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# California Employment Law Notes

**July 2014**

### "Unauthorized Alien" Who Provided False SSN Can Proceed With Disability Discrimination Lawsuit

*Salas v. Sierra Chem. Co.*, 2014 WL 2883878 (Cal. S. Ct. 2014)

Vicente Salas worked on Sierra Chemical's production line, filling containers with various chemicals. At the time of his hire, Salas provided Sierra with a resident alien card and a Social Security card and signed an Employment Eligibility Verification Form (I-9 Form). After allegedly injuring his back several times and presenting doctors' notes restricting his ability to lift, stoop and bend, Salas was laid off in December 2006 as part of Sierra's annual reduction in its production line staff. Salas received a recall-to-work letter in May 2007, but Sierra did not permit him to return to work after he told the company he was "not completely healed." Salas subsequently filed a lawsuit against Sierra, alleging disability discrimination and denial of employment in violation of public policy.

After filing an in limine motion stating that he would assert his Fifth Amendment right against self-incrimination to any questions concerning his immigration status, Sierra discovered that the Social Security number ("SSN") used by Salas to secure employment belonged to a man in North Carolina. Summary judgment was eventually granted in favor of Sierra on the ground that it never would have hired or recalled Salas if it had known he was using a counterfeit SSN. However, in this opinion, the California Supreme Court reversed summary judgment and held that the federal Immigration Reform and Control Act preempts California's Fair Employment and Housing Act ("FEHA"), which protects employees regardless of their immigration status, only for lost-pay damages for the period of time after the employer discovers that the employee was ineligible to work in the United States. *See also Serri v. Santa Clara Univ.*, 226 Cal. App. 4th 830 (2014) (after-acquired expert evidence that there were no adverse consequences resulting from employee's failure to perform his or her job duties did not preclude summary judgment for employer).

**Employee Was Properly Limited To Just One Theory Of Age Discrimination At Trial**

*Rosenfeld v. Abraham Joshua Heschel Day School, Inc.*, 226 Cal. App. 4th 886 (2014)

Ruth Rosenfeld sued the day school where she had worked as a teacher for 35 years after her hours were reduced and she was allegedly forced to resign. Rosenfeld asserted that age discrimination was a motivating factor in the reduction of her hours, though the school asserted that Rosenfeld's hours were reduced because of a decline in student enrollment. Shortly after her resignation, Rosenfeld was replaced by another teacher who was in her mid-50's (slightly younger than Rosenfeld). A jury returned a verdict in favor of the school, and Rosenfeld filed this appeal, asserting that the trial court erred in not permitting her to put on a case of disparate impact in addition to disparate treatment – though all of her pleadings leading up to the trial only mentioned disparate treatment as her theory of discrimination. The Court of Appeal affirmed the trial court, holding that Rosenfeld had failed to provide timely notice to the school (i.e., before the close of discovery) that she would be pursuing a different theory of discrimination at trial. The appellate court found no error in various other rulings of the trial court, including permitting the school to put on evidence of Rosenfeld's failure to pursue its internal grievance procedure before filing suit.

**Male Deputies Prohibited From Supervising Female Inmates Could Proceed With Sex Discrimination Case *(Is Orange the New Black?)***

*Ambat v. City & County of San Francisco*, 2014 WL 2959634 (9th Cir. 2014)

The plaintiffs in this case are current and former deputies of the San Francisco Sheriff's Department ("SFSD") who challenged the SFSD's policy prohibiting male deputies from supervising female inmates. The deputies contend that the policy violates Title VII's prohibition against sex discrimination. The district court granted summary judgment to the City and County of San Francisco, but the U.S. Court of Appeals for the Ninth Circuit reversed, holding that San Francisco was not entitled to the defense that being a female was a "bona fide occupation qualification" for supervising female inmates. The Court held that statistics reflecting sexual misconduct perpetrated by male deputies against female inmates "while troubling… by themselves do not prove that 'all or substantially all' male deputies are likely to perpetrate sexual misconduct."

**$60,000 Sexual Harassment Verdict Is Affirmed**

*Kim v. Konad USA Distribution, Inc*., 226 Cal. App. 4th 1336 (2014)

