Proskauer

California Employment Law Notes

November 2014

Google Required To Produce Emails In Response To Former Employer's Subpoena

Negro v. Superior Court, 2014 WL 5341926 (Cal. Ct. App. 2014)

Navalimpianti USA, Inc. subpoenaed Google, Inc. to produce copies of email messages it had relating to one of Navalimpianti's former employees, Matteo Negro. Prior to initiating this action against Google in state court in California, Navalimpianti sued Negro and other former employees in state court in Florida for various breaches of duty pursuant to a conspiracy that culminated in their entry into competition with Navalimpianti. After the Florida court issued an order directing Negro to send an email to Google consenting to disclosure of his emails, the California Court of Appeal in this opinion determined that the consent Negro expressly gave pursuant to the Florida court's order constituted "lawful consent" under the Stored Communications Act, rejecting Negro's assertion of "judicial coercion."

University Professor Was Properly Terminated For Refusing Fitness-For-Duty Exam

Kao v. The University of San Francisco, 229 Cal. App. 4th 437 (2014)

Dr. John S. Kao was a tenured professor at USF who submitted a 485-page complaint (plus a 41-page addendum) to the university alleging race-based discrimination and harassment at the school. Kao was not satisfied with the university's two-page response, which he said did not offer any remedies for the problems he perceived with the way the school recruited new faculty members. Soon, other professors became "terrified" of Kao's behavior, which included sudden bouts of yelling and screaming, uncontrollable rage and references to his judo expertise. Kao hit one of his colleagues "forcefully on the shoulder," charged at another in a hallway and began responding to various people at the university with a "wild cackling laugh." In response, the university conducted an internal investigation and asked Kao to submit to a fitness-for-duty examination ("FFD") to be conducted by an independent physician and to submit his medical records to the physician. When Kao refused, the university terminated him. Kao sued the university for, among other things, disability discrimination, invasion of privacy and defamation. The trial court granted a non-suit against Kao on the defamation claim, and a jury ruled against him on the remaining claims. The Court of Appeal affirmed, holding that the university was not required to engage in the interactive process before referring Kao for an FFD because it was Kao's burden (not the employer's) to initiate the interactive process and that there was a business necessity for an FFD in this case. The Court found "untenable" Kao's claim that USF had violated the Unruh Civil Rights Act given the existence of substantial evidence of a legitimate concern that Kao was dangerous. The Court also affirmed dismissal of the claim that the university had violated the Confidentiality of Medical Information Act by requiring Kao to submit his medical records to the independent physician as well as the defamation claim because communications about Kao to the independent physician were qualifiedly privileged. Finally, the Court affirmed denial of Kao's motion in limine to exclude evidence that he had failed to mitigate his damages by not seeking work outside a university setting. *See also EEOC v. Peabody W. Coal Co.*, 768 F.3d 962 (9th Cir. 2014) (mining leases that require employer to give preference to "Navajo Indians" do not violate Title VII's prohibition against national origin discrimination).

Liability For Employer's Harassment, False Imprisonment Of Employees Was Not Covered By Insurance

Jon Davler, Inc. v. Arch Ins. Co., 229 Cal. App. 4th 1025 (2014)

After one of the owners of Jon Davler, Inc. (Christina Yang) found a used sanitary napkin in the women's bathroom and blood around the toilet seat, she started yelling at the employees that they were "dirty" and demanded to know which of them was on her menstrual period. When the employees denied they were on their menstrual cycle, Yang instructed another female employee (against her will) "to take each of the employees into the bathroom, one by one, and check their panties to see who was on their menstrual period, by requiring each to pull down her pants and underwear for an inspection." Not surprisingly, the employees brought suit against Jon Davler and Yang for sexual harassment, invasion of privacy and false imprisonment. Jon Davler tendered the action to its insurer, Arch Insurance, which denied coverage based on an employment-related practices exclusion, which triggered this insurance coverage lawsuit by Jon Davler against Arch. The trial court sustained Arch's demurrer to the complaint, and the Court of Appeal affirmed dismissal of the action, holding that the employment practices exclusion applied. *See also Baek v. Continental Cas. Co.*, 230 Cal. App. 4th 356 (2014) (massage therapist's alleged sexual assault against client was not covered under massage therapy center's comprehensive general liability insurance policy).

Employee Was Not Acting Within Scope Of Employment While Driving Home From Work

Lobo v. Tamco, 178 Cal. Rptr. 3d 515 (Cal. Ct. App. 2014)

Deputy Daniel Lobo, a San Bernardino County deputy sheriff, was killed as a result of the allegedly negligent operation of a motor vehicle by Luis Del Rosario, who was leaving the premises of his employer (Tamco) to go home at the time of the collision. A jury returned a special verdict that Del Rosario was not acting within the course and scope of his employment at the time of the accident, and judgment was entered in favor of Tamco. The Court of Appeal affirmed, holding that the verdict was supported by substantial evidence because Del Rosario's infrequent use of his vehicle for Tamco business did not confer a sufficient benefit to the employer so as to make it reasonable to require the employer to bear the cost of the employee's negligence when operating the vehicle.

Employee Who Used False SSN To Obtain Employment Was Properly Deported

Hernandez de Martinez v. Holder, 2014 WL 5394445 (9th Cir. 2014) (*per curiam*)

Graciela Hernandez de Martinez, a native and citizen of Mexico, petitioned for review of a final order of removal from the United States. The Board of Immigration Appeals held that she was statutorily ineligible for cancellation of removal because of her conviction for violation of an Arizona statute prohibiting criminal impersonation by assuming a false identity with the intent to defraud another. Hernandez de Martinez argued that her conviction did not categorically involve moral turpitude because she had used a false Social Security number to obtain employment and "not for anything nefarious." The United States Court of Appeals for the Ninth Circuit disagreed, holding that crimes such as this one that require an intent to defraud necessarily involve moral turpitude.

