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By **Anthony J. Oncidi***

California Employment Law Blog

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Male Employee's Sexual Harassment Claims Should Not Have Been Dismissed

Lewis v. City of Benecia, 224 Cal. App. 4th 1519 (2014)

Brian Lewis, a heterosexual man, sued his former employer (the City of Benecia) and two former male supervisors for sexual harassment and the City for retaliation. The trial court granted summary judgment in favor of the supervisors (Steve Hickman and Rick Lantrip) and judgment on the pleadings for the City. A jury found in favor of the City on the retaliation claim. The Court of Appeal reversed all of the lower court's rulings except the summary judgment that was granted in favor of Lantrip. As for Hickman, the Court found that the alleged course of conduct allowed an inference that he was pursuing a romantic relationship with Lewis and that the frequency and regularity of the alleged conduct allowed an inference of a pervasive pattern of conduct rather than a few isolated acts. As for Lantrip's alleged conduct, the Court held there was no basis for a reasonable trier of fact to conclude Lantrip harassed Lewis on the basis of sex or subjected Lewis to a pervasive pattern of harassing conduct (by displaying pornographic images on his computer two or three times and telling "obscene jokes"). As for the retaliation claim against the City, the Court held the trial court erred by excluding evidence of Hickman's alleged sexual harassment and of a psychologist's expert testimony about emotional distress allegedly suffered by Lewis.

*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.

Employee's Sexual Harassment Lawsuit Was Not Barred By Shortened Statute Of Limitations

Ellis v. U.S. Sec. Assocs., 224 Cal. App. 4th 1213 (2014)

When Ashley Ellis applied to work as a security guard for U.S. Security Associates, she signed an employment application that purported to limit the statute of limitations to six months for any employment-related claims. Later, Ellis claimed to have been sexually harassed by her supervisor and filed a lawsuit within 12 months of receipt of a right-to-sue letter from the California Department of Fair Employment and Housing. The employer filed a motion for judgment on the pleadings, asserting that the lawsuit was barred by the six-month statute of limitations contained in the employment application. The trial court granted the employer's motion without leave to amend, but the Court of Appeal reversed, holding that the shortened statute of limitations is "unreasonable and against public policy." *Cf. Hopkins v. Kedzierski*, 2014 WL 1466282 (Cal. Ct. App. 2014) (case remanded to trial court for factual findings as to whether employee demonstrated the elements of equitable tolling of two-year tort statute of limitations).

Court Should Not Consider Merits When Determining Certification Of Class Action

Stockwell v. City & County of San Francisco, 2014 WL 1623736 (9th Cir. 2014)

In this putative class action, several San Francisco police officers over the age of 40 alleged that a new policy of the San Francisco Police Department abandoning an examination for consideration for promotion to Assistant Inspector worked a disparate impact upon them based on their age. The district court denied class certification, but the Court of Appeals for the Ninth Circuit reversed, holding that "the district court erred in denying class certification because of its legal error of evaluating merits questions, rather than focusing on whether the questions presented, whether meritorious or not, were common to the members of the putative class." The Court concluded the officers had identified a "single, well-enunciated, uniform policy that, allegedly, generated all the disparate impact of which they complain."

Employees Of Contractors Of Public Companies May Sue For Retaliation Under Sarbanes-Oxley Act

Lawson v. FMR LLC, 571 U.S. ___, 134 S. Ct. 1158 (2014)

Plaintiffs in this case are former employees of private companies that contract to advise or manage mutual funds (collectively, "FMR"). Both plaintiffs allege that they "blew the whistle" on putative fraud relating to the mutual funds and as a result suffered retaliation from FMR. Plaintiffs filed suit in federal court alleging violations of the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002. FMR moved to dismiss the actions on the ground that plaintiffs were not employees of a public company, but were instead employees of private companies that contract with public companies. The United States Supreme Court reversed the dismissal of plaintiffs' claims, holding that the statute's whistleblower protection extends to employees of contractors and subcontractors of public companies. *See also Ventress v. Japan Airlines*, 2014 WL 1258133 (9th Cir. 2014) (Federal Aviation Act preempted former employee's retaliation and constructive termination claims).

PAGA Action Should Have Been Remanded To State Court

Baumann v. Chase Inv. Servs., 2014 WL 983587 (9th Cir. 2014)

Joseph Baumann sued his employer, Chase Investment Services Corporation, under the Private Attorneys General Act ("PAGA"), alleging claims for unpaid overtime, meal breaks and rest periods and timely expense reimbursements. Baumann further alleged his potential share of any recovery and attorney's fees would be less than $75,000. Chase removed the action under the Class Action Fairness Act ("CAFA") and by invoking diversity jurisdiction, claiming the amount in controversy exceeded $75,000. The district court denied Baumann's motion to remand, but the Court of Appeals for the Ninth Circuit reversed, holding that a PAGA claim is not a "class action" within the meaning of CAFA. The Court further held that PAGA claims cannot be aggregated in determining the amount in controversy for purposes of establishing diversity jurisdiction (citing *Urbino v. Orkin Servs. of Cal., Inc.*, 726 F.3d 1118 (9th Cir. 2013)). *See also Leite v. Crane Co.*, 2014 WL 1646924 (9th Cir. 2014) (employer established it had a colorable federal defense sufficient to defeat plaintiffs' motion to remand action to state court).

