Proskauer

newsletter

November 2012
Vol. 11 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***

"A Motivating Reason" Jury Instruction Is Upheld In Pregnancy Discrimination Case

Alamo v. Practice Mgmt. Info. Corp., 2012 WL 4450066 (Cal. Ct. App. 2012)

Lorena Alamo sued her former employer Practice Management Information Corp. ("PMIC") for pregnancy discrimination and retaliation in violation of the California Fair Employment and Housing Act ("FEHA") and wrongful termination in violation of public policy. Alamo was terminated for poor work performance after she returned from maternity leave. Following a jury trial, Alamo was awarded damages in the amount of $10,000, and the court awarded her attorney's fees in the amount of $50,858.44 under FEHA. On appeal, PMIC challenged the trial court's use of several pattern jury instructions that required Alamo to prove that her pregnancy-related leave was only "a motivating reason" for her termination rather than the "but for" cause of the termination. The trial court also refused to give a "mixed motive" instruction under BAJI No. 12.26 because both parties had treated the case as a single-motive pretext case. The Court of Appeal affirmed the judgment, holding that the jury had been properly instructed and that Alamo had been properly awarded her attorney's fees as the prevailing party under FEHA.

Wrongful Termination Claim Based Upon Workers' Compensation Filing Was Properly Dismissed

Dutra v. Mercy Med. Ctr. Mt. Shasta, 209 Cal. App. 4th 750 (2012)

Michelle Dutra sued Mercy Medical Center for wrongful termination in violation of public policy based upon Cal. Labor Code § 132a (prohibiting discrimination against an employee who has filed a workers' compensation claim). After a jury was selected, the trial court granted Mercy's motion to dismiss on the ground that the Workers' Compensation Appeals Board ("WCAB") has exclusive jurisdiction to adjudicate claims under section 132a. (Dutra declined the trial court's invitation to amend her complaint to allege additional claims.) The Court of Appeal affirmed dismissal after distinguishing *City of Moorpark v. Superior Court*, 18 Cal. 4th 1143 (1998) and concluding that section 132a does not provide a basis for a common law wrongful termination claim because "allowing plaintiff to pursue a tort cause of action based on a violation of section 132a would impermissibly give her broader remedies and procedures than that provided by the statute."

*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.

Minimal Allegations Were Sufficient To State Claim For Age Discrimination

Sheppard v. David Evans & Assoc., 694 F.3d 1045 (9th Cir. 2012)

Kathryn Sheppard filed a brief, two-and-a-half page complaint in federal court alleging discrimination under the Age Discrimination in Employment Act ("ADEA") and wrongful termination under Oregon state law. The district court dismissed Sheppard's complaint with prejudice under FRCP 8(a)(2) after concluding she had failed to plead a cause of action with sufficient factual detail to state a claim. The Ninth Circuit reversed, holding that under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), a complaint need not contain "detailed factual allegations."

Summary Judgment Was Properly Granted In Race Discrimination Case

Batarse v. Service Employees Int'l Union, 209 Cal. App. 4th 820 (2012)

Ray Batarse sued the SEIU for race discrimination, among other things, associated with the termination of his employment. The trial court granted the employer's motion for summary judgment based upon Cal. Code Civ. Proc. § 437c(b)(3) because of Batarse's failure to include a separate statement of disputed and undisputed facts. Batarse asserted on appeal that the court had abused its discretion by failing to grant him a continuance in order to file a proper separate statement. The Court of Appeal affirmed summary judgment for the SEIU after determining that Batarse had not established any prejudice arising from the denial of an opportunity to correct the defective separate statement because the evidence cited by Batarse in his opposition to the motion was insufficient to raise a triable issue of material fact. Among other things, the court noted that the SEIU had produced substantial evidence of legitimate, nondiscriminatory reasons for the termination – including that Batarse had made false statements regarding his law practice during the application process and had failed to disclose that he had resigned from the State Bar while disciplinary charges were pending against him. Moreover, when the decision was made to terminate his employment, the SEIU decision-maker was not aware of Batarse's race or national origin or of any complaints he may have made about discrimination, harassment or retaliation. Batarse failed to establish that any of these reasons for the SEIU's termination decision was pretext for discrimination or retaliation.

Employee Was Bound By Stipulated Injunction That Prohibited His Solicitation Of Customers

Wanke, Indus., Commercial, Residential, Inc. v. Superior Court, 209 Cal. App. 4th 1151 (2012)

In an underlying lawsuit, Wanke sued its former employees Scott Keck and Jacob Bozarth for misappropriation of trade secrets, among other things. That lawsuit was settled, and the parties agreed to a stipulated injunction pursuant to which Keck, Bozarth and their company WP Solutions (collectively, "WP Solutions") would not contact or solicit certain specified Wanke customers. When WP Solutions contacted Con Am Management (one of Wanke's customers), Wanke filed an application for an order to show cause requesting the trial court to hold WP Solutions in contempt for having violated the terms of the stipulated injunction. The trial court acquitted WP Solutions and denied Wanke's

motion to enforce the settlement agreement after determining that the stipulated injunction was invalid under Cal. Bus. & Prof. Code § 16600 (which prohibits non-compete covenants).

