

California Employment Law Notes

Vol. 7
No. 1
January 2008

By Anthony J. Oncidi

Anthony J. Oncidi is a partner in and the Chair of the Labor and Employment Department of Proskauer Rose LLP 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

San Francisco Health Care Security Ordinance Is Preempted By Federal Law

Golden Gate Restaurant Ass'n v. City and County of San Francisco, No. C 06-06997-JSW (N.D. Cal. filed Dec. 26, 2007)

In 2006, the San Francisco Board of Supervisors passed and the Mayor signed into law the San Francisco Health Care Security Ordinance which, among other things, would have required employers with more than 20 employees to make health care expenditures on behalf of their employees. The ordinance was scheduled to go into effect on January 1, 2008. The District Court held that the ordinance is preempted by federal law, specifically the Employee Retirement Income Security Act of 1974 (ERISA), and enjoined its implementation.

Trial Court Erred In Failing To Certify Broader Wage & Hour Class Action

Bell v. Superior Court, 2007 WL 4127646 (Cal. Ct. App. Nov. 21, 2007)

Four employees of H.F. Cox Inc. d/b/a Cox Petroleum Transport filed this wage and hour class action challenging their employer's failure to pay overtime; its requirement of off-the-clock work; its failure to provide meal and rest periods; its incorrect calculation of vacation pay; and its failure to pay pro rata vacation pay upon termination. The trial court granted plaintiffs' motion to certify a class but only with respect to the last category of claims. In response, plaintiffs filed a petition for writ of mandate, which the Court of Appeal granted, holding that the trial court had erred in failing to certify a class for the overtime pay and the vacation pay calculation claims. The appellate court reasoned that the trial court's determination that individual issues predominated over common ones was not supported by substantial evidence. *Cf. Fireside Bank v. Superior Court*, 40 Cal. 4th 1069 (2007) (trial court erred in ruling on the substantive merits of class action while concurrently certifying the class).

Housekeeper's Award Of \$70,000 For Unpaid Wages Is Affirmed

Gonzalez v. Beck, 2007 WL 4532647 (Cal. Ct. App. Dec. 27, 2007)

Josepha Gonzalez worked as a caregiver and housekeeper for the Beck Family. Upon the termination of her employment, she filed a claim for unpaid wages with the California Labor Commissioner. When the Becks failed to answer or appear at the administrative hearing, Gonzalez obtained an award of \$70,238.54 (including interest and penalties) from the Commissioner upon which judgment was subsequently entered. The Becks' motion to set aside the judgment was denied by the trial court on the ground that they had failed to exhaust their administrative remedies under Labor Code § 98(f), which requires defendants to move to set aside the award before the Commissioner prior to seeking judicial relief from a default. The Court of Appeal affirmed the judgment. *Cf. McCoy v. Superior Court*, 157 Cal. App. 4th 225 (2007) (claim for waiting-time penalties is subject to one-year rather than four-year statute of limitations).

Employer Could Pay Employees Increased Compensation Rather Than Reimburse Them Separately For Expenses

Gattuso v. Harte-Hanks Shoppers, Inc., 42 Cal. 4th 554 (2007)

Frank Gattuso is an outside sales representative for Harte-Hanks, a California corporation that prepares and distributes advertising booklets and leaflets, including the *PennySaver* and the *California Shopper*. Rather than separately reimburse outside sales representatives for their automobile expenses, Harte-Hanks paid them higher salaries and commissions than it paid its inside sales representatives. Gattuso and Ernest Sigala filed this class action lawsuit, seeking indemnification under Labor Code § 2802 for the expenses they incurred in using their own automobiles to perform their employment duties. The trial court denied the motion to certify the class and determined that the employer had properly indemnified the employees by paying them an increased amount of base salary and commission compensation. The California Supreme Court agreed with the lower courts' ruling in part, holding that "an employer may satisfy its statutory business expense reimbursement obligation under section 2802 by paying employees enhanced compensation... provided the employer establishes some means to identify the portion of overall compensation that is intended as expense reimbursement, and provided also that the amounts so identified are sufficient to fully reimburse the employees for all expenses actually and necessarily incurred." However, the Supreme Court reversed the judgment to the extent it denied class certification on the ground that the lower courts had failed properly to analyze whether common issues predominated. *Cf. Solis v. The Regis Corp.*, 2007 WL 4328806 (N.D. Cal. Dec. 10, 2007) (company violated Labor Code § 212 by paying its subsidiaries' employees with checks drawn from an out-of-state bank).

