Proskauer

California Employment Law Notes

July 2007

Operating Expenses May Be Deducted From Revenues In Supplemental Compensation Plan

Prachasaisoradej v. Ralphs Grocery Co., 2007 WL 2388914 (Cal. S. Ct. Aug. 23, 2007)

Eddy Prachasaisoradej, a produce manager for Ralphs, challenged the calculation of bonuses he received under a written incentive compensation plan, which included deductions for expenses and losses due to cash and merchandise shortages and shrinkage, workers' compensation, tort claims and other losses beyond his control. After unsuccessfully removing the case to federal court, Ralphs demurred to the complaint on the ground that all claims were preempted by Section 301 of the Labor Management Relations Act. Although the trial court sustained the demurrer without leave to amend, the Court of Appeal reversed, holding that Prachasaisoradej's claims involved non-negotiable rights not subject to preemption. The Court further held that Prachasaisoradej had stated valid claims under California law, relying upon *Ralphs Grocery Co. v. Superior Court*, 112 Cal. App. 4th 1090 (2003). However, in a 4-to-3 decision, the California Supreme Court reversed the appellate court and held that the incentive compensation plan did not violate Labor Code §§ 221, 3751 or other provisions of California law that prohibit deductions from employee wages for business losses and expenses. The Court distinguished between illegal deductions from employees' individual bonuses, commissions and other compensation and supplementary incentive compensation based on store profitability, such as existed in this case.

Disabled Employee Bears Burden Of Proving Ability To Perform Essential Duties Of The Job

Green v. State of Cal., 2007 WL 2388920 (Cal. S. Ct. Aug. 23, 2007)

Dwight Green worked as a stationary engineer for the Department of Corrections at the California Institute for Men in Chino. Seven years after contracting hepatitis C (presumably from the sewer pipes at the Institute), Green began taking the drug interferon, which caused him to feel fatigued, to have trouble sleeping and to suffer headaches and body aches. Green asserted that his ongoing medical condition prevented him from being punctual and occasionally required that he be put on "light duty." Eventually, Green was informed that unless he could be cleared for full duty by his doctor, he could not return to his position as a stationary engineer. Following a trial on his disability discrimination claim, the jury awarded Green $2.6 million in compensatory damages. The Court of Appeal affirmed the judgment, holding that the FEHA does not require plaintiff to prove that he is a qualified individual — rather, it is the employer's burden to prove that the employee is incapable of performing the essential duties of the position with reasonable accommodation. In a 4-to-3 ruling, the California Supreme Court reversed the Court of Appeal and held, consistent with the federal ADA, that it is the employee's burden to prove that he or she can perform the essential functions of the job with or without reasonable accommodation.

CEO Could Proceed With Malicious Prosecution Action Against Former Employee's Attorneys

Siebel v. Mittlesteadt, 41 Cal. 4th 735 (2007)

Thomas M. Siebel, the CEO of Siebel Systems, Inc. (SSI), sued Carol L. Mittlesteadt and E. Rick Buell, II (the "Lawyers"), for malicious prosecution based on their representation of Debra Christoffers, a former SSI employee. Through the Lawyers, Christoffers sued Siebel (individually) as well as SSI for wrongful termination, fraud, unpaid compensation and discrimination. Most of Christoffers' claims were dismissed before trial, but she did obtain a verdict against SSI in the amount of $193,000 for unpaid commissions and was awarded costs and attorneys' fees attributable to that portion of the action. Because Christoffers had failed to recover from Siebel personally, he was awarded his litigation costs. In the settlement agreement that followed, Siebel expressly preserved any claims that he might have against the Lawyers. In this malicious prosecution action, Siebel alleged that the Lawyers "willfully and purposely prosecuted" baseless discrimination claims against him in order to coerce a settlement. Among other things, Siebel argued that he was immune to many of Christoffers' claims because SSI, not Siebel, was her employer. Although the trial court granted the Lawyers' motion for summary judgment, the Court of Appeal reversed, holding that Siebel could establish a "favorable termination" because the parties had not agreed to modify the underlying judgment, which encompassed a disposition entirely in Siebel's favor. The California Supreme Court affirmed the judgment of the Court of Appeal.

