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California Employment Law Blog

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TV Station's Failure To Hire Weather News Anchor Was Protected By Free Speech Rights

Hunter v. CBS Broadcasting, Inc., 221 Cal. App. 4th 1510 (2013)

Kyle Hunter sued CBS Broadcasting for age and gender discrimination after it refused to hire him as a weather news anchor. Hunter alleged that CBS "repeatedly shunned him for numerous on-air broadcasting positions due to his gender and age" and that excluding him was "part of a plan to turn prime time weather broadcasting over to younger attractive females." In response to the complaint, CBS filed a motion to strike pursuant to Cal. Code Civ. Proc. § 425.16, asserting that its selection of on-air weather reporters qualified as a protected exercise of its free speech rights. The trial court denied CBS's motion, but the Court of Appeal reversed, agreeing with the station that the selection of a news anchor is conduct in furtherance of the exercise of free speech rights. The Court remanded the matter to the trial court to determine whether Hunter had demonstrated a reasonable probability of prevailing on the merits – an issue the trial court had not reached. *See also Kurz v. Syrus Sys., LLC*, 221 Cal. App. 4th 748 (2013) (employer's cross-complaint against wrongful termination plaintiff for malicious prosecution of claim for unemployment benefits should have been stricken under anti-SLAPP statute).

Malpractice Claim Against In-House Counsel Should Not Have Been Dismissed

Yanez v. Plummer, 221 Cal. App. 4th 180 (2013)

Michael Yanez sued his former employer, Union Pacific Railroad Co., for wrongful discharge as well as Union Pacific's in-house counsel, Brian Plummer, for legal malpractice, breach of fiduciary duty and fraud. Union Pacific fired Yanez for dishonesty based upon a discrepancy between a witness statement that Yanez wrote and a deposition answer that he gave concerning another employee's on-the-job injury. At the deposition, Plummer represented both Union Pacific and Yanez (without first obtaining informed written consent from the clients as required by Rule of Prof. Conduct 3-310(C)). Yanez claimed the alleged dishonesty was a simple miswording in his witness statement that Plummer "manufactured [during the deposition] into something sinister for Union Pacific's benefit." The trial court granted summary judgment in favor of Plummer on the ground that Yanez could not meet the causation element of his claims. However, the Court of Appeal reversed,

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holding that it was Plummer's conduct during the deposition (in which Plummer questioned his own client) that highlighted the discrepancy between Yanez's deposition testimony and a witness statement Yanez had previously written about the accident, which ultimately resulted in the termination of Yanez's employment. *See also Optimal Markets, Inc. v. Salant*, 221 Cal. App. 4th 912 (2013) (Cal. Code Civ. Proc. § 128.7 sanctions motion against attorneys who prosecuted allegedly frivolous trade secrets claim in arbitration was properly denied).

Court Affirms $700,000 Attorney's Fee Award To Demoted Employee Who Recovered Only $27,280

Muniz v. United Parcel Serv., Inc., 2013 WL 6284357 (9th Cir. 2013)

Kim Muniz sued UPS for employment discrimination based on various theories, but proceeded to trial only on her claim of gender discrimination in violation of the Fair Employment and Housing Act. The jury found in favor of Muniz only with respect to her claim that her demotion from division manager to supervisor was based on her gender and awarded her a total of $27,280 for lost earnings, medical expenses and non-economic damages. After the trial, Muniz requested that the court grant her more than $1.9 million in prevailing-party attorney's fees, which the court adjusted downward to $698,000. Over a spirited dissent from Judge Smith, a three-judge panel of the Ninth Circuit affirmed the award, holding that the district court had not abused its discretion in awarding fees to the employee even though the fees dwarfed the amount of the verdict by a factor of more than 25-to-1. In his dissent, Judge Smith wrote that the lower court failed to explain how such a huge fee award "could have been reasonable in light of the mere $27,280 that plaintiff recovered in damages" and that the majority opinion "departs from and adds confusion to our well-settled jurisprudence governing the review of fee awards."

Former Employee Who Was Unemployed For Only Eight Months Was Properly Awarded Three Years Of Lost Wages

Villacorta v. Cemex Cement, Inc., 221 Cal. App. 4th 1425 (2013)

Alfredo Villacorta sued Cemex, his former employer, for wrongful termination in violation of public policy, intentional infliction of emotional distress and national origin discrimination. At trial, Villacorta's attorney asserted that he had suffered only $44,000 in lost wages during his eight months of unemployment following his allegedly wrongful termination, but the jury awarded him $198,000 after the judge told the jury that "The amount [of damages] is up to you." The Court of Appeal affirmed the judgment on the ground that the jury may have concluded that the new job Villacorta obtained (which paid him more than he was earning at Cemex) was actually inferior because it was located two to three hours away from his home.