The Court of Appeal held that the double jeopardy clauses of the Fifth Amendment to the United States Constitution precluded reexamination of the court-decreed acquittal of WP Solutions. However, the Court held that the trial court had erred in failing to enforce the stipulated injunction with respect to WP Solutions' solicitation of Wanke's customers – "WP Solutions may not stipulate to an injunction that identifies certain customers whom they will not solicit, in order to resolve claims that they misappropriated Wanke's trade secrets, then proceed to violate the stipulated injunction and defend against its enforcement by claiming that Wanke's customer list is not a trade secret."

Former CEO's Qui Tam Action Was Improperly Dismissed Under Anti-SLAPP Statute

People ex rel. Strathmann v. Acacia Research Corp., 2012 WL 5233520 (Cal. Ct. App. 2012)

Michael Strathmann filed a qui tam complaint against his former employer Acacia in which he alleged insurance fraud. In response, Acacia filed a special motion to strike the complaint pursuant to the anti-SLAPP statute (Cal. Code Civ. Proc. § 425.16), which the trial court granted. The Court of Appeal reversed the dismissal, holding that Strathmann's complaint is protected by the public interest exception to the anti-SLAPP statute (section 425.17(b)). The Court concluded that Strathmann was not seeking personal relief, but rather he was seeking recovery from the bounty to which he might be entitled under the Insurance Code. *See also Hawran v. Hixson*, 209 Cal. App. 4th 256 (2012) (former employee's claims did not fall within commercial speech exemption of the anti-SLAPP statute, but employee did demonstrate reasonable probability of prevailing on his claims for defamation, invasion of privacy, unfair business practices and breach of contract, so anti-SLAPP motion was properly denied); *Young v. Tri-City Healthcare Dist.*, 2012 WL 4900847 (Cal. Ct. App. 2012) (physician's claim challenging summary suspension should not have been dismissed under anti-SLAPP statute).

Employer Is Entitled To Recover Its Fees As Prevailing Party In Reporting Time Pay Case

Aleman v. AirTouch Cellular, 209 Cal. App. 4th 556 (2012)

Two members of a putative class appealed from a trial court order granting summary judgment against them. The Court of Appeal affirmed summary judgment on the ground that the employee was not entitled to receive reporting time pay for attending meetings at work because all of the meetings in question were scheduled in advance, and the employee worked at least half of the scheduled time. The Court also held that another employee was not owed additional compensation for working split shifts because on each occasion a split shift was worked, the employee earned more than the minimum amount of pay required by the applicable wage order. In an earlier opinion, the Court of Appeal had reversed the trial court's award to AirTouch of its attorney's fees. However, in this opinion (and after consideration of the California Supreme Court's intervening opinion in *Kirby v. Immoos Fire Protection, Inc.*, 53 Cal. 4th 1244 (2012)), the Court determined that

because a reporting time claim is brought to recover unpaid wages, it is subject to Cal. Labor Code § 218.5, which allows a prevailing defendant to recover its attorney's fees.

Employer Permitted To Proceed With Defense Of Class Action Based On "Rounding" Policy

See's Candy Shops, Inc. v. Superior Court, 2012 WL 5305729 (Cal. Ct. App. 2012)

Pamela Silva sued her former employer, See's Candy, for various wage-and-hour violations. After certifying a class of current and former California employees, the trial court granted Silva's motion for summary adjudication on four of See's Candy's affirmative defenses. In a writ petition to the Court of Appeal, See's Candy challenged the dismissal of two of its affirmative defenses involving its policy of rounding employees' time up or down to the nearest tenth of an hour. Although the Court of Appeal initially summarily denied the writ petition, the California Supreme Court granted the petition and ordered the appellate court to vacate its prior order and to issue an order to show cause in the matter. In this opinion, the Court ordered the trial court to vacate the summary adjudication order and to enter a new order denying summary adjudication. In so ruling, the Court held that the United States Department of Labor's regulation as well as the California Division of Labor Standards Enforcement's rule permitting employers to use rounding policies is the appropriate standard even though there is no California statute or case law specifically authorizing or permitting this practice.

Trial Court Erred In Part In Failing To Certify Class Of Newspaper Home Delivery Carriers

Ayala v. Antelope Valley Newspapers, Inc., 2012 WL 4098995 (Cal. Ct. App. 2012)

Plaintiffs Maria Ayala, Rosa Duran and Osman Nuñez sought to certify a class of newspaper home delivery carriers in a lawsuit brought against Antelope Valley Newspapers, Inc. ("AVN"), alleging that AVN had improperly classified the carriers as independent contractors rather than employees in violation of California labor laws. The trial court denied class certification on the ground that there were numerous variations in how the carriers performed their jobs and that, therefore, common issues did not predominate. The Court of Appeal reversed in part and held that because all of the carriers perform the same job under virtually identical contracts, the variations constituted common evidence that tended to show AVN's lack of control over certain aspects of the carriers' work – and that the carriers were entitled to class certification on the independent contractor/employee issue. However, the Court affirmed denial of class certification of the carriers' claims for missed meal and rest breaks and unpaid overtime. *See also Tien v. Tenet Healthcare Corp.*, 209 Cal. App. 4th 1077 (2012) (denial of class certification for claims of missed meal and rest periods, waiting time penalties and pay stub violations affirmed in wake of *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (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 lawyers 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

Kenneth Sulzer, Partner
310.284.5663 – ksulzer@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.

greenspaces

Beijing | Boca Raton | Boston | Chicago | Hong Kong | London | Los Angeles | New Orleans | New York | Newark | Paris São Paulo | Washington, DC

www.proskauer.com