\$1.3 Million Verdict Affirmed In Favor Of Employee Who Was Retaliated Against

Wysinger v. Automobile Club of S. Cal., 69 Cal. Rptr. 3d 1 (Cal. Ct. App. 2007)

Guy Wysinger, a former district manager for ACSC's Santa Barbara office, filed a complaint with the EEOC in 1999 in which he alleged that ACSC had discriminated against him on the basis of his age. Thereafter, Wysinger's work environment changed – he was no longer invited to be on management committees or to apply for management positions; he was treated "coldly" and ignored at management meetings; ACSC ignored requests to accommodate his disabilities (lupus, a heart condition and rheumatoid arthritis); he received unfavorable job evaluations; and staff was transferred from his office, creating a hardship for Wysinger. The jury found that ACSC had retaliated against Wysinger because he had filed the EEOC complaint and that it had failed to engage in the interactive process in connection with Wysinger's disability – though the jury also found that ACSC had not discriminated against Wysinger on the basis of his disability or his age. The jury awarded Wysinger economic damages of \$204,000, non-economic damages of \$80,000, and punitive damages of \$1 million. In addition, the trial court awarded attorney's fees to Wysinger in the amount of \$978,791. The Court of Appeal affirmed the judgment, holding that substantial evidence

supported the finding of retaliation and failure to engage in the interactive process.

Evidence Supported Whistleblower Retaliation Claim But Not Sexual Harassment

Mokler v. County of Orange, 157 Cal. App. 4th 121 (2007)

Pamela Mokler was employed as the executive director of the County's Office on Aging ("OoA"). Following her termination, she sued the County for breach of contract, wrongful termination, hostile work environment and unlawful retaliation under Labor Code § 1102.5 (the "whistleblower statute"). The jury awarded Mokler \$14,089.60 in past economic damages and \$1,681,823 in past and future emotional distress damages (which the trial court reduced to \$125,000 if Mokler would not agree to a new trial on damages). Although the jury found in favor of Mokler on the sexual harassment/hostile work environment claim, it awarded her no damages on that claim. Both sides appealed. The Court of Appeal ordered the trial court to enter judgment in favor of defendants on the sexual harassment claim, holding that County Supervisor Chris Norby's acts vis-à-vis Mokler (making various rude and inappropriate comments and placing his arm around Mokler while rubbing against her breast) were not sufficiently severe or pervasive to establish a hostile work environment. The Court found that substantial evidence supported Mokler's retaliation claim, which was based on her termination following her complaint to her supervisors that the County had engaged in illegal activity by reorganizing the OoA. Finally, the Court affirmed the new trial order, holding that the non-economic damages were excessive in light of the fact that Mokler had no trouble finding a new job (two weeks later) and her reputation was not damaged.