Following a bench trial, Esther Kim was awarded $60,000 against her former employer (Konad) and her former boss (Dong Whang) for sexual harassment and wrongful termination. Curiously, defendants did not challenge the pleadings or file any pretrial motion to dispose of any part of the case prior to the commencement of trial, asserting lack of jurisdiction based on the fact that Konad may have had fewer than five employees and Kim may have failed to exhaust her administrative remedies. It was only after the trial court issued its proposed statement of decision that the defense finally raised these issues – a strategy the appellate court referred to as "the road less travelled." The Court of Appeal affirmed the judgment in favor of Kim, holding that "defendants forfeited any right they may have had (in the abstract) for a judgment of dismissal on the FEHA cause of action" and, in any event, "there is clear evidence in the record that plaintiff timely submitted verified administrative complaints against both defendants on all the claims pursued at trial and received right-to-sue letters for both defendants." The Court also held that because plaintiff's common law wrongful termination claim was based both on FEHA and the California Constitution, it was properly prosecuted against a company that may have had fewer than five employees because a "common law tort based on sexual harassment can be brought against an employer of any size." The appellate court also failed to reverse the wrongful termination judgment against Whang (who was Kim's supervisor but not her employer) because the issue was not timely raised in the lower court and because there was no evidence that Whang was actually prejudiced by the judgment, which held him and Konad liable for the undifferentiated sum of $60,000.

**Dependents Of Officer Who Died In Auto Accident Were Not Entitled To WCAB Benefits**

*Lantz v. WCAB*, 226 Cal. App. 4th 298 (2014)

Lieutenant Seth Patrick Lantz, a 33-year-old correctional officer at Pleasant Valley State Prison in Coalinga, California, was killed in an automobile accident on his way home from work. Lantz's widow, on behalf of herself and her four children, applied for workers' compensation benefits, contending that Lantz sustained the fatal injury during the course of his employment. Before the fatal accident, Lantz had been "held over" for an extra shift so that he had worked a total of 16 hours. The Court of Appeal affirmed the decision of the WCAB that the hold-over shift was not "extraordinary" and, therefore, workers' compensation benefits were properly denied to Lantz's survivors. *See also Young v. WCAB*, 2014 WL 2875839 (Cal. Ct. App. 2014) (correctional sergeant's off-duty injury sustained while performing his regular exercise regimen was compensable where county required officers to maintain themselves in good physical condition); *Kesner v. Superior Court*, 226 Cal. App. 4th 251 (2014) (nephew of employee who allegedly contracted mesothelioma from exposure to friable asbestos while in his uncle's home could proceed with products liability lawsuit against uncle's former employer); *Haver v. BNSF Ry. Co.*, 226 Cal. App. 4th 1104 (2014) (wrongful death action based on premises liability associated with exposure to employer-sourced asbestos was properly dismissed).

**Employee's Threat To File False Criminal Complaint Against Former Employer Was Extortion**

*Stenehjem v. Sareen*, 2014 WL 2646729 (Cal. Ct. App. 2014)

Jerome Stenehjem sued his former employer and its president and CEO, Surya Sareen, for defamation, among other things. In response, Sareen filed a cross-complaint for civil extortion, alleging, among other things, that while representing himself, Stenehjem made a written threat by email to file a false criminal complaint against Sareen unless he paid Stenehjem money to settle the defamation claim. Stenehjem filed a motion to dismiss Sareen's cross-complaint under the anti-SLAPP statute (Cal. Code Civ. Proc. § 425.16) on the ground the alleged extortionate statement was protected speech within the meaning of the anti-SLAPP statute. The trial court granted the motion to dismiss, but the Court of Appeal reversed, holding Stenehjem's prelitigation email demand constituted extortion as a matter of law and was not protected speech.

**Employee's Refusal To Sign Disciplinary Notice Did Not Disqualify Him From Unemployment Benefits**

*Paratransit, Inc. v. CUIAB*, 2014 WL 2988013 (Cal. S. Ct. 2014)

Craig Medeiros worked as a vehicle operator for Paratransit for six years. Medeiros was a member of a union, and the union and the employer were parties to a collective bargaining agreement. Paratransit investigated a complaint filed by a passenger, alleging that Medeiros had unlawfully harassed her. Following the investigation, Paratransit concluded the alleged misconduct had occurred and decided to suspend Medeiros for two days without pay. Medeiros denied the misconduct and refused to sign a memorandum documenting the discipline (but not admitting guilt), stating his belief that by signing the memorandum he would be admitting guilt. He also requested that a union representative be present during his meeting with Paratransit, a request the employer denied. Paratransit subsequently terminated Medeiros for insubordination due to his refusal to sign the disciplinary notice. While the lower courts found that Medeiros had engaged in misconduct by deliberately disobeying Paratransit's lawful and reasonable instruction to sign the disciplinary notice, the California Supreme Court reversed, holding that Medeiros was not disqualified from receiving unemployment benefits. The Supreme Court concluded Medeiros "acted out of a genuine belief that signing the notice would be an admission of allegations he disputed, and that belief was not so unreasonable under the circumstances as to constitute misconduct within the meaning of the [California Unemployment Insurance Code]."

