Proskauer

newsletter

May 2013
Vol. 12, No. 3

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By **Anthony J. Oncidi***

Asian Employee's Claim Of Discrimination By Supervisor Of Arab Ancestry Was Properly Rejected

Hatai v. Dep't of Transportation, 214 Cal. App. 4th 1287 (2013)

Kenneth Hatai sued his employer (CalTrans) and his supervisor (Sameer Haddadeen), alleging discrimination based on his Japanese ancestry and the fact that he was not of Arab ancestry like Haddadeen. The case was tried to a jury, which returned defense verdicts in favor of CalTrans and Haddadeen. On appeal, Hatai asserted the trial court erred by excluding evidence of Haddadeen's alleged discrimination against persons of non-Arab ancestry. The Court of Appeal affirmed the judgment in favor of the defendants (including the award of more than $30,000 in costs to defendants), holding that "the trial court acted well within the bounds of its discretion in excluding evidence related to employees outside Hatai's protected class" (i.e., employees of east Asian or Japanese descent). The Court noted that "this [case] was pled as an anti-Asian case, not as an Arab favoritism case. It was only on the eve of trial that Hatai sought to reframe the case to show that Haddadeen had discriminatory intent 'against anyone who is not an Arab' – lacking evidence of anti-Asian animus by Haddadeen, Hatai now sought to prove his case by showing Haddadeen's general xenophobia against non-Arabs."

"Crude And Offensive Remarks" Did Not Create A Hostile Work Environment, But Employer May Have Illegally Retaliated

Westendorf v. West Coast Contractors, 712 F.3d 417 (9th Cir. 2013)

Jennifer Westendorf, a project manager assistant, claimed sexual harassment and retaliatory discharge under Title VII of the Civil Rights Act of 1964. The district court granted the employer's motion for summary judgment, and the Ninth Circuit affirmed dismissal of the sexual harassment claim on the ground that Westendorf had failed to submit sufficient evidence to support a finding that the offensive sexual conduct (which consisted of four or five "crude and offensive remarks") was so severe or pervasive that it altered the conditions of her employment and created a hostile or abusive work environment. However, the Court reversed the dismissal of Westendorf's retaliatory discharge claim on the ground that the evidence was sufficient to raise a material question of fact as to whether Westendorf's complaints about the "crude and offensive remarks" were a but-for cause of her termination.

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Employee Could Proceed With Invasion Of Privacy Claim Despite Absence Of Written Disclosure

Ignat v. Yum! Brands, Inc., 214 Cal. App. 4th 808 (2013)

Melissa Ignat, who was employed in the Yum Real Estate Title Department, suffered from bipolar disorder. In connection with an absence related to her bipolar disorder, Ignat's supervisor "told everyone in the department that Ignat was bipolar." After she returned to work, Ignat's coworkers avoided and shunned her, and one of them asked the supervisor if Ignat was likely to "go postal" at work. The trial court dismissed Ignat's claim for invasion of privacy by public disclosure of private facts because there was no evidence of a writing disclosing the private facts. The Court of Appeal reversed the summary judgment that had been granted in defendants' favor, holding that "limiting liability for public disclosure of private facts to those recorded in a writing is contrary to the tort's purpose, which has been since its inception to allow a person to control the kind of information about himself made available to the public." The Court further held that alleging a violation of a person's common-law right to privacy is not the equivalent of alleging a violation of the constitutional right to privacy and, therefore, the trial court had properly refused to consider Ignat's arguments with respect to the latter theory of liability (which was not pled).

Federal Securities Law Preempts Enforcement Of California's Forced-Patronage Statute

McDaniel v. Wells Fargo Investments, LLC, 2013 WL 1405949 (9th Cir. 2013)

In these four related class actions, plaintiffs (all former employees of large financial institutions) alleged that their firms' policies of forbidding employees from opening outside securities trading accounts violates Labor Code § 450(a), which prohibits an employer from compelling or coercing an employee to patronize his or her employer in the purchase of anything of value. The employers argued the state statute is preempted by the federal Securities Exchange Act and related regulatory rules. The district court agreed and dismissed the cases; the Ninth Circuit Court of Appeals affirmed the dismissals.