UPS May Not Have Violated The ADA By Excluding Deaf Drivers Who Failed To Satisfy DOT Hearing Standard

Bates v. United Parcel Serv., 2007 WL 4554016 (9th Cir. Dec. 28, 2007) (*en banc*)

One of the requirements applied by UPS to those applicants seeking to drive the familiar brown "package cars" was that they pass the physical examination (including a hearing exam) that the DOT requires of drivers of commercial vehicles of a gross vehicle weight rating (GVWR) of at least 10,001 pounds. (UPS's vehicles had a GVWR of 9,318 pounds or less.) Plaintiffs in this case (a class of deaf UPS applicants and employees) challenged the company's application of the DOT standard, which did not apply to the vehicles in question. The Ninth Circuit, sitting *en banc*, reversed the district court's judgment that was rendered in favor of plaintiffs because it had failed to analyze whether plaintiffs were "qualified individuals" capable of performing the "essential function" of safely driving a package car. The Court overruled its earlier opinion in *Morton v. United Parcel Serv.*, 272 F.3d 1249 (9th Cir. 2001), to the extent that that opinion imported into the analysis of an ADA claim the bona fide occupational qualification defense found in Title VII and the ADEA. Further, the Court reversed the judgment with respect to plaintiffs' claim for violation of the Unruh Act on the ground that it does not incorporate the employment discrimination provisions found under Title I of the ADA.

Employee Who Was Convicted For Taking Bribes Could Be Kept Away From Employers' Money

United States v. Betts, 2007 WL 4355365 (9th Cir. Dec. 14, 2007)

Marcus Brandon Betts, who worked for TransUnion (one of the three major credit reporting agencies), took bribes to conspire with his co-defendants to falsely improve credit scores. According to the Ninth Circuit, "it was a kind of private sector ticket-fixing scheme." Betts falsified 654 credit histories, which generated about a million dollars in losses to lenders. He pled guilty to conspiracy but challenged some of the conditions of his supervised release, including a restriction that Betts "shall not be employed in any capacity wherein he has custody, control, or management, of his employer's funds, lines of credit, or any similar sources of money." Betts argued that the restriction was an abuse of discretion by the trial court because his crime did not involve stealing from his employer. The Ninth Circuit disagreed and held that "as an employee, he owed [TransUnion] a fiduciary duty of loyalty. An employee's duty of loyalty includes a duty to act solely for the interests of his employer within the business area for which he is employed, account to the employer for money received in connection with his work, and avoid undisclosed interests that might affect his conduct as an employee." *Cf. Otsuka v. Polo Ralph Lauren Corp.*, 2007 WL 3342721 (N.D. Cal. Nov. 9, 2007) (employer stated claim against employee for breach of duty of loyalty associated with allegedly fraudulent transactions).

Sales Representative's \$480,000 Wrongful Termination Award Is Affirmed

Casella v. SouthWest Dealer Services, 2007 WL 4328440 (Cal. Ct. App. Dec. 12, 2007)

Zachary Casella was employed as a sales representative for SouthWest Dealer Services, which sells its aftermarket auto products to auto dealerships and helps train auto dealership finance and insurance salespeople on how to promote and sell SouthWest's products. Casella moved from New York to California to accept the position. After his employment was terminated approximately five months later, Casella sued SouthWest for wrongful termination in violation of public policy, fraud, and fraudulent inducement in violation of Labor Code § 970. Casella alleged that his employment was terminated in retaliation for his having reported SouthWest's participation in some of its car dealership clients' fraudulent business practices known as "payment packing" (which involved dealership sales personnel quoting inflated monthly payment amounts in order to hide the true cost of aftermarket products). Casella also alleged that he was fraudulently induced to move to California to take the job because SouthWest had failed to disclose its involvement in these fraudulent activities. The jury found in favor of Casella, awarding him \$240,000 in compensatory damages and \$240,000 in punitive damages. The Court of Appeal affirmed the judgment on the grounds that Casella's public policy claim was "tethered" to Penal Code § 487 (criminal fraud) and that the Section 970 verdict was supported by substantial evidence. Finally, the Court affirmed an award of \$12,500 in attorney's fees to Casella associated with his successful defense against SouthWest's cross-complaint for breach of contract – however, he could not recover any

attorney's fees associated with the prosecution of his affirmative claims against SouthWest since he did not allege a breach of the contract that contained the prevailing-party attorney's fees provision.

