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By **Anthony J. Oncidi***

Desperate Housewife's Wrongful Termination Claim Should Have Been Dismissed

Touchstone Television Prods. v. Superior Court, 208 Cal. App. 4th 676 (2012)

Touchstone had an agreement with actress Nicollette Sheridan that gave it the exclusive option to renew Sheridan's contract on an annual basis for an additional six seasons (after the first season) of the television show "Desperate Housewives." Sheridan sued Touchstone for wrongful termination in violation of public policy, claiming she had been fired because she had complained about a battery allegedly committed upon her by Marc Cherry, the creator of the show. When the jury deadlocked on this claim, Touchstone moved for a directed verdict, contending that it had not terminated Sheridan, but rather had simply not renewed her contract for an additional season. The trial court denied the motion, but the Court of Appeal issued an alternative writ of mandate compelling the trial court to grant the directed verdict motion on the ground that a cause of action for wrongful termination in violation of public policy does not lie if an employer decides simply not to exercise an option to renew a contract. The Court also ordered the trial court to permit Sheridan to file an amended complaint alleging a cause of action under Labor Code § 6310(b) (prohibiting retaliation against an employee who complains about unsafe working conditions, etc.) *See also Howard Entertainment, Inc. v. Kudrow*, 2012 WL 3704928 (Cal. Ct. App. 2012) (entertainer's former personal manager could proceed with breach of contract claim in which he seeks a percentage of the entertainer's income from the services rendered during the period of his retention).

Post-Employment Non-Compete Covenant Could Not Be Enforced Against Seller/Employee Of Company

Fillpoint, LLC v. Maas, 2012 WL 3631266 (Cal. Ct. App. 2012)

Michael Maas sold his stock in Crave Entertainment Group, Inc. to Handleman Company and signed a stock purchase agreement that contained a three-year covenant not to compete. Maas signed a separate employment agreement with Crave that contained a one-year covenant not to compete, which would become operative when Maas's employment with Crave ended. Maas resigned from Crave three years after the acquisition and, approximately six months later, began working for a competitor of Crave. Fillpoint, which had acquired Crave from Handleman, sued Maas for breach of the non-

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compete covenant contained in the employment agreement and also sued Maas's new employer for interference with contract. The trial court granted defendants' motion for nonsuit, and the Court of Appeal affirmed, holding that the post-employment non-compete/non-solicitation covenants were void and unenforceable under California law because they "targeted an employee's fundamental right to pursue his or her profession."

Former Church Ministers May Not Proceed With Trafficking Victims Protection Act Claims

Headley v. Church of Scientology Int'l, 687 F.3d 1173 (9th Cir. 2012)

Marc and Claire Headley were ministers in the Sea Organization ("Sea Org"), which is an elite religious order of the Church of Scientology. The Sea Org demands much of its ministerial members, renders strict discipline, imposes stringent ethical and lifestyle constraints and goes to great efforts to retain clergy and to preserve the integrity of the ministry. The Headleys claimed they worked more than 100 hours per week and that each received a $50 weekly stipend as well as room and board at the Church's headquarters in Gilman Hot Springs, California. After leaving the Sea Org, the Headleys sued the Church under the federal Trafficking Victims Protection Act, which makes it a crime "knowingly" to "provide or obtain the labor or services of a person by…means of force, threats of force, physical restraint," etc. The Headleys alleged the Church "psychologically coerced" them to provide forced labor, but the Ninth Circuit affirmed summary judgment against the Headleys because "the record contains little evidence that the defendants obtained the Headleys' labor 'by means of' serious harm, threats, or other improper methods." The Court did not find it necessary to consider the applicability of the ministerial exception defense in this case.

