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By **Anthony J. Oncidi***

California Employment Law Blog

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$150,000 Sexual Harassment Verdict And $680,000 Fee Award Affirmed

Taylor v. Nabors Drilling USA, LP, 222 Cal. App. 4th 1228 (2014)

Max Taylor worked as a floorhand on an oil rig where he alleged he was harassed by his supervisors who called him "queer," "fagot [sic]," "homo," and "gay porn star" and was subjected to other humiliating and harassing conduct, including simulated masturbation in his presence. Following a trial, the jury awarded Taylor $160,000 in damages, including $10,000 for past economic loss. In its unsuccessful motion for judgment notwithstanding the verdict ("JNOV"), the defense argued that Taylor had failed to prove that he was harassed "because of his sex and/or perceived sexual orientation" in the absence of evidence of actual sexual desire or intent by the harassers. The Court of Appeal affirmed denial of the JNOV motion on the ground that "the focus of a [sexual harassment] case is whether the victim has been subjected to sexual harassment, not what motivated the harasser." *See also newly enacted* Cal. Gov't Code § 12940(j)(4)(C) (same). The defense also unsuccessfully challenged a defective special verdict form because it had failed to object to it before the jury was discharged. Because the jury had concluded that Taylor had been lawfully discharged, the Court reduced the verdict by $10,000 (from $160,000 to $150,000) but otherwise affirmed the verdict and the award of $680,520 in attorney's fees. *See also Kelley v. CUIAB*, 2014 WL 505343 (Cal. Ct. App. 2014) (conditions for return to work demanded by employee's lawyer were not "ultimatums" and did not justify employer's termination of employee for purposes of eligibility for unemployment benefits).

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$238,000 Wrongful Termination Verdict Is Reversed In Light Of Improper Jury Instructions

Mendoza v. Western Med. Ctr. Santa Ana, 222 Cal. App. 4th 1334 (2014)

Romeo Mendoza worked as a nurse for the hospital for more than 20 years. In late 2010, Mendoza reported that he was being sexually harassed by a supervisor (Del Erdmann). Both Mendoza and Erdmann are gay. Mendoza's complaint was investigated, and it was determined that Erdmann had made inappropriate sexual comments to Mendoza and that he had shown his genitals to Mendoza. Erdmann contended that Mendoza welcomed the behavior and that he had "bent over provocatively" in front of Erdmann, requested that Erdmann display his genitals and in fact had "assisted Erdmann in exposing his genitals." Erdmann claimed he was a "reluctant participant" in the conduct initiated by Mendoza. Upon completion of the investigation, the hospital fired both Mendoza and Erdmann for "unprofessional conduct." Mendoza subsequently sued for wrongful termination in violation of public policy (for reporting sexual harassment to his employer), and the jury awarded him $238,328, including $145,000 in past emotional distress damages. However, because the jury was instructed to determine if Mendoza's reporting sexual harassment was "a motivating reason" and not "a *substantial* motivating reason" for his termination as required by *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013), the Court of Appeal reversed the judgment. The Court rejected the employer's contention that its simultaneous termination of Erdmann was "conclusive proof" that it had acted in good faith in light of the "numerous shortcomings in the investigation" conducted by the employer following Mendoza's complaint.

$100,000 Attorney's Fees Award Was Properly Granted Against Employee

Robert v. Stanford Univ., 2014 WL 739112 (Cal. Ct. App. 2014)

Francis Robert, an American Indian, was terminated from his employment at Stanford due to his harassment of a female Stanford employee. Before his termination, Robert was given several warnings and was the subject of a restraining order. Robert then sued Stanford for discrimination under the Fair Employment and Housing Act ("FEHA"), claiming he was discriminated against on the basis of his "native ancestry." The trial court granted Stanford's motion for nonsuit as to his FEHA claim but allowed his claims for retaliation and breach of contract to go to the jury, which returned a defense verdict in 15 minutes. The trial court awarded Stanford $100,000 in attorney's fees against Robert on the ground that the "FEHA claim was without merit and was frivolous and vexatious. It was a legal theory in search of facts." The Court of Appeal affirmed the award against Robert despite the trial court's failure to make written findings or consider Robert's purported impecuniousness.