Employer Required To Give Retirement Credit For Pregnancy Leaves Taken Before 1979

Hulteen v. AT&T Corp., 2007 WL 2332071 (9th Cir. Aug. 17, 2007) (*en banc*)

The federal Pregnancy Discrimination Act of 1978 (PDA) became effective in 1979. Prior to the PDA, an AT&T employee who was on pregnancy leave was not awarded service credit for the period of her pregnancy leave, whereas employees who were on other temporary disability leaves received full credit for such absences. Four female employees and their union, the Communications Workers of America, challenged AT&T's pre-PDA policy as a violation of Title VII. In an earlier three-judge panel decision, the Ninth Circuit held the PDA could not be applied retroactively and that plaintiffs' claims were barred by the applicable statute of limitations. However, in this *en banc* decision, the Ninth Circuit affirmed the district court's summary judgment against AT&T, concluding that service credit that excludes time spent on pregnancy leave violated Title VII.

Summary Judgment Granted In Meal/Rest Period Case

White v. Starbucks Corp., 2007 WL 1952975 (N.D. Cal. July 2, 2007) (Walker, J.)

Steve White, a former store manager for Starbucks, claimed the company had failed to (1) pay overtime wages in violation of Labor Code §§ 201 and 204 and Cal. Code Regs., tit. 8,
§ 11070(12)(A); (2) provide meal and rest periods in violation of Labor Code §§ 226.7 and 512; and (3) provide correct itemized wage statements in violation of Labor Code § 226. White also alleged that Starbucks had competed unfairly in violation of the Unfair Competition Law. White, who quit his job 11 days after starting work, admitted he did not notify Starbucks that he had worked overtime or off the clock. The District Court granted summary judgment in favor of Starbucks, holding that no reasonable jury could conclude that Starbucks knew about the allegedly unpaid time. The Court refused to follow *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949 (2005), and held that while an employer is required to *offer* meal breaks, it need not *ensure* that employees actually take such breaks. *Cf. Arias v. Superior Court*, 153 Cal. App. 4th 777 (2007) (representative claim brought under the Unfair Competition Law must be brought as a class action, though representative claim brought under Private Attorneys General Act need not be); *Corrales v. Bradstreet*, 153 Cal. App. 4th 33 (2007) (Labor Commissioner's attempt to issue a binding precedent decision regarding meal and rest periods was an invalid circumvention of the rulemaking requirements of state law).

Insurance Claims Adjusters Are Not Exempt From Overtime
Harris v. Superior Court, 2007 WL 2325580 (Cal. Ct. App. Aug. 16, 2007)

Plaintiffs, members of four coordinated class actions filed against two insurance companies, alleged they were improperly classified as exempt employees in violation of the administrative exemption from the overtime requirements of California law. Applying the Administrative/Production Worker Dichotomy analysis, the Court of Appeal concluded that plaintiffs were primarily engaged in work that fell on the production side of the dichotomy, namely the day-to-day tasks involved in adjusting individual insurance claims. Accordingly, the Court held that plaintiffs were not exempt administrative employees under either Wage Order 4 or Wage Order 4-2001. Cf. *Nigg v. USPS*, 2007 WL 2410165 (9th Cir. Aug. 27, 2007) (federal postal inspectors are entitled to overtime pay under the FLSA).

Federally Chartered Credit Union Not Immune From Punitive Damages
McGee v. Tucoemas Fed. Credit Union, 153 Cal. App. 4th 1351 (2007)

Kimberly McGee, a former vice president of lending for the credit union, took a leave of absence for surgery and chemotherapy after being diagnosed with breast cancer. The credit union allegedly told McGee that if she did not return to work within four months she would be fired. When McGee returned to work by the date specified by the credit union, she was demoted to a branch manager position, which involved greater physical demands. McGee quit her employment due to stress and sued for disability discrimination in violation of the FEHA. The jury decided in favor of McGee, awarding her over $2 million in compensatory damages and an additional $1.2 million in punitive damages. The issue in this appeal was whether a federally chartered credit union is immune from punitive damages. The Court of Appeal held that the "sue and be sued" clause in the federal credit union enabling legislation presumptively waives immunity from punitive damages.