Applicant For Union Organizer Job Was Unqualified Due To Prior Criminal Conviction

Horne v. International Union of Painters & Allied Trades, 221 Cal. App. 4th 1132 (2013)

Raymond E. Horne was a glazier and a member of the glazier's union. He also served as an officer and a member of the council and of the executive board of the union. Horne, who is African American, twice applied for an organizer position with the council but both times the position was filled by whites. Horne sued the union for racial discrimination under the Fair Employment and Housing Act. During discovery, Horne admitted that he had been convicted of possession of narcotics for sale and that he had served a prison term for that conviction. He also admitted that his citizenship rights had been revoked as a result of the conviction, but denied that those rights had not been restored. When, during the course of the lawsuit, the union found out about the conviction,

it asserted that under federal law (29 U.S.C. § 504(a)), Horne was barred from employment as a union organizer because of the criminal conviction. The trial court granted the union's motion for summary judgment, and the Court of Appeal affirmed, holding that Horne was disqualified for the organizer position due to the criminal conviction. *See also Dzakula v. McHugh*, 737 F.3d 633 (9th Cir. 2013) (plaintiff's employment discrimination action was barred based on judicial estoppel doctrine due to her failure to list it in her Chapter 7 bankruptcy schedules); *United States v. Kahre*, 737 F.3d 554 (9th Cir. 2013) (criminal convictions affirmed for three defendants who paid employees their wages in gold and silver coins (later exchanged for cash) in order to avoid payment of payroll and income taxes).

Employee Could Proceed With Constructive Termination Claim

Vasquez v. Franklin Mgmt. Real Estate Fund, Inc., 2013 WL 6869682 (Cal. Ct. App. 2013)

Jorge L. Vasquez quit his job as a maintenance technician and sued for constructive discharge in violation of public policy and intentional infliction of emotional distress because he could "not tolerate the work environment of only being paid $10.00 per hour, not being paid for gas and having to drive around town for work without being reimbursed for mileage." The trial court sustained the employer's demurrers and dismissed the case, but the Court of Appeal reversed, holding that Vasquez could proceed with his constructive discharge claim based on his allegation that "the duties [the employer] assigned required such extensive driving that the [mileage] reimbursement to which he was entitled represented a significant percentage of his already low salary." Because Vasquez alleged that he was "effectively being paid less than the minimum wage" after he paid his own mileage expenses, his claim implicated a fundamental public policy in the form of California's minimum wage law. The Court affirmed dismissal of the claim for intentional infliction of emotional distress because of the absence of allegations of sufficiently severe emotional distress or outrageous conduct on the part of the employer. *See also Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013) (agricultural employer was required to reimburse its immigrant employees during the first week of work for inbound travel and immigration expenses to the extent such expenses lowered their compensation below the minimum wage).

Employees Who Were Denied Stay Bonuses Could Proceed With Claims For Fraud And Breach Of Contract

Moncada v. West Coast Quartz Corp., 221 Cal. App. 4th 768 (2013)

Three plaintiff-employees sued after they were denied bonuses they had been promised would be large enough for them to retire and that would be paid to them if they continued to work for the company until it was sold. The trial court sustained defendants' demurrers and dismissed the action, but the Court of Appeal reversed, holding that plaintiffs had sufficiently pled the elements of promissory estoppel, fraud and breach of contract. The Court rejected defendants' argument that the alleged promises were too vague to be enforceable. However, the appellate court affirmed dismissal of the claims for intentional infliction of emotional distress (no extreme or outrageous conduct alleged), negligent misrepresentation (no honest but unreasonable belief by defendants in the representations alleged) and "estoppel in pais" (no such cause of action under California law).

Owner-Operated Business With No Employees May Still Be A "Place Of Employment" Under Anti-Smoking Law

Opinion of Cal. Attorney Gen. Kamala D. Harris, No. 12-901 (Dec. 20, 2013)

The question presented by the Hon. Jeff Gorell, Member of the State Assembly, is "Under what circumstances does an owner-operated business with no employees nevertheless constitute a 'place of employment' under Labor Code section 6404.5, which prohibits smoking in the workplace?" The Attorney General answered that such a workplace is covered by the anti-smoking statute when "employment of any kind is carried on at the business location – that is, even when such employment is carried on by persons who are employed by someone other than the business owner [e.g., workers rendering temporary clerical or accounting services, janitorial, maintenance or repair services]."