Employer May Seek Its Own Evaluation Of Employee's Fitness For Duty Following FMLA Leave

White v. County of Los Angeles, 2014 WL 1478701 (Cal. Ct. App. 2014)

Susan White worked as a Senior District Attorney Investigator with the Los Angeles County District Attorney's Office. Following the death of her brother-in-law, White began experiencing emotional difficulties on the job and was observed acting erratically in the workplace with "very high emotional highs and very low lows." At one point, White, who carried a weapon, described herself as a "whack job." White eventually took a Family Medical Leave Act ("FMLA") leave of absence because of her own serious health condition. Before returning from that leave, White submitted a letter from her doctor stating that she was able to return to work and perform the essential functions of the job. Upon returning from the leave, White was placed on paid administrative leave and reassigned to her home. The DA then required that White submit to a medical reevaluation pursuant to Los Angeles County Civil Service Rule 9.07 based upon her erratic conduct prior to her FMLA leave. After White twice refused to appear for the medical reevaluation, her employment was terminated. White then filed this lawsuit and obtained a permanent injunction preventing the DA from requiring a medical reevaluation based on her conduct prior to the FMLA leave and from charging her with insubordination for failing to submit to the medical reevaluation. The Court of Appeal reversed, holding that the return-to-work certification that White had obtained from her doctor did not preclude a potential finding of unfitness for duty and that the DA's order that White appear for a medical reevaluation did not violate the FMLA.

Injured Truck Driver May Not Have Been Employee

Global Hawk Ins. Co. v. Le, 2014 WL 1478514 (Cal. Ct. App. 2014)

Jerry Le was one of two truck drivers on a cross-country trip for V&H Transport for which he was to be paid a lump sum of $1,100 with no deductions. Le was seriously injured when the other truck driver was involved in a one-vehicle accident. After the accident, V&H refused to pay Le the promised lump sum because he did not finish the trip. He also was told he was not an employee and would not be eligible for workers' compensation benefits. Le then sued V&H and its owners for his injuries which tendered the defense to Global Hawk Insurance under a commercial auto truckers liability insurance policy. Global Hawk refused the defense and filed a declaratory relief action, contending that Le's injuries were excluded from coverage because he was an employee. The trial court granted summary judgment in favor of Global Hawk, but the Court of Appeal reversed, holding that there was a triable issue of fact as to whether Le was an employee.

Severance Payments Are Taxable Wages Under FICA

United States v. Quality Stores, Inc., 572 U.S. ___, 134 S. Ct. 1377 (2014)

Before and following the filing of an involuntary Chapter 11 bankruptcy, Quality Stores and its affiliated companies terminated thousands of employees. The employees received severance payments, and Quality Stores reported those payments as wages on W-2 tax forms, paid the employer's required share of FICA taxes and withheld the employees' share of FICA taxes. Quality Stores then asked 3,100 former employees to allow it to file FICA tax refund claims for them, of which approximately 1,850 employees agreed. After the IRS neither allowed nor denied the claim for refund, Quality Stores initiated a proceeding in the Bankruptcy Court seeking a refund of the disputed amount. In this opinion, the United States Supreme Court held that the severance payments constituted taxable wages under FICA.

Employee Who Dismissed Claims Upon Receipt Of Settlement Can Recover Costs As Prevailing Party

deSaulles v. Community Hosp. of the Monterey Peninsula, 2014 WL 1724043 (Cal. Ct. App. 2014)

Maureen deSaulles agreed to dismiss with prejudice two of her seven causes of action in exchange for a settlement payment from her former employer in the amount of $23,000. The trial court subsequently exercised its discretion and awarded $12,731.92 in costs to the employer. deSaulles appealed, claiming that the settlement payment to her was a net monetary recovery, which entitled – her rather than the employer – to recover costs. The Court of Appeal agreed and reversed, holding that the trial court should have recognized deSaulles was entitled to mandatory costs under the statutory definition of "prevailing party." The Court further concluded that because the employer was not the prevailing party, the trial court should not have exercised its discretion to determine which party prevailed based on the merits of the case. Finally, the Court cautioned that "[o]f course, parties can avoid this mechanical approach by taking care to provide for costs in their settlements."

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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

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