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By **Anthony J. Oncidi***

California Employment Law Blog

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Former *LA Times* Columnist's Age/Disability Discrimination Judgment Upheld, New Trial On Damages Ordered

Simers v. Los Angeles Times Commc'ns, LLC, 18 Cal. App. 5th 1248 (2018)

T.J. Simers, a well-known sports columnist for the *Los Angeles Times*, alleged disability and age discrimination and constructive discharge – Simers, who had suffered a "mini-stroke" from which he quickly recovered, quit his job after his column was suspended and he was reprimanded and demoted for a possible ethical breach. The jury awarded Simers over $2.1 million in economic damages and $5 million in emotional distress damages. The trial court granted the *Times'* motion for judgment notwithstanding the verdict ("JNOV") on Simers' constructive termination claim, but otherwise denied the JNOV, finding substantial evidence supported the verdict on plaintiff's age and disability discrimination claims. The trial court also granted the *Times'* motion for a new trial on all damages because it was not possible to determine what amount of noneconomic damages the jury awarded because of the discrimination but not because of the constructive discharge. The Court of Appeal affirmed the trial court's judgment, holding that none of the circumstances relied upon by Simers to justify his resignation, "alone or in combination, amount to working conditions that are either unusually aggravated or a continuous pattern of mistreatment." In addition to affirming the grant of the new trial motion as to damages, the appellate court also affirmed the denial of the *Times'* JNOV motion as to age and disability discrimination.

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Dodd-Frank Anti-Retaliation Protection Does Not Apply Absent Prior Notice To The SEC

Digital Realty Trust, Inc. v. Somers, 583 U.S. ___, 2018 WL 987345 (2018)

Paul Somers alleged that his former employer Digital Realty terminated his employment after he reported to senior management suspected securities-law violations by the company. Somers neither alerted the Securities and Exchange Commission ("SEC") of his concerns prior to his termination nor did he file an administrative complaint within 180 days of his termination, rendering him ineligible for relief under the Sarbanes-Oxley Act. After Somers filed this whistleblower case against Digital Realty, the company filed a motion to dismiss on the ground that Somers did not qualify as a whistleblower because he had failed to report any alleged legal violations to the SEC. In reversing the Ninth Circuit, the United States Supreme Court in this opinion held that "Courts are not at liberty to dispense with the condition – tell the SEC – Congress imposed" before filing suit under the statute.

California Rejects Federal Rule For Calculating Overtime Rate For Employees Who Earn Flat Sum Bonus

Alvarado v. Dart Container Corp. of Cal., 2018 WL 1146645 (Cal. S. Ct. 2018)

Hector Alvarado, who worked as a warehouse associate for Dart, is a member of a putative class of employees who, in addition to their normal hourly wages, received a $15 per day attendance bonus if they were scheduled to work on a Saturday or Sunday and did so, completing their full work shift. According to the California Supreme Court, the question presented is "whether the bonus is treated as if it were earned throughout the *entire* pay period (including any overtime hours), or whether the bonus is treated as if it were earned throughout only the *nonovertime* hours of the pay period." The Court noted that the enforcement policy of the California Division of Labor Standards Enforcement ("DLSE") has expressly resolved this question in favor of plaintiff's interpretation, but also concluded that that policy is a "void underground regulation." Notwithstanding that determination, the Supreme Court held (consistent with the DLSE's policy and contrary to federal law) that the divisor for purposes of calculating the per-hour value of the attendance bonus should be the number of nonovertime hours *actually worked* in the relevant pay period, not the number of nonovertime hours that *exist* in the pay period. The Supreme Court further held that its ruling should be applied retroactively, not just prospectively.

$48,000 Judgment Affirmed In Favor Of Former Parks & Recreation Employee

Hurley v. California Dep't of Parks & Recreation, 2018 WL 989506 (Cal. Ct. App. 2018)

Delane Hurley worked as a staff services analyst who sued her employer, the Department of Parks & Recreation ("DPR"), and her former supervisor Leda Seals for harassment based on sex and sexual orientation in violation of the Fair Employment and Housing Act ("FEHA"), invasion of privacy, violation of the Information Practices Act ("IPA") and discrimination in violation of FEHA against DPR. After a four-week trial, the jury returned verdicts in favor of all defendants on the FEHA causes of action and against defendants for violation of IPA and against Seals for intentional and negligent infliction of emotional distress. The jury awarded Hurley $19,200 for past economic damages; $19,200 for past noneconomic (emotional distress) damages; and $28,800 in punitive damages against Seals only. The Court of Appeal affirmed the judgment on the IPA verdicts on the ground that Seals had personally maintained and disclosed information from Hurley's personnel file in violation of the statute. Although Hurley had suffered emotional distress as a result of the violation of the IPA, she failed to prove any past economic damages from the breach within the applicable limitations period. Finally, the Court held that the workers' compensation exclusivity doctrine did not bar the claims for intentional and negligent infliction of emotional distress.