Insurance Agency Agreement Was Terminable At Will

Bernard v. State Farm Mut. Auto. Ins. Co., 2007 WL 4465075 (Cal. Ct. App. Dec. 21, 2007)

William Bernard had an insurance agency, representing certain State Farm insurance companies. Bernard alleged he was forced to resign when he was unable to carry out the physical requirements of the sales program following injuries he sustained in a car collision. Among other things, Bernard sued State Farm for breach of the implied covenant of good faith and fair dealing based on certain misrepresentations that allegedly had been made by his supervisors. The agency agreement in question provided that "You or State Farm have the right to terminate this Agreement by written notice delivered to the other or mailed to the other's last known address." The Court of Appeal held that this provision rendered Bernard's employment terminable at will – even in the absence of more precise language. Therefore, Bernard's claim for breach of the implied covenant of good faith and fair dealing had been properly dismissed by the trial court.

Release Enforced As To Defamation And Overtime Claims – But Not Claim Under USERRA

Perez v. Uline, Inc., 68 Cal. Rptr. 3d 872 (Cal. Ct. App. Dec. 6, 2007)

On the day that Brian Perez, a captain in the United States Marine Corps Reserves, returned to work after duty with the Reserves, his employment with Uline, Inc. was terminated. He was presented with a "Severance Agreement and Release," offering him severance in the amount of six weeks' salary in exchange for his execution of the release. The agreement stated that Perez had seven days to accept it and advised him "to consult with an advisor of his choice prior to executing it." On the seventh day, Perez signed the release. Perez subsequently sued Uline and three of its employees, alleging wrongful termination in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), breach of oral contract, defamation and failure to pay overtime in violation of the California Labor Code. The Court of Appeal enforced the release and affirmed dismissal of Perez's claims with the exception of the claim arising under USERRA, which expressly states that a contract may not limit the protections of the statute.

\$1.1 Million In Attorney's Fees Awarded Following Recovery Of \$30,300 Discrimination Judgment

Harman v. City and County of San Francisco, 2007 WL 4465750 (Cal. Ct. App. Dec. 21, 2007)

This case, which was originally filed in federal court in 1999, involved allegations of race and sex discrimination by Allen Harman and two other white males who were employed as

airfield safety officers at the San Francisco International Airport. After the case went to trial, a jury awarded Harman \$15,300 as damages for economic harm and another \$15,000 for emotional distress. The trial court subsequently awarded Harman attorney's fees in the amount of \$1.1 million. The Court of Appeal affirmed the award of substantially all of the attorney's fees that were awarded by the trial court notwithstanding the relatively small amount of the underlying judgment. *Cf. Engle v. Copenbarger & Copenbarger*, 157 Cal. App. 4th 165 (2007) (former legal assistant who accepted law firm's offer to compromise sexual harassment claims pursuant to Code Civ. Proc. § 998 was entitled to recover her attorney's fees on top of the settlement amount that was offered – because the offer failed expressly to exclude fees and costs).

Pharmacist's Claims For Breach Of Contract And Unpaid Overtime Were Properly Dismissed

Soremekun v. Thrifty Payless, Inc., 2007 WL 4168339 (9th Cir. Nov. 27, 2007)

Adediji Adesola Soremekun, who was employed as a pharmacist at Thrifty Payless d/b/a Rite Aid, was subject to a collective bargaining agreement that existed between Rite Aid and the United Food and Commercial Workers Union. After resigning his employment, Soremekun filed a lawsuit in which he alleged claims for breach of contract, failure to pay wages in violation of the California Labor Code and related claims. The Ninth Circuit affirmed summary judgment of Soremekun's contract and related claims on the ground that he had failed to exhaust the grievance procedures that were available to him under the collective bargaining agreement. Further, the Court affirmed summary judgment of the Labor Code claims on the ground that those claims had not been filed prior to the expiration of the 6-month limitations period set forth in the collective bargaining agreement. *Compare Ortega v. Contra Costa Cmty. College Dist.*, 156 Cal. App. 4th 1073 (2007) (public employee's claims for race discrimination and infliction of emotional distress were improperly dismissed for failure to exhaust administrative remedies provided by a collective bargaining agreement).