Ninth Circuit Certifies Question To California Supreme Court Regarding Commission Exemption

Peabody v. Time Warner Cable, Inc., 2012 WL 3538753 (9th Cir. 2012)

Susan J. Peabody was employed as a commissioned salesperson by Time Warner Cable ("TWC") for approximately 10 months. Peabody's commissions were based on the revenue generated by advertising that was aired every broadcast month, which lasted four or five weeks. Peabody also received a base salary of $20,000 per year. During her 10 months of employment, Peabody was paid approximately $75,000 in total compensation. In this putative class action, Peabody alleges that her earnings did not exceed one and one-half times the minimum wage at all relevant times because she only received commission payments every four or five weeks. On the other hand, TWC contends that Peabody's earnings should be calculated based on the broadcast month so that Peabody's commissions count towards the pay period in which they were earned rather than the pay period in which the commissions were actually paid. Finding no "California case directly on point" and disregarding the DLSE Manual, the U.S. Court of Appeals for the Ninth Circuit certified the following question to be answered by the California Supreme Court pursuant to Cal. Rule of Court 8.548:

> To satisfy California's compensation requirements, whether an employer can average an employee's commission payments over certain pay periods when it is equitable and reasonable for the employer to do so.

Appellate Courts Begin To Apply *Brinker* Decision

Hernandez v. Chipotle Mexican Grill, Inc., 2012 WL 3579567 (Cal. Ct. App. 2012)

Rogelio Hernandez appealed from the order denying his motion for class certification and granting Chipotle's motion to deny class certification as to his claims that Chipotle denied non-exempt employees their meal and rest breaks. Chipotle moved to deny class certification on the ground that it had met its responsibility under California law to *provide* (i.e., to authorize and permit) employees to take meal and rest breaks. Hernandez contended that while an employer need only provide employees with rest breaks, it must *ensure* that employees take their meal breaks. Relying upon the California Supreme Court's opinion in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012), the court held that an employer need only provide not ensure meal and rest breaks and that the trial court had properly denied class certification. *See also Lamps Plus Overtime Cases*, 2012 WL 3587610 (Cal. Ct. App. 2012) (same); *Muldrow v. Surrex Solutions Corp.*, 2012 WL 3711553 (Cal. Ct. App. 2012) (employment recruiters were properly classified as exempt commissioned employees and were properly provided meal and rest breaks).

Claim For Unpaid Vacation Benefits Was Properly Dismissed

Bell v. H.F. Cox, Inc., 2012 WL 3846827 (Cal. Ct. App. 2012)

Oscar Bell and other truck drivers filed a putative class action against Cox, alleging wage and hour violations. Among other things, the drivers alleged that Cox had failed to pay promised vacation benefits to current employees (it paid them a flat rate of $500 of vacation pay per week, which was later increased to $650) as well as vacation benefits due upon termination of employment. The trial court held that the vacation benefits claims were preempted by ERISA. The Court of Appeal reversed in part, finding a triable issue of fact as to whether Cox's vacation benefits plan was funded from Cox's general assets or from a separate trust (as required by ERISA). However, the Court held that the trial court had properly adjudicated in Cox's favor the claim for failure to pay promised vacation benefits because "a vacation benefits policy [need not] provide for payment of vacation time at an employee's regular rate of pay." The Court also determined that the employees are exempt from the FLSA's overtime compensation requirement pursuant to the Motor Carrier Exemption. Finally, the Court held that the partial reversal of the judgment compelled reversal of the trial court's award to Cox of $120,000 in attorney's fees. *See also Arias v. Kardoulias*, 207 Cal. App. 4th 1429 (2012) (employee's untimely appeal of labor commissioner's award did not entitle employer to recovery of attorney's fees pursuant to Labor Code § 98.2); *Hester v. Vision Airlines*, 687 F.3d 1162 (9th Cir. 2012) (answer of employer that engaged in multiple discovery violations was properly stricken, default judgment was properly entered and class should have been permitted to seek punitive damages during trial).

Employee Who Attempted To Buy Shoes For A Friend At Company Expense Was Entitled To Unemployment Benefits

Robles v. Employment Dev. Dep't, 207 Cal. App. 4th 1029 (2012)

Jose Robles worked as a service technician for Liquid Environmental Solutions for four years prior to his termination. His job was to collect food grease from restaurants and

other food outlets. Robles's employment was terminated after he attempted to buy shoes for a friend with the $150 annual shoe allowance that Robles received from the company. Although Robles's intent was to "perform a noble gesture for a friend," the EDD denied him unemployment benefits because he "broke a reasonable employer rule." Robles challenged the EDD's determination by filing a petition for writ of administrative mandate with the Court of Appeal, which reversed the decision of the Board because although Robles knew that the employer intended its employees to use the shoe allowance to purchase safety shoes for work, the element of culpable intent was not established. The Court also noted that the employer did not oppose benefits, did not speak with the EDD investigators and did not present evidence in opposition to the claim for benefits. *See also McGuire v. Employment Dev. Dep't*, 2012 WL 3590790 (Cal. Ct. App. 2012) (the base period to be used for determining eligibility for extended unemployment benefits is the same base period used for determining regular unemployment compensation benefits).