**Class Action Plaintiffs Must Develop A Trial Plan That May Include Statistical Sampling**

*Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1 (2014)

Plaintiffs in this case are loan officers for U.S. Bank ("USB") who claim they were misclassified as exempt employees under the outside salesperson exemption. After certifying a class of 260 plaintiffs, the trial court devised a plan to determine the extent of USB's liability to all class members by extrapolating from a random sample of 21 plaintiffs. Based on testimony from the small sample group, the trial court found the entire class had been misclassified and ultimately rendered a verdict of approximately $15 million (an average recovery of over $57,000 per employee). The California Supreme Court affirmed the judgment of the court of appeal reversing the trial court's judgment and holding that the trial plan's reliance on a representative sampling to determine liability denied USB its due process right to litigate affirmative defenses. The Court concluded that "[i]f statistical methods are ultimately incompatible with the nature of the plaintiffs' claims or the defendant's defenses, resort to statistical proof may not be appropriate. Procedural innovation must conform to the substantive rights of the parties." *See also Hall v. Rite Aid Corp.*, 226 Cal. App. 4th 278 (2014) (suitable seating class action was improperly decertified where order was based on an assessment of the merits of plaintiffs' theory rather than whether the theory was amenable to class treatment).

**Trial Court Must Determine Whether Action Challenging Independent Contractor Status Could Proceed As A Class Action**

*Ayala v. Antelope Valley Newspapers, Inc.*, 2014 WL 2924954 (Cal. S. Ct. 2014)

Plaintiffs Maria Ayala, Rosa Duran and Osman Nuñez sought to certify a class of newspaper home delivery carriers in a lawsuit brought against Antelope Valley Newspapers, Inc. ("AVN"), alleging that AVN had improperly classified the carriers as independent contractors rather than employees in violation of California labor laws. The trial court denied class certification on the ground that there were numerous variations in how the carriers performed their jobs and, therefore, common issues did not predominate. The court of appeal reversed in part and held that because all of the carriers perform the same job under virtually identical contracts, the variations constituted common evidence that tended to show AVN's lack of control over certain aspects of the carriers' work – and that the carriers were entitled to class certification on the independent contractor/employee issue. However, the court affirmed denial of class certification of the carriers' claims for missed meal and rest breaks and unpaid overtime. In this opinion, the California Supreme Court affirmed the judgment of the court of appeal, holding that "whether the hirer's right to control can be shown on a classwide basis will depend on the extent to which individual variations in the hirer's rights vis-à-vis each putative class member exist, and whether such variations, if any, are manageable." *See also Ruiz v. Affinity Logistics Corp.*, 2014 WL 2695534 (9th Cir. 2014) (home delivery drivers were employees and not independent contractors under California law); *Laguna v. Coverall N. Am., Inc.*, 2014 WL 2465049 (9th Cir. 2014) (settlement of class action involving misclassification of franchisees as independent contractors was fair, reasonable and adequate).

**Summary Judgment Was Properly Granted In Favor Of Employer In Off-The-Clock Overtime Case**

*Jong v. Kaiser Found. Health Plan, Inc.*, 226 Cal. App. 4th 391 (2014)

Henry Jong, who worked as an hourly Outpatient Pharmacy Manager for Kaiser, claimed he was owed unpaid overtime that was earned from alleged "off-the-clock" hours that Kaiser either knew or should have known he had worked. Jong testified in his deposition that he was aware of Kaiser's policy to pay for all hours worked; that he was familiar with Kaiser's timekeeping rules and system for recording time; that he had signed a document entitled "Attestation Form for Hourly Managers and Supervisors – Working Off-the-Clock Not Allowed"; and that he did not know if anyone in Kaiser's management was aware he was working off the clock. The trial court granted summary judgment in favor of Kaiser, and the Court of Appeal affirmed, holding that "none of [the] evidence, considered independently or collectively, is sufficient to support a finding that Kaiser was aware of [Jong's] unreported overtime hours. Jong failed to create a triable issue of material fact essential to his claim, and Kaiser's motion for summary judgment therefore was properly granted."

**Resident Manager Of Apartment Building Was Properly Compensated In Part By Free Rent**

*Von Nothdurft v. Steck*, 2014 WL 2900132 (Cal. Ct. App. 2014)

Brenda Leigh Von Nothdurft worked as a resident manager of an apartment building owned by John Steck. Both signed a management agreement that provided that Von Nothdurft would be compensated in part by "free rent of a three bedroom apartment during the term as manager." Von Nothdurft later sued, claiming she was not adequately compensated and sought to recover wages for all of her work without deduction for the value of the rent-free apartment. The Court of Appeal affirmed judgment in favor of Steck on the ground that Wage Order 5-2001 provides that "…lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee. When credit for… lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited may not be more than … two-thirds (2/3) of the ordinary [apartment] rental value, and in no event more than… $451.89 per month [effective January 1, 2008]." The Court held that because the management agreement in this case satisfied the requirements of Wage Order 5, Steck was entitled to take a rental credit of $451.89 per month against the minimum wage amounts owed to Van Nothdurft.

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