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By **Anthony J. Oncidi***

$1.347 Million Award To Former General Counsel For Breach Of Implied Contract Is Upheld

Faigin v. Signature Group Holdings, Inc., 211 Cal. App. 4th 726 (2012)

Alan W. Faigin worked as an in-house attorney for Fremont General Corporation (which later became Signature Group Holdings) for 17 years before his employment was terminated for cause in March 2008. Faigin sued Fremont based on a number of theories, including breach of an implied-in-fact contract, and a jury returned a verdict in Faigin's favor in the amount of $1,347,000. The Court of Appeal affirmed the judgment, holding that the absence of an express employment-at-will agreement supported Faigin's assertion that his employment was subject to an implied-in-fact contract that the employment could only be terminated for good cause. The court also affirmed the award of damages and held that it did not constitute an illegal "golden parachute" payment within the meaning of the Federal Deposit Insurance Act. The court also ruled that "oral assurances of job security… [are,] in and of themselves, evidence of the existence of an implied promise" and are, therefore, not inadmissible hearsay. Finally, the court held that the denial of prejudgment interest to Faigin was proper.

$114,000 Pregnancy Discrimination Award Is Reversed Based On Erroneous Jury Instructions

Veronese v. Lucasfilm Ltd., 2012 WL 6628544 (Cal. Ct. App. 2012)

Julie Gilman Veronese sued Lucasfilm on a number of theories, including pregnancy discrimination, failure to prevent pregnancy discrimination and wrongful termination in violation of public policy. Following 11 days of trial and three days of deliberation, the jury returned a verdict in favor of Veronese in the amount of $93,830 for past economic damages and $20,000 for emotional distress damages. The trial court later awarded Veronese $1,157,411 in attorney's fees. The Court of Appeal reversed the judgment because the trial court refused to give a special instruction involving the exercise of business judgment that was proposed by Lucasfilm:

> "You may not find that Lucasfilm discriminated or retaliated against Julie Gilman Veronese based upon a belief that Lucasfilm made a wrong or unfair decision. Likewise, you cannot find liability for discrimination or retaliation if you find that Lucasfilm made an error in business judgment. Instead, Lucasfilm can only be

*Anthony J. Oncidi is a Partner in and the Chair of Proskauer's Labor and Employment Law Department 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.

liable to Julie Gilman Veronese if the decisions made were motivated by discrimination or retaliation related to her being pregnant."

The court further held that it was error for the trial court to instruct the jury (at Veronese's request) that "[a] potential hazard to a fetus or an unborn child is not a defense to pregnancy discrimination" because Lucasfilm did not assert such a concern as a defense to discrimination in this case. The court also found error based upon the trial court's failure to instruct the jury on the failure to prevent discrimination claim (even though the jury found for Veronese on that claim) and on the difference between the termination claim and the failure to hire/promote claim.

Wrongful Termination Claim Was Properly Dismissed Based Upon Employee's Ineligibility For Family Leave

Olofsson v. Mission Linen Supply, 2012 WL 6200336 (Cal. Ct. App. 2012)

Lars Olofsson was a regular route driver for Mission Linen when he informed the plant manager (Jack Anderson, Sr.) that he needed seven weeks off from work to care for his elderly mother in Sweden who was recuperating from back surgery. Anderson told Olofsson he could have the leave if he filled out the application for leave and submitted a doctor's certification. Olofsson later submitted a letter, ostensibly from his mother's doctor that was not on printed letterhead indicating it was generated by a medical establishment. Later, the company notified Olofsson that he was ineligible for family leave because he had not worked the requisite 1,250 hours in the year preceding the leave (he was approximately 75 hours short). Further, Olofsson failed to give the company 30 days' advance notice of a foreseeable event such as a family member's planned medical treatment. The trial court granted judgment in favor of the employer, concluding that it did not misrepresent by deed that Olofsson's leave had been approved and that it was not silent when it had a duty to speak under the applicable family leave regulations. The Court of Appeal affirmed the judgment.