Parties' Selection Of Saudi Arabia As Forum For Resolution Of Disputes May Not Be Enforceable

Petersen v. Boeing Co., 2013 WL 1776975 (9th Cir. 2013)

Robin P. Petersen, a former Navy pilot, was recruited to work in Saudi Arabia as a flight instructor for Boeing. Prior to his departure, Petersen signed a preliminary employment agreement that did not contain a forum selection clause; however, once he arrived in Saudi Arabia, he was forced to sign a second employment agreement that contained a forum selection clause requiring that any contractual disputes between the parties be resolved in the "Labor Courts of Saudi Arabia." Petersen submitted evidence that his work environment in Saudi Arabia was "marked by rampant safety and ethics violations." When he returned to the United States, he brought suit against Boeing, alleging breach of contract and several statutory and common law claims. The district court granted Boeing's motion to dismiss the action under Fed. R. Civ. P. 12(b)(3) for improper venue, holding that the proper venue for Petersen's lawsuit was Saudi Arabia. However, the

Ninth Circuit Court of Appeals reversed the dismissal of Petersen's lawsuit on the ground that he had provided specific evidence that he would be "wholly foreclosed from litigating his claims against Boeing in a Saudi forum." The Court further held that the district court erred by not granting Petersen's request to amend his pleadings to allege "additional facts that should have dispelled any lingering doubt the district court might have had as to whether an evidentiary hearing, at the least, was needed."

Injuries From Suicide Attempt May Be Compensable Under Workers' Compensation Statute

Kealoha v. Director, Office of Workers' Compensation Programs, 2013 WL 1405951 (9th Cir. 2013)

Two years after William Kealoha was injured when he fell 25 to 50 feet from a barge to a dry dock while working as a ship laborer, he shot himself in the head, causing severe head injuries. He later filed a claim under the Longshore and Harbor Workers' Compensation Act, alleging that his suicide attempt resulted from his earlier fall and the litigation related to that claim. Kealoha's expert psychiatrist diagnosed him with major depressive disorder due to multiple traumas and chronic pain, post-traumatic stress disorder and a cognitive disorder. The Benefits Review Board ("BRB") denied benefits because Kealoha's suicide attempt was deemed to be intentional and not the result of an "irresistible impulse." The Ninth Circuit granted Kealoha's petition and reversed the decision of the BRB, holding that "a suicide or injuries from a suicide attempt are compensable under the Longshore Act when there is a direct and unbroken chain of causation between a compensable work-related injury and the suicide attempt. The claimant need not demonstrate that the suicide or attempt stemmed from an irresistible suicidal impulse." *See also County of Sacramento v. WCAB*, 2013 WL 1715802 (Cal. Ct. App. 2013) (case remanded for determination of whether the causes of the employee's psychiatric injury were personnel actions and thus subject to the personnel action defense of Labor Code § 3208.3(h)); *Minish v. Hanuman Fellowship*, 214 Cal. App. 4th 437 (2013) (accident victim who had obtained workers' compensation benefits was not judicially estopped from denying that she was a volunteer/employee covered by the Workers' Compensation Act in subsequent negligence action against nonprofit premises owner).