State Overtime Law Does Not Apply To Employees Covered By Collective Bargaining Agreement

Vranish v. Exxon Mobil Corp., 223 Cal. App. 4th 103 (2014)

George Vranish, Jr. and Steve Teague are employees of Exxon Mobil whose employment is governed by the terms of a collective bargaining agreement ("CBA"). Plaintiffs contend that the CBA does not provide premium compensation for all "overtime hours worked" and, therefore, Cal. Lab. Code § 514 (exempting employees subject to a CBA from the state's overtime law) does not apply. The trial court granted the employer's summary judgment motion, and the Court of Appeal affirmed on the ground that the word "overtime" as used in Section 514 is defined by the CBA and not by Cal. Lab. Code § 510. *See also Sandifer v. United States Steel Corp*., 571 U.S. ___, 134 S. Ct. 870 (2014) (unionized steelworkers' donning and doffing of protective gear constituted non-compensable time spent "changing clothes" within the meaning of the Fair Labor Standards Act).

Employer Proved Conversion By Employee's Misuse Of Its Credit Card

Welco Elec., Inc. v. Mora, 223 Cal. App. 4th 202 (2014)

Welco sued its former quality assurance manager (Nicholas J. Mora) for more than $400,000 based on Mora's use of Welco's credit card to transfer specific sums of money to Mora's bank account. Mora contended that Welco agreed to pay him "like a vendor using [Welco's] credit card account" because Welco's president "was concerned about a garnishment of Mora's wages." Following a bench trial, judgment was entered in favor of Welco and against Mora in the amount of $446,447.81. The Court of Appeal affirmed, holding that Mora's use of a credit card to obtain money wrongfully from Welco constituted the tort of conversion – "[t]aking a credit card or its information in order to obtain money is not materially different in effect than conversions by taking other instruments such as checks, bonds, notes, bills of exchange, warehouse receipts, stock certificates, and information related to those instruments, to obtain someone else's money."

Federal Court In California Has No Jurisdiction Over Foreign Employees' Claims

Daimler AG v. Bauman, 571 U.S. ___, 134 S. Ct. 746 (2014)

In this case, 22 Argentinian residents (including a Chilean national) sued DaimlerChrysler Aktiengesellschaft ("DCAG") in federal court in California, alleging that one of DCAG's subsidiaries, Mercedes-Benz Argentina ("MBA"), collaborated with state security forces to kidnap, detain, torture and kill plaintiffs and their relatives during Argentina's "Dirty War" in the 1970s. (Some of the plaintiffs are former employees of MBA.) The Ninth Circuit held that the district court had personal jurisdiction in California over DCAG through the contacts of its subsidiary and agent, Mercedes-Benz USA, in view of the "interest of California in adjudicating important questions of human rights…." In this opinion, the Supreme Court unanimously reversed the Ninth Circuit, holding that "[e]xercises of personal jurisdiction so exorbitant… are barred by due process constraints on the assertion of adjudicatory authority."

Former Employee Could Proceed With Age Discrimination Lawsuit

Cheal v. El Camino Hosp., 223 Cal. App. 4th 736 (2014)

Carol Cheal worked as a "Dietetic Technician Registered" for the hospital for 21 years before her termination at age 61. Before Kim Bandelier became Cheal's supervisor (approximately a year before her termination), Cheal received the "highest category of performance" ratings on her annual evaluations; after Bandelier became Cheal's supervisor, she was "accused of numerous shortcomings" and received written warnings and her employment was terminated. Cheal sued for age discrimination under the Fair Employment and Housing Act, and the trial court granted summary judgment in favor of the employer. In this opinion, however, the Court of Appeal reversed the summary judgment, holding that "[a] factfinder could conclude that, apart from … one error eight months before her discharge, plaintiff exhibited no significant failures of competence while under Bandelier's supervision." The Court also relied upon an alleged "confession of bias," which it characterized as "another smoking gun," that Bandelier told a "former friend" that she favored "younger and pregnant workers."