Former Lockheed Engineer May Proceed With False Claims Act Lawsuit

Hooper v. Lockheed Martin Corp., 2012 WL 3124970 (9th Cir. 2012)

Nyle J. Hooper brought suit against Lockheed Martin under the qui tam provisions of the False Claims Act (the "FCA"). Hooper filed suit in the District Court for the District of Maryland, which transferred the suit at Lockheed's request to the Central District of California on forum non conveniens grounds. The California district court granted summary judgment in favor of Lockheed on all grounds, but the Ninth Circuit reversed in part. The Ninth Circuit affirmed summary judgment in Lockheed's favor of Hooper's claims of fraudulent use of certain software and defective testing procedures because there is no genuine issue of material fact as to whether Lockheed "knowingly" submitted a false claim to the government regarding those issues. However, the Court reversed summary judgment of Hooper's wrongful discharge claim because the district court erroneously applied California's two-year statute of limitations rather than Maryland's three-year statute. The Court also reversed the dismissal of Hooper's claim that Lockheed violated the FCA by knowingly underbidding the contract at issue. *See also Fahlen v. Sutter Central Valley Hospitals*, 208 Cal. App. 4th 557 (2012) (whistleblower doctor need not exhaust administrative remedies before filing a whistleblower lawsuit under Health & Safety Code § 1278.5); *Aguilar v. Goldstein*, 207 Cal. App. 4th 1152 (2012) (anti-SLAPP motion was properly denied in response to plaintiff physicians' breach of fiduciary duty lawsuit).

Loss Of Consortium Claim Of Injured Employee's Spouse Should Have Been Dismissed

LeFiell Mfg. Co. v. Superior Court, 2012 WL 3570743 (Cal. S. Ct. 2012)

O'Neil Watrous and his wife Nidia filed a civil action against LeFiell Manufacturing for injuries O'Neil suffered while he was operating a swaging machine at work. The swaging machine is a "power press machine" within the meaning of Cal. Labor Code § 4558 – an injury from which provides an exception to the workers' compensation exclusivity rule that usually applies to industrial injuries. In addition to O'Neil's claims, Nidia asserted a claim

for loss of consortium. The Supreme Court held that Nidia's loss of consortium claim should have been dismissed on demurrer by the trial court because "where, as here, the worker's power press injuries do not prove fatal, the Legislature has expressly restricted standing to bring the action at law… to the injured worker alone [and not his spouse]."

Insurance Claims Adjusters Are Not Exempt Administrative Employees

Harris v. Superior Court, 207 Cal. App. 4th 1225 (2012)

Plaintiffs in this case are insurance claims adjusters who claim they were misclassified as exempt from overtime under the administrative exemption. The Court of Appeal held that because the adjusters' primary work duties are the day-to-day tasks of adjusting individual claims and are not directly related to management policies or general business operations, the adjusters were improperly classified as exempt from overtime under the administrative exemption.

California Increases Protection of Religious Expression in the Workplace

Effective January 1, 2013, California employers will be required to accommodate their employees' religious dress and grooming practices. Governor Brown has signed into law the "Workplace Religious Freedom Act of 2012" (authored by Assemblymember Mariko Yamada (D-Davis)), which specifies that religious dress and grooming practices shall be considered a protected religious observance under the California Fair Employment and Housing Act. The bill defines "religious dress practice" to broadly include "the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed." "Religious grooming practice" is defined broadly to include "all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed." The bill expressly prohibits segregation from the public or other employees as a form of accommodation. Employers should recognize that the new law increases the likelihood that employees or applicants who avail themselves of such religious dress and/or grooming practices may claim that any adverse job action that they happen to suffer (even if unrelated to such practices) is retaliation by the employer for the expression of their rights under the statute.

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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