Employer's Offer Of Judgment To Employee Mooted Individual And Collective Actions

Genesis Healthcare Corp. v. Symczyk, 569 U.S. ___, 133 S. Ct. 1523 (2013)

Laura Symczyk, a registered nurse, brought this collective action on behalf of herself and other similarly situated employees under the Fair Labor Standards Act ("FLSA") based upon the employer's alleged practice of automatically deducting 30 minutes of time worked per shift for meal breaks even when the employees performed compensable work during the breaks. When the employer answered the complaint, it simultaneously served an offer of judgment upon Symczyk under Fed. R. Civ. P. 68 in the amount of $7,500 for allegedly unpaid wages in addition to such reasonable attorney's fees, costs and expenses as the court may determine. After Symczyk failed to respond to the offer, the employer filed a motion to dismiss for lack of subject matter jurisdiction, arguing that because it had offered Symczyk complete relief on her individual damages claim, she no longer possessed a personal stake in the outcome of the collective action, thus rendering it moot. The district court granted the motion to dismiss, but the court of appeals reversed, holding that although the offer mooted plaintiff's individual claim, it did not moot the collective action. The United States Supreme Court reversed the court of appeals. Assuming without deciding that the employer's unaccepted offer of judgment mooted Symczyk's individual claim, the Supreme Court concluded her lawsuit (including the collective action) was appropriately dismissed for lack of subject matter jurisdiction. *See also Busk v. Integrity Staffing Solutions, Inc.*, 2013 WL 1490577 (9th Cir. 2013) (FLSA collective action and state law class action are not inherently incompatible even though the opt in/opt out rules differ; employees stated FLSA claims for unpaid time spent undergoing a security screening; and lunch period claims were properly dismissed under FLSA, but remand was necessary to determine issue under Nevada state law).

Automotive Managers Could Not Proceed With Class Action For Allegedly Unpaid Overtime And Meal Breaks

Dailey v. Sears, Roebuck & Co., 214 Cal. App. 4th 974 (2013)

William Dailey brought individual and class action claims against Sears for allegedly misclassifying its automotive managers and assistant managers as exempt from overtime. Dailey alleged the managers worked at least 50 hours per week and spent the majority of their time working on nonexempt activities. Sears opposed the motion to certify and sought to preclude the class on the ground that determining how the class members actually spend their time requires individualized evidence and cannot be proven on a classwide basis. The trial court granted Sears's motion to preclude and denied Dailey's motion to certify the class. The Court of Appeal affirmed, holding that the trial court had not abused its discretion in denying class certification based on its finding that common questions of law and fact do not predominate. The Court further held that the trial court did not err in rejecting a proposed statistical sampling procedure when the class action proponent fails to "explain how the procedure will effectively manage the issues in question."

Automotive Service Technicians Were Entitled To More Than $1.5 Million In Unpaid Wages

Gonzalez v. Downtown LA Motors, LP, 215 Cal. App. 4th 36 (2013)

DTLA compensates its 108 automotive service technicians on a piece-rate basis by which they are paid a flat rate ranging from $17 to $32 per hour for each "flag hour" a technician accrued. (A DTLA technician who completes a repair task accrues the number of flag hours that Mercedes-Benz assigns to that particular task, regardless of how long the technician actually took to complete the task.) DTLA also keeps track of all time a technician spends at the work site whether or not the technician is actually working on a repair order. At the end of the pay period, DTLA calculates how much each technician would earn if paid an amount equal to his total recorded hours "on the clock" multiplied by the applicable minimum wage; if a technician's flat rate/flag hour pay falls short of the "minimum wage floor," DTLA supplements the technician's pay in the amount of the shortfall. In this case, the technicians filed a putative class action against DTLA, claiming the company violated California law by failing to pay them a minimum wage during their waiting time, which averaged approximately 1.85 hours per day. The trial court ruled in favor of plaintiffs and awarded them over $1.5 million in unpaid wages and another $237,840 in penalties; the Court of Appeal affirmed, holding that under Wage Order No. 4, an employer may not average employees' compensation over the total number of hours worked to determine compliance with minimum wage obligations. *Compare Choate v. Celite Corp.*, 2013 WL 1833015 (Cal. Ct. App. 2013) (employer owed former employees accrued but unpaid vacation benefits, but it was not liable for waiting time penalties because parties stipulated that employer "otherwise acted in good faith").

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