Employee Who Falsified Timesheets Was Ineligible For Unemployment Benefits

Irving v. CUIAB, 229 Cal. App. 4th 946 (2014)

Jim L. Irving who worked as a probationary heavy truck driver for the Los Angeles Unified School District was terminated for, among other things, taking excessively long breaks and falsifying his time records. The Court of Appeal determined that Irving had committed misconduct and was thus ineligible for unemployment benefits when he took excessive breaks and falsely documented their duration in the school district's time records.

Court Properly Enjoined Plaintiffs' Lawyers From Distributing $5 Million In Fees To Themselves

Lofton v. Wells Fargo Home Mortgage, 2014 WL 5358364 (Cal. Ct. App. 2014)

The Initiative Law Group ("ILG") represented more than 600 plaintiffs in a class action filed in Los Angeles against Wells Fargo that was initially certified and then was later decertified. After decertification, ILG continued to represent the plaintiffs in their individual lawsuits against Wells Fargo. A similar class action (in which separate counsel represented the class) was pending in San Francisco. Both cases settled during a joint mediation, and a $6 million common fund settlement was set up for ILG and its clients. At the preliminary approval hearing for the settlement, the trial court was told that ILG's clients who were members of the San Francisco class would opt out of the class action. However, after the hearing, ILG assisted its class member clients in participating in the $19 million class action settlement rather than the $6 million common fund, which ILG later explained to its clients it "thought" represented attorney's fees owed to ILG. After an intervenor objected, ILG agreed to pay $1,750 to each of its clients from the $6 million common fund, leaving a total of $4.95 million to be distributed to ILG. Upon learning of the situation, the trial court issued a temporary restraining order requiring, among other things, that ILG deposit the funds in a secure escrow account. The Court of Appeal affirmed the TRO, noting that "[i]t is manifest that ILG intended to effectuate distribution of almost $5 million in fees to itself without court approval. Such a move by lawyers representing so many plaintiffs in a common fund situation appears to us unprecedented. It is fraught with the potential for conflicts of interest, fraud, collusion and unfairness." *See also Hernandez v. Siegel*, 230 Cal. App. 4th 165 (2014) (in the absence of a contrary agreement, costs and post-judgment interest belong to the plaintiff's attorney who owns the fee judgment).

Class Of Insurance Claims Adjusters Was Properly Certified

Jiminez v. Allstate Ins. Co., 765 F.3d 1161 (9th Cir. 2014)

Jack Jiminez and approximately 800 other Allstate employees claimed that Allstate has a practice or unofficial policy of requiring its claims adjusters to work unpaid off-the-clock overtime in violation of California law. The district court certified the class with respect to the unpaid overtime, timely payment and unfair competition claims. The lower court held that the common question of whether Allstate had an "unofficial policy" of denying overtime payments while requiring overtime work predominated over any individualized issues regarding the specific amount of damages a particular class member might be able to prove. The United States Court of Appeals for the Ninth Circuit affirmed certification, holding that the common questions identified by the district court contained the "glue" necessary to say that "examination of all the class members' claims for relief will produce a common answer to the crucial questions" raised in the complaint. The Court rejected Allstate's contention that it had been denied its due process rights by plaintiffs' use of statistical sampling, holding that the district court had accepted a form of statistical analysis that is capable of leading to a fair determination of Allstate's liability and that preserved the rights of Allstate to present its damages defenses on an individual basis.

Federal Law Does Not Preempt Meal And Rest Break Requirements For Motor Carrier Employees

Godfrey v. Oakland Port Servs. Corp., 2014 WL 5439289 (Cal. Ct. App. 2014)

Plantiffs Lavon Godfrey and Gary Gilbert initiated this class action against AB Trucking, alleging that AB did not pay its drivers for all hours worked, misclassified some drivers as non-employee trainees whom it did not pay at all, and failed to provide required meal and rest breaks. The trial court certified the class, and the case proceeded to a bench trial where plaintiffs prevailed and were awarded $964,557 plus attorney's fees, costs and class representative enhancements. The Court of Appeal affirmed, holding that the Federal Aviation Administration Authorization Act of 1994 does not preempt California's meal and rest break requirements. The Court further held that the class was properly certified and that the damages model was supported by substantial evidence. *See also Solus Indus. Innovations, LLC v. Superior Court*, 229 Cal. App. 4th 1291 (2014) (federal law preempts district attorney's reliance on the Unfair Competition Law to address workplace safety violations).

Parent Corporation May Have Liability For Nonpayment Of Wages

Castaneda v. The Ensign Group, Inc., 229 Cal. App. 4th 1015 (2014)

John Castaneda filed a class action on behalf of himself and other certified nursing assistants against Ensign for unpaid minimum and overtime wages. He alleges that Ensign is the alter ego of the Cabrillo Rehabilitation and Care Center, a nursing facility that Ensign owns. The trial court granted Ensign's motion for summary judgment, but the Court of Appeal reversed, holding that there was sufficient evidence that Ensign exercised control over Cabrillo's operation and employees and that Ensign had made certain statements in its SEC 10-k form, among other places, that it acts as a resource and provides centralized information technology, human resources, accounting and payroll services to its "cluster companies," including Cabrillo. *See also Dynamex Ops. West, Inc. v. Superior Court*, 2014 WL 5173038 (Cal. Ct. App. 2014) (class of drivers was properly certified based on IWC definition of employee as to claims falling within the scope of Wage Order No. 9).

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