 202 Cal. App. 4th 832 (2012)

Pamela Mize-Kurzman, who had been promoted to Dean of Enrollment Services as part of a settlement of a previous lawsuit against the district, claimed the district retaliated against her for disclosing what she believed to be violations of the law or regulations to various individuals and entities. Mize-Kurzman went to trial against the district on claims alleging violation of the whistleblower protection provisions codified in Cal. Labor Code § 1102.5 and the Education Code. The jury deliberated two days before finding against Mize-Kurzman on all of her claims. In this appeal, Mize-Kurzman asserted instructional error on the part of the trial court. The Court of Appeal reversed the judgment and ordered a new trial after concluding the trial court had erroneously instructed the jury.

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Specifically, the Court held the trial court had erroneously instructed the jury that a plaintiff must prove that any disclosure was made in good faith and for the public good and not for personal reasons, holding that "it may often be the case that a personal agenda or animus towards a supervisor or other employees will be one of several considerations motivating the employee whistleblower to make a disclosure regarding conduct that the employee also reasonably believes violates a statute or rule or constitutes misconduct." The Court also held that it was error to instruct the jury that "debatable differences of opinion concerning policy matters are not protected disclosures" and "information passed along to a supervisor in the normal course of duties is not a protected disclosure." However, the Court found no error in the instructions that "reporting publicly known facts is not a protected disclosure" and "efforts to determine if a practice violates the law are not protected disclosures." The Court did find error in the trial court's admission of evidence of Mize-Kurzman's retirement eligibility and income with respect to the issue of mitigation of her damages. *See also Chaaban v. Wet Seal, Inc.*, 203 Cal. App. 4th 49 (2012) (prevailing party that served Cal. Code Civ. Proc. § 998 may recover fees paid to opposing party's expert witness).

LAPD Officer's $2.1 Million Jury Award For Retaliation Is Reversed

Joaquin v. City of Los Angeles, 202 Cal. App. 4th 1207 (2012)

Richard Joaquin alleged his employment as an LAPD officer was terminated in retaliation for his having filed a sexual harassment complaint against his supervisor, Sgt. James Sands. The case was tried to a jury and Joaquin was awarded more than $2.1 million in damages. On appeal, the city asserted that Joaquin had failed to introduce substantial evidence that its decision to terminate his employment was motivated by retaliatory animus or intent. The Court of Appeal agreed and reversed the judgment, holding that "in appropriate circumstances, an employer may discipline or terminate an employee for making false charges, even where the subject matter of those charges is an allegation of sexual harassment." Specifically, the Court held that although Sands may have wanted Joaquin disciplined for having alleged sexual harassment, there was no evidence that Sands played a role in or had the power to effect the termination of Joaquin's employment. Although not part of its holding in this case, the Court identified a "significant flaw" in CACI No. 2505 because it does not clearly state that retaliatory intent is a necessary element of a FEHA retaliation claim.

Army Corps Of Engineers Employee Could Proceed With Age Discrimination Claim

Shelley v. Geren, 666 F.3d 599 (9th Cir. 2012)

After Devon Scott Shelley applied for but was not promoted to be Chief of Contracting for the Army Corps of Engineers, he filed this lawsuit alleging age discrimination in violation of the Age Discrimination in Employment Act. The district court granted summary judgment to the Corps based upon the Supreme Court's opinion in *Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167 (2009). However, the Ninth Circuit reversed the summary judgment, refusing to apply *Gross* in the summary judgment context and applying instead the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Because Shelley had provided both direct and indirect evidence that the proffered reason for his termination was pretextual, the Ninth Circuit reversed the summary judgment that had been entered in favor of the Corps.

PAGA Judgment Is Mostly Affirmed In Employee's Favor

Thurman v. Bayshore Transit Mgmt., Inc., 2012 WL 604037 (Cal. Ct. App. 2012)

Leander Thurman sued Bayshore for alleged violations of the Private Attorneys General Act of 2004 ("PAGA") and the Unfair Competition Law and, following a bench trial, a judgment was entered imposing civil penalties, including unpaid wages, against Bayshore in the total amount of $358,588 and awarding Thurman restitution in the amount of $28,605. Both sides appealed, and the Court of Appeal generally affirmed the judgment except it reversed the trial court's award for missed meal periods after July 2003 because Thurman's complaint contained judicial admissions that defendants had provided meal periods as required since that date. The Court of Appeal affirmed the trial court's orders denying a continuance of the trial; denying Thurman's motion to certify the case as a class action; denying PAGA penalties under a wage order (as opposed to a statute); reducing defendants' civil penalties by 30 percent because they had attempted to comply with the law; awarding underpaid wages as part of a civil penalty; and permitting PAGA penalties for missed rest periods. *See also Bridgeford v. Pacific Health Corp.*, 202 Cal. App. 4th 1034 (2012) (unnamed putative members of a class that was never certified are not bound by collateral estoppel, and PAGA claims should not have been dismissed); *Pickett v. Superior Court*, 2012 WL 556314 (Cal. Ct. App. 2012) (two related PAGA cases were not "one action" for purposes of a Cal. Code Civ. Proc. § 170.6 peremptory challenge to the judge).

Employer Was Deprived Of Due Process By Trial Court's Erroneous Use Of Representative Sampling

Duran v. U.S. Bank Nat'l Ass'n, 2012 WL 366590 (Cal. Ct. App. 2012)

U.S. Bank ("USB") appealed a $15 million judgment that was entered against it following a bifurcated bench trial. The plaintiffs are 260 current and former business banking officers who claimed they were misclassified by USB as outside sales personnel exempt from overtime pay. The Court of Appeal agreed with USB that the trial management plan prevented it from defending against the individual claims of over 90 percent of the class because the plan erroneously relied on a representative sampling of 21 of the 260 class members. Citing the Supreme Court's opinion in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Court stated that "While *Wal-Mart* is not dispositive of our case, we agree with the reasoning that underlies the court's view that representative sampling may not be used to prevent employers from asserting individualized affirmative defenses in cases where they are entitled to do so." *See also Muldrow v. Surrex Solutions Corp.*, 202 Cal. App. 4th 1232 (2012) (trial court properly determined that recruiters were exempt commissioned employees).

California Law Should Have Been Applied To Determine If Drivers Were Employees Or Independent Contractors

Ruiz v. Affinity Logistics Corp., 2012 WL 388171 (9th Cir. 2012)

Fernando Ruiz and similarly situated drivers filed a class action against Affinity alleging violations of the Fair Labor Standards Act and California law for failure to pay overtime, failure to pay wages, improper charges for workers' compensation insurance and unfair business practices. To work for Affinity, the drivers had to enter into an "Independent Truckman's Agreement and Equipment Lease Agreement" with Affinity, which stated that the parties were entering into an independent contractor relationship and that Georgia law applied to any disputes. The district court applied Georgia law and ruled in favor of Affinity, but the Ninth Circuit vacated the judgment and remanded the case after concluding that the parties' choice of Georgia law was unenforceable and that California (not Georgia) law applied. On remand, the district court was ordered to apply California law in order to determine whether the drivers are employees or independent contractors.

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 lawyers welcome any questions you might have.

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