$377 Million Judgment Upheld For Tortious Interference With Contract

Asahi Kasei Pharma Corp. v. Actelion Ltd., 2013 WL 6726150 (Cal. Ct. App. 2013)

Asahi, a Japanese company that develops and markets pharmaceutical products and medical devices, entered into a licensing and development agreement with CoTherix (a California-based company) to develop and commercialize one of Asahi's drugs in North America and Europe. Actelion, a Swiss pharmaceutical company, that sells a drug that competes with Asahi's drug, acquired all of the stock of CoTherix through a subsidiary and concurrently notified Asahi that CoTherix would discontinue development of Asahi's drug for "business and commercial reasons." Asahi sued Actelion and three of its senior executives for tortious interference with the licensing agreement, among other things, and obtained a jury verdict of more than $577 million (including $30 million in punitive damages against the executives individually), which was subsequently reduced by the trial court to $377 million. The Court of Appeal affirmed the judgment, holding that the jury was properly instructed concerning tortious interference with contractual relations. The Court further held that the executives were properly found liable for tortious interference (even though they had acted within the scope of their employment) and that the "manager's privilege" defense did not apply because there was no contract between Actelion and Asahi – "The manager's privilege does not exempt a manager from liability when he or she tortiously interferes with a contract or relationship between third parties."

Non-Resident Professional Basketball Player Is Denied California Workers' Comp Benefits

Federal Ins. Co. v. WCAB (Johnson), 221 Cal. App. 4th 1116 (2013)

Adrienne Johnson, an applicant for California workers' compensation benefits, was a professional basketball player who was not employed by a California team, never resided in California, played only one professional game in California out of 34 games during the 2003 season and suffered no specific injury in California. In this action, she sought a workers' compensation award in California against her former non-California team and its insurer for a disability based on an alleged cumulative injury. The Court of Appeal held that California does not have a sufficient interest in this matter to apply its workers' compensation law or to retain jurisdiction over the case. *See also* AB 1309, 2013 Cal. Stats. Ch. 653 (amending Cal. Lab. Code § 3600.5 to exclude from workers' compensation benefits professional athletes who have spent less than 20 percent of their working days in California).

Auto Insurance Field Adjusters' Class Action Should Not Have Been Decertified

Williams v. Superior Court, 221 Cal. App. 4th 1353 (2013)

In this case, a putative class of auto field adjusters (led by Christopher Williams) who work for Allstate Insurance Co. claimed they were denied overtime because they worked more than eight hours per day and 40 hours per week and that Allstate's Work Force Management System incorrectly presumed that each adjuster's eight-hour workday began when the adjuster arrived at his first vehicle-inspection appointment of the day. Williams claimed the adjusters' (unpaid) overtime tasks included logging onto their work computers; downloading their assignments; making courtesy calls to auto repair shops and car owners to confirm appointments; checking their voicemail and traveling to and from their first appointment of the day. Although the class was initially certified, the trial court granted Allstate's motion to decertify the class following the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). The Court of Appeal then summarily denied Williams' petition for a writ of mandate, but the California Supreme Court subsequently returned the matter to the Court of Appeal with directions to issue an order to show cause why the relief sought (vacating the decertification order and ordering certification of the class) should not be granted. In this opinion, the Court of Appeal issued a writ of mandate granting the relief sought by Williams on the ground that *Dukes* does *not* support decertification because California's class action statute differs from the federal law at issue in *Dukes*. The Court further noted that "differences in the amount of individual damages do not by themselves defeat class certification." *See also Martinez v. Joe's Crab Shack*, 221 Cal. App. 4th 1148 (2013) (denial of class certification of claims by managerial employees reversed and remanded); *Jones v. Farmers Ins. Exch.*, 221 Cal. App. 4th 986 (2013) (same, involving uniform employer policy as applied to insurance claims representatives and adjusters); *Palagin v. Paniagua Constr., Inc.*, 2013 WL 6657053 (Cal. Ct. App. 2013) (trial court should have dismissed employer's appeal from Labor Commissioner's award in employee's favor after employer failed to timely post an undertaking).

Ninth Circuit Certifies Suitable Seating Questions To The California Supreme Court

Kilby v. CVS Pharmacy, Inc., 2013 WL 6908934 (9th Cir. 2013)

The United States Court of Appeals for the Ninth Circuit certified questions to the California Supreme Court regarding Section 14(A) of California Wage Orders 4-2001 and 7-2001. Section 14(A) requires that "all working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." The Ninth Circuit's questions include whether the phrase "nature of the work" refers to an individual task or duty that an employee performs during the course of his or her workday or whether courts should construe the term "holistically" and evaluate the entire range of an employee's duties; whether courts should consider the employer's business judgment as to whether the employee should stand, the physical layout of the workplace or the physical characteristics of the employee; and whether a plaintiff needs to prove what would constitute "suitable seats" to show the employer has violated Section 14(A).

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

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