Ranger Who Was Injured In Residence Provided By State Was Limited To Workers' Compensation Remedies

Vaught v. State of Cal., 2007 WL 4395435 (Cal. Ct. App. Dec. 18, 2007)

Marck Vaught was employed as a resource ranger for the State. His position required him to be on call "all the time." As an inducement to accept the position, the State offered Vaught and his wife the use of a residence located in the district in which Vaught worked. Vaught subsequently slipped and fell in the bathroom of the residence and sued the State for negligence and failure to make the house habitable for human occupation. Vaught's wife sued for loss of consortium. The trial court granted the State summary judgment on the ground that the Vaughts' claims were subject to the exclusive remedies provided by the Workers' Compensation Act. The Court of Appeal affirmed. *Cf. Millard v. Biosources*, 156 Cal. App. 4th 1338 (2007) (general contractor had no duty of care to injured employee of subcontractor).

Has Your Address Changed?

Please let us know if your mailing address needs to be updated. Contact Hayley Grill with the correct information, either via e-mail: hgrill@proskauer.com, or fax: 212.969.2900. Thank you.

Want To Receive Future Issues of California Employment Law Notes and Client Alerts by e-mail?

Please send an e-mail with your name, title, organization, mailing address, e-mail address and phone number to: aoncidi@proskauer.com.

BOCA RATON • BOSTON • LONDON

LOS ANGELES • NEW ORLEANS • NEW YORK • NEWARK

PARIS • SÃO PAULO • WASHINGTON, D.C.

Proskauer's nearly 200 Labor and Employment lawyers are capable of addressing the most complex and challenging labor and employment law issues faced by employers. The following Los Angeles attorneys welcome any questions you might have.

Los Angeles Partners:

Harold M. Brody – 310.284.5625 – hbrody@proskauer.com
 Anthony J. Oncidi – 310.284.5690 – aoncidi@proskauer.com
 Arthur F. Silbergeld – 310.284.5624 – asilbergeld@proskauer.com
 Mark Theodore – 310.284.5640 – mtheodore@proskauer.com

Los Angeles Counsel:

Mylene J. Brooks – 310.284.5674 – mybrooks@proskauer.com
 (Special Employment Counsel)
 Beverly Frank – 310.284.4515 – bfrank@proskauer.com
 (Senior Counsel)

Los Angeles Associates:

Adam Abrahms – 310.284.5641 – aabrahms@proskauer.com
 Catherine Brito – 310.284.4538 – cbrito@proskauer.com
 Joann Chang* – 310.284.5682 – jchang@proskauer.com
 George Samuel Cleaver – 310.284.4588 – gcleaver@proskauer.com
 Enzo Der Boghossian – 310.284.4592 – ederboghossian@proskauer.com
 David G. Gross – 310.284.5680 – dgross@proskauer.com
 Dawn M. Irizarry – 310.284.5698 – dirizarry@proskauer.com
 Jeremy M. Mittman – 310.284.5634 – jmittman@proskauer.com
 Kathleen F. Paterno – 310.284.4558 – kpaterno@proskauer.com

*California Bar admission pending.

You may also contact any other member of Proskauer's Labor and Employment Department in:

Boca Raton	561.241.7400	Boston	617.526.9600
London	44.20.7083.8500	Los Angeles	310.557.2900
Newark	973.274.3200	New Orleans	504.310.4088
New York	212.969.3000	Paris	331.53.05.60.00
São Paulo	55.11.3045.1250	Washington	202.416.6800

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice or render a legal opinion.

© 2008 PROSKAUER ROSE LLP. All rights reserved. Attorney Advertising.

You can also visit our web site at <http://www.proskauer.com>