Urging Other Employees To Quit And Sue Employer Is Protected Conduct Under Anti-SLAPP Statute

Bel Air Internet, LLC v. Morales, 2018 WL 1045222 (Cal. Ct. App. 2018)

Bel Air Internet sued two of its former employees, Albert Morales and Flavio Delabra, for encouraging their fellow employees to quit and sue the company for alleged employment violations rather than sign a release of claims as Bel Air had requested. Bel Air sued Morales and Delabra for intentional interference with contractual relations; breach of contract; breach of the implied covenant of good faith and fair dealing and conversion (Morales only). In response to Bel Air's complaint, Morales and Delabra filed a motion to strike under the anti-SLAPP statute (Cal. Code Civ. Proc. § 425.16) on the ground that by allegedly encouraging other employees to quit and sue Bel Air, they had engaged in protected conduct under the statute. The Court of Appeal reversed the trial court and held that Morales and Delabra could rely upon Bel Air's allegations that they had engaged in what amounted to protected conduct – even though they had filed declarations denying such conduct. The Court further held that Bel Air had failed to show a probability that it would prevail on its claims because "the litigation privilege applies to [Morales and Delabra's] litigation-related activity" even though they were encouraging other employees to sue Bel Air. Finally, the Court ordered Bel Air to pay Morales and Delabra the attorney's fees and costs they had incurred in bringing the motion and prosecuting the appeal.

Unsuccessful Disability Discrimination Plaintiff Is Not Entitled To Attorney's Fees

Bustos v. Global P.E.T., Inc., 19 Cal. App. 5th 558 (2017)

William Bustos sued his former employer for disability discrimination. A jury determined that Bustos' actual or perceived physical condition was a substantial motivating reason for his termination, but nevertheless returned defense verdicts on all of his claims. After the trial, Bustos sought an award of his attorney's fees under the Fair Employment and Housing Act ("FEHA"). The trial court denied the motion for attorney's fees, and the Court of Appeal affirmed, holding that because Bustos had obtained no relief at trial (either monetary or equitable), he did not "realize his litigation objectives." *See also Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 18 Cal. App. 5th 1098 (2018) (employer may only recover attorney's fees for prevailing on employee's wage and FEHA claims if they were "frivolous" – though ordinary costs and expert fees may be recoverable under Cal. Code Civ. Proc. § 998 on unsuccessful wage claim); *Burkhalter Kessler Clement & George LLP v. Hamilton*, 19 Cal. App. 5th 38 (2018) (managing partner who was prevailing party on plaintiff's alter ego claim may recover fees under reciprocal contractual attorney fee statute); *Terris v. County of Santa Barbara*, 2018 WL 915128 (Cal. Ct. App. 2018) (costs may not be awarded against unsuccessful FEHA plaintiff unless the claim was frivolous).

Employee's Qui Tam Action Is Not Barred By The Litigation Privilege

People ex rel. Alzayat v. Hebb, 18 Cal. App. 5th 801 (2017)

Mahmoud Alzayat filed this qui tam action against his employer (Sunline Transit Agency) and his supervisor (Gerald Hebb), alleging a violation of the Insurance Frauds Prevention Act ("IFPA") based upon allegedly false statements that Hebb made in an incident report submitted in response to Alzayat's workers' compensation claim and in a deposition taken during the investigation into Alzayat's claim. The trial court dismissed the complaint based upon the litigation privilege, codified at Cal. Civ. Code § 47(c). The Court of Appeal reversed, holding that the litigation privilege does not bar an action brought under the IFPA, which is a more specific statute than the litigation privilege, and application of the litigation privilege to claims brought under the IFPA "would in large measure nullify the Act." The Court further held that the Workers' Compensation Act's exclusivity rule did not apply to Alzayat's claims under the IFPA because such claims are not based on the qui tam relator's own injuries.

Statute Of Limitations For State Law Claims Was Suspended While Case Was Pending In Federal Court

Artis v. District of Columbia, 583 U.S. ___, 138 S. Ct. 594 (2018)

Stephanie Artis filed a Title VII employment discrimination case against her employer, the District of Columbia, which was eventually dismissed on summary judgment by the district court; the district court declined to exercise supplemental jurisdiction over the remaining state-law claims that were included in the complaint. Artis then refiled her state law claims in state court 59 days after dismissal of her federal lawsuit. Pursuant to 28 U.S.C. § 1367(d), the state law statute of limitations shall be "tolled while the claim is pending [in federal court] and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." Reversing the District of Columbia Court of Appeals, the United States Supreme Court held in a 5-4 opinion (Chief Justice Roberts voting with the majority) that "tolling" means "to hold [the state limitations period] in abeyance, *i.e.*, to stop the clock" rather than to merely provide a 30-day grace period after dismissal of the federal court action.