Staffing Company Is Not Liable For Employee's Poisoning Of Coworker

Montague v. AMN Healthcare, Inc., 2014 WL 659690 (Cal. Ct. App. 2014)

AMN Healthcare, Inc., dba Nursefinders, is a staffing company that provides prescreened nurses and medical personnel to hospitals and other medical facilities. Nursefinders hired Theresa Drummond as a medical assistant and later assigned her to Kaiser (one of Nursefinders' clients) where Sara Montague also worked as a medical assistant. Drummond and Montague had a couple of disagreements at work before Drummond surreptitiously poured carbolic acid into Montague's water bottle, which burned Montague's tongue and throat and caused her to vomit. Montague and her husband sued Nursefinders for negligent training of Drummond and various related torts under a theory of respondeat superior. The trial court granted summary judgment in favor of Nursefinders, and the Court of Appeal affirmed, holding that "[t]he facts, construed most favorably for Montague, do not support liability against Nursefinders because Drummond's poisoning of Montague was highly unusual and startling." The Court also affirmed dismissal of Montague's husband's loss of consortium claim and found that Nursefinders was not liable for negligently training Drummond because the poisoning could not have been caused by its failure to properly train her. *See also Elsheref v. Applied Materials, Inc.*, 223 Cal. App. 4th 451 (2014) (employer did not owe duty of care to not-yet-conceived child of employee who had been exposed to toxic chemicals, but plaintiffs could proceed with products liability claim); *Gonzalez v. Seal Methods, Inc.*, 223 Cal. App. 4th 405 (2014) (employee could not proceed with civil claim under Lab. Code § 4558 because there was no evidence that employer bypassed, removed or tampered with point of operation guard on power press); *Solus Indus. Innovations, LLC v. Superior Court*, 2014 WL 690512 (Cal. Ct. App. 2014) (federal OSHA preempts California law, precluding prosecutor's pursuit of civil penalties under Unfair Competition Law); *People v. Superior Court (Solus Indus. Innovations, LLC)*, 2014 WL 690607 (Cal. Ct. App. 2014) (district attorney has no power to pursue civil penalties unless specifically authorized by statute to do so).

Terminated Physician Need Not Succeed In Mandamus Action Before Proceeding With Civil Suit

Fahlen v. Sutter Central Valley Hosps., 2014 WL 655995 (Cal. S. Ct. 2014)

Dr. Mark T. Fahlen claimed that Sutter terminated his physician staff privileges in retaliation for his reports of substandard performance by hospital nurses in violation of Health & Safety Code § 1278.5. The hospital moved to dismiss Fahlen's action on the ground that he could not bring a civil suit under Section 1278.5 unless he first succeeded by mandamus in overturning the hospital's action. The trial court denied the motion, the Court of Appeal reversed in part, and in this opinion the California Supreme Court affirmed the appellate court, holding that a hospital staff physician who claims a hospital decision to restrict or terminate his staff privileges was an act in retaliation for his or her whistleblowing in furtherance of patient care and safety need not seek and obtain a mandamus petition to overturn the decision before filing a civil action under Section 1278.5. *See also Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. ___, 134 S. Ct. 852 (2014) (immunity from suit under Aviation and Transportation Security Act may not be denied without a determination that a disclosure was materially false); *Driscoll v. Superior Court*, 223 Cal. App. 4th 630 (2014) (state courts have concurrent jurisdiction over federal False Claims Act retaliation claims).

United Airlines' Sick Leave Plan Is Not Exempt From Kin Care Law

Airline Pilots Ass'n Int'l v. United Airlines, Inc., 223 Cal. App. 4th 706 (2014)

United Airlines created an employee sick leave plan and trust, which United contends is subject to ERISA and, thus, exempt from state regulation, including California's Kin Care Law (Lab. Code § 233), which requires employers that provide paid sick leave to their employees to allow them to use sick leave to care for family members. The trial court ruled against United, holding that application of the Kin Care Law to California-domiciled pilots was not preempted by ERISA. The Court of Appeal affirmed, holding that the trusts United established are not "bona fide separate trusts" and thus ERISA preemption does not apply. The Court also rejected United's argument that the pilots union did not have standing to prosecute the action.