FedEx Drivers Were Employees For Purposes Of Obtaining Reimbursement For Expenses

Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327 (Cal. Ct. App. Aug. 13, 2007)

Anthony Estrada, a former driver for FedEx, alleged unfair business practices under Business & Professions Code § 17200, contending that the pick-up and delivery drivers were improperly classified as "independent contractors" rather than employees and, as a result, they were owed reimbursement for employment-related expenses as required by Labor Code § 2802. The Court of Appeal agreed, concluding that the drivers were "totally integrated into the FedEx operation," that they performed work essential to FedEx's core business, that their customers were those assigned to them by FedEx, that no specialized skills were required, that they were required to wear uniforms and conform absolutely to FedEx's standards and, in the end, each driver had a job with "little or no entrepreneurial opportunities." Therefore, the drivers were entitled to recover reasonable compensation for the business expenses they had incurred. However, the Court of Appeal reversed the trial court's award of $12.4 million in attorneys' fees as "excessive."

Discrimination And Sexual Harassment Suit Properly Dismissed On Summary Judgment

Jones v. California Dep't of Corrections and Rehabilitation, 152 Cal. App. 4th 1367 (2007)

Kim C. Jones worked as a correctional officer at the R.J. Donovan Correctional Facility for approximately 16 years before experiencing alleged gender discrimination, sexual harassment, race discrimination, assault and battery and intentional and negligent infliction of emotional distress. The trial court granted summary judgment to the defendants, including her supervisors and the warden of the facility. In affirming summary judgment for defendants, the Court of Appeal concluded that Jones failed to present a triable issue of material fact from which it reasonably could be inferred that she suffered harassment proscribed by the FEHA. Jones repeatedly testified in her deposition that she did not believe that, or did not know whether, the comments and complaints that formed the basis of her action were motivated by race or gender. Additionally, the alleged incidents were so few and trivial that they were not sufficiently severe or pervasive enough to constitute harassment or actionable discrimination. Finally, the Court concluded the causes of action for assault and battery, infliction of emotional distress and negligent supervision were barred by the workers' compensation exclusivity rule. *Compare Craig v. M&O Agencies, Inc.*, 2007 WL 2264635 (9th Cir. Aug. 9, 2007) (summary judgment dismissing sexual harassment, assault and battery and infliction of emotional distress claims reversed).

Discrimination, Retaliation Claims Under Title VII Were Untimely Filed

Payan v. Aramark Mgmt. Services Ltd. P'ship, 2007 WL 2199270 (9th Cir. Aug. 2, 2007)

In response to a charge of discrimination and retaliation that Martha E. Payan filed with the EEOC, the agency issued a right-to-sue letter on September 26, 2003. Payan asserted that the date she received the letter was "unknown." However, it was undisputed that she failed to file her Title VII complaint in federal court until January 2, 2004 – 98 days after the EEOC had issued the letter. Pursuant to 42 U.S.C. § 2000e-5(f)(1), Payan had only 90 days in which to file the action, which Aramark contended barred her claim. The Ninth Circuit affirmed the district court's dismissal on summary judgment of Payan's claim after presuming that Payan received the right-to-sue letter by mail no later than three days after the EEOC had issued it. *Compare Holland v. Union Pac. R.R. Co.*, 2007 WL 2446250 (Cal. Ct. App. Aug. 29, 2007) (summary judgment in favor of employer reversed where employee said he relied upon DFEH's oral assurance that timely submission of a pre-complaint questionnaire would satisfy the filing deadline); *Forester v. Chertoff*, 2007 WL 2429374 (9th Cir. Aug. 29, 2007) (dismissal of discrimination claims filed by U.S. Border Patrol agents vacated even though they failed to wait 30 days after filing a notice of intent to sue with the EEOC before filing suit).

No Private Right Of Action Under Federal Whistleblower Protection Program

Williams v. United Airlines, Inc., 2007 WL 2458504 (9th Cir. Aug. 31, 2007)

Anthony L. Williams, a maintenance worker, sued United Airlines and his former supervisor, alleging retaliatory discrimination under the Federal Airline Deregulation Act's Whistleblower Protection Program (WPP) and related state law claims. Williams claimed that he was terminated in retaliation for a dispute related to an alleged safety violation. Although United did not challenge the district court's exercise of jurisdiction, the Ninth Circuit nonetheless raised the issue of subject matter jurisdiction *sua sponte* and concluded that the district court lacked jurisdiction because the WPP does not create a right of action – it merely confers authority on the Secretary of Labor to accept complaints from aggrieved employees. *Compare Ventress v. Japan Airlines*, 486 F.3d 1111 (9th Cir. 2007) (California's whistleblower protection laws are not preempted by international treaty between the United States and Japan); *cf. AmerisourceBergen v. Roden*, 2007 WL 2296775 (9th Cir. Aug. 13, 2007) (district court erroneously applied *Younger* abstention doctrine in dismissing employer's breach of contract claim filed against its former CEO).