Employer Did Not Waive Its Right To Remove Action to Federal Court By Filing Demurrer

Kenny v. Wal-Mart Stores, Inc., 881 F.3d 786 (9th Cir. 2018)

Kris Kenny filed a putative class action in California state court, challenging Wal-Mart's policy requiring employees who have suffered workplace-related injuries to submit to drug and/or urine testing. Wal-Mart filed a demurrer in response to the complaint, but before the hearing date on the demurrer, Wal-Mart removed the action to federal court pursuant to the Class Action Fairness Act. Shortly thereafter, the district court (the Hon. Judge Manuel L. Real), acting *sua sponte*, issued an order remanding the action to state court based on the court's conclusion that Wal-Mart had waived its right to remove the case by filing a demurrer in state court. Wal-Mart successfully petitioned the Ninth Circuit for permission to appeal the district court's remand order. In this opinion, the Court of Appeals vacated the district court's order and held the lower court had erred by remanding the action to state court *sua sponte* on a non-jurisdictional ground: "Wal-Mart removed the case before Kenny opposed Wal-Mart's demurrer, and before any hearing was held, let alone any ruling was issued [in state court]."

Payments Made To Union Trust Fund Are Not Subject To California Wage Statement Law

Mora v. Webcor Constr., L.P., 20 Cal. App. 5th 211 (2018)

Steven Mora filed this putative class action/PAGA claim against his former employer, Webcor Construction, for violation of the California wage statement statute (Cal. Lab. Code § 226(a)) based upon payments made to a union vacation trust fund authorized by the Labor Management Relations Act of 1947 ("LMRA"). The trial court sustained the employer's demurrer without leave to amend on the grounds that payments to the union vacation trust fund were not "wages" within the meaning of the Section 226(a) and, in any event, Mora's claims were preempted by the LMRA. The Court of Appeal affirmed dismissal of the action. *See also Newton v. Parker Drilling Mgmt. Servs., Ltd.*, 881 F.3d 1078 (9th Cir. 2018) (California law (not the FLSA) applies to workers employed on drilling platforms located on the outer continental shelf off the coast of Santa Barbara); *Solus Indus. Innovations, LLC v. Superior Court*, 4 Cal. 5th 316 (2018) (district attorney's unfair competition and fair advertising law claims brought against employer for violating workplace safety standards were not preempted by the federal OSHA statute).

PAGA Claim Dismissed Where Employee Failed To Provide Adequate Notice To LWDA

Khan v. Dunn-Edwards Corp., 19 Cal. App. 5th 804 (2018)

Hamid H. Khan brought this lawsuit against his former employer pursuant to the Private Attorneys General Act of 2004 ("PAGA") based on the fact that his final paycheck (in contrast to all other wage statements he had received) did not include the start date for the applicable pay period. Khan purported to sue on behalf of himself and others similarly situated. After the lawsuit was already pending, Khan provided Dunn-Edwards' counsel and the California Labor and Workforce Development Agency ("LWDA") with notice of his own individual PAGA claim. The trial court granted Dunn-Edwards' summary judgment motion on the ground that Khan's notice to the LWDA was insufficient. The Court of Appeal affirmed, holding that "[b]ecause his notice expressly applied only to [Khan], it failed to give the [LWDA] an adequate opportunity to decide whether to allocate resources to investigate Khan's representative action. Because Khan referred only to himself, the agency may have determined that no investigation was warranted." The Court further held that Khan could not proceed with an individual PAGA claim because he had dismissed his individual claims and because "a PAGA action is only a representative action." *See also Kim v. Reins Int'l Cal., Inc.*, 18 Cal. App. 5th 1052 (2017) (employee who accepted offer to settle his individual claims is no longer an "aggrieved employee" who has standing to assert a PAGA claim on behalf of other employees).

Class Certification Was Properly Denied In Outside Sales Exemption Case

Duran v. U.S. Bank Nat'l Ass'n, 19 Cal. App. 5th 630 (2018)

Samuel Duran and Matt Fitzsimmons filed this wage-and-hour class action challenging the Bank's classification of its business banking officers as exempt employees under the outside salesperson exemption. The trial court denied class certification after concluding plaintiffs had failed to carry their burden of showing that common questions predominated. The trial court found survey data that was supplied by plaintiffs to be "unreliable for any purpose" and observed that the representative sampling offered by plaintiffs could not be used to establish an aggregate restitution award because the proposed sample sizes were not scientifically supportable for that purpose. Further, because some of the putative class members worked most of their time outside the office, the court determined that it would not be able to adequately manage the case because of the need for "a host of mini trials." The Court of Appeal affirmed the order denying class certification. *See also Lampe v. Queen of the Valley Med. Ctr.*, 19 Cal. App. 5th 832 (2018) (trial court properly denied certification of nurses' putative class action); *compare ABM Indus. Overtime Cases*, 19 Cal. App. 5th 277 (2017) (trial court's wholesale exclusion of plaintiffs' expert evidence was error, as was trial court's refusal to certify class of present and former ABM janitorial employees).

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