Continuous Videotaping Of Truck Drivers Does Not Violate Labor Code § 1051

Opinion of Cal. Atty. Gen. Kamala D. Harris, No. 12-1101 (Feb. 13, 2014)

The question presented by the Hon. Jerry Hill, Member of the State Senate, is "Does continuous videotaping surveillance of truck drivers during their on-the-job driving constitute a misdemeanor under Labor Code section 1051 [which prohibits requiring an employee to be photographed for the purpose of furnishing the photograph to another employer or third party] where the video file is inspected by a third party and used as a basis for discipline by the driver's employer." The Attorney General answered the question "No," provided that "the third party is an agent of the driver's employer who is videotaping and inspecting the file for the sole benefit of the driver's employer, and that the file is furnished only to the driver's employer." The Attorney General reasoned that the statute was originally intended as an anti-blacklisting provision (that predates more

modern laws on the subject) and that in any case the videotapes in question are not being provided to another employer or a third party who is not the agent of the current employer.

Contractor's Employees' Wage And Hour Claims Against Airlines Were Properly Dismissed

Hawkins v. TACA Int'l Airlines, S.A., 223 Cal. App. 4th 466 (2014)

Arlette Hawkins filed a putative class action alleging wage and hour claims against her former employer (Sereca Security Corp.) and a Labor Code § 2810 claim against the airlines that had hired Sereca on the ground that Section 2810 authorizes the employees of a service contractor to sue the party hiring the contractor if the hiring party knowingly pays a contract price that is insufficient to permit the contractor to comply with the law in performing the contract. Hawkins sued the airline defendants (Sereca was not a party to this appeal) for entering into "underfunded contracts" with Sereca though she admitted she had never seen the relevant contracts and had no information concerning their contents. The trial court sustained the airlines' demurrers on the ground that Hawkins had failed to allege any facts to show that they had knowingly entered into underfunded contracts in violation of Section 2810. The Court of Appeal affirmed dismissal on demurrer, holding that Hawkins should have obtained the contracts with the airlines through means of third-party discovery – "upon obtaining the contracts, Hawkins could have ascertained whether they were underfunded." Further, Hawkins' allegation that Sereca had the ability to pay all wages earned by the putative classes meant "the contracts were *not* underfunded." *See also Petrosyan v. Prince Corp.*, 223 Cal. App. 4th 587 (2014) (mistrial should not have been granted in employee's case against former employer where employee represented himself and had not violated judge's *in limine* order).

Employee Who Expressly Declined To Take FMLA Leave Was Properly Denied Relief Under The Statute

Escriba v. Foster Poultry Farms, Inc., 2014 WL 715547 (9th Cir. 2014)

Maria Escriba worked in a Foster Poultry Farms processing plant in Turlock, California for 18 years before her employment was terminated for failing to comply with the company's "three day no show, no call rule" at the end of a previously approved period of leave during which she was caring for her ailing father in Guatemala. She claimed her termination was an unlawful interference with her rights under the Family Medical Leave Act ("FMLA"), but Foster Farms contended that Escriba had explicitly declined to have her time off count as FMLA leave. The jury found in favor of the employer, and the Ninth Circuit affirmed, holding that "an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection." The Court further found that the district court did not abuse its discretion in declining to award costs of suit to Foster Farms as the prevailing party.

Overtime Class Action Was Properly Removed To Federal Court Under CAFA

Rea v. Michaels Stores, Inc., 2014 WL 607322 (9th Cir. 2014)

Plaintiffs brought this putative class action against Michaels Stores, alleging the misclassification of store managers as exempt from overtime. Michaels removed the case to federal court within 30 days under the Class Action Fairness Act ("CAFA"). The district court remanded the case back to state court, finding that CAFA's $5 million amount-in-controversy requirement was not met because plaintiffs expressly disclaimed any recovery in excess of $4,999,999.99. Michaels removed the case again the day after the Supreme Court's opinion in *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013), holding that attempted damages waivers are ineffective to defeat removal under CAFA. The district court again remanded on the grounds that the second removal was untimely and that Michaels had failed to carry its burden to demonstrate that the amount in controversy exceeded $5 million. The United States Court of Appeals for the Ninth Circuit reversed the second remand, holding that the amount in controversy is to be determined from the time of the first removal (thus ignoring subsequent developments that might suggest a lower amount in controversy) and that the second removal was timely because of a "change of circumstances" created by the Supreme Court's opinion in *Standard Fire Ins*.

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