Negligence Suit Against Employment Agency Was Not Time-Barred

E-Fab, Inc. v. Accountants, Inc. Services, 64 Cal. Rptr. 3d 9 (Cal. Ct. App. Aug. 2, 2007)

E-Fab designs and manufactures precision components and tools. When in 1996 E-Fab needed a temporary accountant, it contacted defendant Accountants, Inc. Services. Accountants represented to E-Fab that it had screened Vickie Hunt and had confirmed and verified her qualifications, credentials and accomplishments. From 1996 to 2003, Hunt embezzled approximately $1 million from E-Fab. After discovering the embezzlement, E-Fab contacted law enforcement, which informed E-Fab that Hunt had prior criminal convictions for theft and welfare fraud, that she had been incarcerated and had falsified her academic credentials — facts the agency had failed to uncover during its "screening process." E-Fab filed suit against Accountants within two years of learning of Hunt's criminal record from the police and, over the objection of Accountants, successfully invoked the "discovery rule," contending it was unable to have made earlier discovery despite reasonable diligence: "Vickie Hunt appeared to be a competent and honest employee," said E-Fab.

Customs Service Employee Was Retaliated Against, But Not Constructively Discharged

Poland v. Chertoff, 2007 WL 2069651 (9th Cir. July 20, 2007)

James R. Poland, a former employee of the U.S. Customs Service, alleged age discrimination in violation of the ADEA, retaliation and constructive discharge resulting from his transfer to a new job in a new location. After a bench trial, the district court entered a $339,000 judgment in favor of Poland. The Ninth Circuit affirmed the determination that Poland was retaliated against for filing an EEO complaint regarding age discrimination and for filing subsequent retaliation complaints. Further, the Court recognized that this was a case in which an employee with bias precipitated an investigation that led to adverse action being taken against the plaintiff by another employee who did not have bias—the so-called "cat's paw" theory. However, the Court reversed the district court's judgment that the Customs Service's transfer of Poland from Oregon to Virginia amounted to a constructive discharge that resulted in his early retirement. Accordingly, the Court vacated the judgment and remanded the action so Poland could amend his complaint to seek remedies available under a retaliation theory rather than one involving alleged constructive discharge.

Company Failed To Prove Trade Secret Misappropriation By Former Employee

Yield Dynamics, Inc. v. TEA Systems Corp., 2007 WL 2396109 (Cal. Ct. App. Aug. 23, 2007)

Yield Dynamics, which develops and markets software products designed to facilitate the fabrication of microchips, sued its former employee, Terrence Zavecz, and two business entities of which he is a principal for breach of contract, violation of the Uniform Trade Secrets Act and related claims. After a non-jury trial, the trial court granted judgment for defendants. The Court of Appeal affirmed the judgment, holding that the eight segments of source code that were allegedly misappropriated did not possess the independent value necessary to constitute a trade secret. Further, the Court held that Yield had failed to prove any damages, any unjust enrichment or provide any evidence regarding what a reasonable royalty might be. The Court affirmed judgment for defendants on the various breach of contract, fraud, and unfair competition claims as well as an award of $175,000 in attorneys' fees to defendants.

Defamation Claims Of University's Former Head Coach Were Properly Dismissed Under Anti-SLAPP Law

McGarry v. University of San Diego, 2007 WL 2040578 (Cal. Ct. App. July 17, 2007)

Following the termination of Kevin McGarry's employment as head coach of USD's football team, two university officials allegedly commented to the *San Diego Union Tribune* newspaper about the reasons for the termination. In response to these statements, McGarry sued the university and the officials for defamation. Defendants responded with successful motions to strike the defamation claims pursuant to the anti-SLAPP provisions of California law (Cal. Code Civ. Proc. § 425.16). The Court of Appeal affirmed the dismissal of the defamation claims, holding that the alleged statements constituted speech in connection with a public issue within the meaning of the statute. Once the burden shifted to McGarry, the Court of Appeal agreed with the trial court that he had failed to show the likelihood of success on the merits in light of the standards applicable to a limited purpose public figure like himself. The Court further determined that one of the alleged statements was not a provably false assertion of fact. Moreover, since the trial court had denied McGarry's motion to compel the depositions of the newspaper's reporters, he had no competent evidence that the university or its officials were the source of the statements that were published in the newspaper.

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