Police Officer Who Had Heart Attack Could Not Perform Essential Functions Of Administrative Job

Lui v. City and County of San Francisco, 211 Cal. App. 4th 962 (2012)

After suffering a major heart attack, Kenneth Lui retired from his position as a police officer with the San Francisco Police Department. After the Department informed him there were no administrative positions available that did not require him to perform the strenuous duties regularly performed by patrol officers in the field, he sued for disability discrimination under the Fair Employment and Housing Act. The trial court entered judgment in favor of the Department, and the Court of Appeal affirmed, holding that even though officers in administrative positions are not frequently required to engage in strenuous physical activity, the ability to perform such duties is essential because the Department has a legitimate need to be able to deploy officers in those positions in the event of emergencies and other mass mobilizations. *See also Furtado v. State Personnel Bd.,* 2013 WL 64657 (Cal. Ct. App. 2013) (peace officer was properly demoted because he was unable to perform the essential functions of his job with or without accommodation); *Basurto v. Imperial Irrigation Dist.,* 211 Cal. App. 4th 866 (2012) (public... employee's civil claims for age and race discrimination were barred under principles of estoppel and res judicata by a prior adverse administrative decision of the

district's governing board); *Edgerly v. City of Oakland*, 2012 WL 6194390 (Cal. Ct. App. 2012) (former city administrator who was allegedly terminated for refusing to violate the city's charter, municipal code and civil service rules and resolutions could not state claim for violation of the statewide whistleblower statute, Labor Code § 1102.5).

$125,000 Verdict And $550,000 Fee Award Affirmed For Negligent Supervision And Violation Of Civil Code § 51.7 (Freedom From Violence)

Ventura v. ABM Indus., Inc., 2012 WL 6636255 (Cal. Ct. App. 2012)

Sylvia Ventura worked as a janitor for ABM. Ventura alleged a history of harassment and an act of violence by her supervisor, Carlos Manzano, and ratification by ABM. The jury awarded Ventura $100,000 in compensatory damages for past mental suffering. The trial court entered judgment in Ventura's favor in the amount of the compensatory damages plus a $25,000 civil penalty under Civil Code § 51.7; the trial court also awarded Ventura $550,000 in attorney's fees. The Court of Appeal affirmed, holding that ABM had waived the defense of the workers' compensation bar to the negligence-based claims because it had failed to ask the trial court to dismiss those claims (even though it had raised the defense in its answer). The Court also held that it was not error for the trial court to permit Ventura to file a second amended complaint asserting the section 51.7 claim on the eve of trial. For reasons that are unclear, Ventura asserted no claims under the Fair Employment and Housing Act and, according to the concurring and dissenting opinion, "turned to a novel and unprecedented avenue for an attorney fees and penalty award by successfully invoking Civil Code section 51.7."

Certification Was Properly Denied In Class Action Seeking Reimbursement From Employer

Morgan v. Wet Seal, Inc., 210 Cal. App. 4th 1341 (2012)

Crystal Morgan and two other former employees sued Wet Seal because the company allegedly required employees to purchase Wet Seal clothing and merchandise as a condition of employment and also failed to reimburse employees for their mileage between Wet Seal business locations. The trial court denied class certification on the ground that common questions do not predominate over individual questions. The court of Appeal affirmed, holding that Wet Seal's policies did not require employees to wear Wet Seal clothing, providing only that employees must dress in a manner "consistent with current fashion style that is reflected in the stores." As for the travel expense claim, the court held that plaintiffs had essentially conceded that "Wet Seal's travel reimbursement practice was not consistent across the board."

Trial Court Erred In Failing To Certify Class Action For Unpaid Overtime And Meal-And-Rest Breaks

Bradley v. Networkers Int'l, LLC, 2012 WL 6182473 (Cal. Ct. App. 2012)

The three named plaintiffs in this case were among approximately 140 skilled workers retained by Networkers to provide repair and installation services at cell sites. Each worker was required to sign a standard contract, which stated that he or she was an independent contractor rather than an employee. The purported independent contractor

agreement was later replaced with an employment agreement under which only one of the named plaintiffs had worked. The trial court denied class certification, but the Court of Appeal reversed the order except with respect to plaintiffs' claims for alleged off-the-clock violations as to which the court held class certification was properly denied. As for the meal and rest break and unpaid overtime claims, the Court distinguished *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012) and held that under this employer's "uniform practice, none of the workers was provided, or given authorization to take, the required meal or rest breaks" because they had been treated as "independent contractors." Thus, class certification was improperly denied as to those claims. *Cf. Barnes, Crosby, Fitzgerald & Zeman v. Ringler*, 2012 WL 6633855 (Cal. Ct. App. 2012) (attorney may be equitably estopped from claiming a fee-sharing agreement is unenforceable where the attorney is responsible for non-compliance with the rules requiring informed written consent from the client).

Proskauer's nearly 200 Labor and Employment lawyers address the most complex and challenging labor and employment law issues faced by employers.

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

Kenneth Sulzer, Partner
310.284.5663 – ksulzer@proskauer.com

Mark Theodore, Partner
310.284.5640 – mtheodore@proskauer.com