Proskauer

California Employment Law Notes

September 2017

Jobseeker Website May Be Compelled To Disclose Identity Of Anonymous Posters Who Criticized Employer

ZL Technologies, Inc. v. Does 1-7, 13 Cal. App. 5th 603 (2017)

ZL Technologies brought suit, alleging libel per se and online impersonation, against seven anonymous individuals who represented themselves as current or former ZL employees and who posted critical reviews of ZL's management and work environment on Glassdoor (a website where workers can post "reviews" of their employers). ZL served a subpoena on Glassdoor, requesting records identifying and providing contact information for the anonymous posters, but Glassdoor refused to comply. The trial court denied ZL's motion to compel Glassdoor to comply with the subpoena and eventually dismissed the lawsuit in light of ZL's failure to serve the defendants with the lawsuit. The Court of Appeal reversed, holding that the reviews contained statements that declared or implied provably false assertions of fact, providing a legally sufficient basis for a defamation cause of action. The Court further held that "the constitutional protections [First Amendment and privacy rights] weigh in favor of requiring [ZL] to make a prima facie evidentiary showing of the elements of defamation, including falsity, before disclosure of a defendant's identity can be compelled."

Employer Can Recover $90,000 In Costs From Employee Who Rejected Multiple Settlement Offers

Sviridov v. City of San Diego, 2017 WL 3493855 (Cal. Ct. App. 2017)

Aleksei Sviridov, a former police officer for the City of San Diego, was terminated from his job in 2007, reinstated in 2008 and then failed to return to work thereafter, which resulted in a second termination. Following years of litigation and three prior appeals, the case was remanded to the trial court with directions to enter judgment in favor of the City and to award the City its costs on appeal. The City filed a memorandum of costs in which it sought $90,378. Sviridov moved to strike the City's cost bill on the ground that the City could not recover its costs against an unsuccessful plaintiff under the Fair Employment and Housing Act ("FEHA") "unless the plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit," citing *Williams v. Chino Valley Indep't Fire Dist.*, 61 Cal. 4th 97 (2015). The City provided evidence that it had served Sviridov with three separate statutory settlement offers under Cal. Code Civ. Proc. § 998 (all rejected by Sviridov) in which it offered to waive costs in exchange for a dismissal of the action. The trial court determined that *Williams* did not apply because the only claim to survive to trial was a claim under the Public Safety Officers Procedural Bill of Rights Act, which statute does not bar recovery of ordinary costs by a prevailing party. The Court of Appeal affirmed, holding that "a blanket application of *Williams* to preclude section 998 costs unless the FEHA claim was objectively groundless would erode the public policy of encouraging settlement in such cases."

Malicious Prosecution Action Against Former Employer's Law Firm Was Properly Dismissed

Parrish v. Latham & Watkins LLP, 3 Cal. 5th 767 (2017)

In a prior litigation, FLIR Systems, Inc. and Indigo Systems Corp. (collectively, "FLIR") brought suit against their former employees, William Parrish and E. Timothy Fitzgibbons (the "Former Employees"), for, among other things, misappropriation of trade secrets. The Former Employees defeated those claims and then obtained a ruling that the misappropriation of trade secrets claim had been brought against them in bad faith, which resulted in an order that FLIR pay the Former Employees their attorney's fees and costs in an amount exceeding $1.6 million. Thereafter, the Former Employees brought this malicious prosecution claim against FLIR's attorneys (Latham & Watkins LLP), which Latham moved to strike under the anti-SLAPP statute (Cal. Civ. Proc. Code § 425.16). The trial court granted the motion, and the Court of Appeal affirmed, but on different grounds – holding that pursuant to the interim adverse judgment rule, the denial of a dispositive motion on the merits in the underlying action (in this case, a summary judgment motion) established the existence of probable cause and precluded a subsequent malicious prosecution action. In this opinion, the California Supreme Court affirmed the judgment of the Court of Appeal.

Vacation Policy May Lawfully Require "Waiting Period" Of One Year Before Benefits Begin To Accrue

Minnick v. Automotive Creations, Inc., 13 Cal. App. 5th 1000 (2017)

Nathan Minnick, who had worked for only six months before his employment ended, sued his former joint employers under PAGA, alleging their vacation policy violated state law because it required employees who worked for less than one year to forfeit their vested vacation pay. The trial court sustained the employers' demurrer and dismissed the complaint, and the Court of Appeal affirmed, holding that the policy in question ("All employees earn 1 week of vacation after completion of one year of service…") simply imposed a one-year "waiting period" before employees began to earn and could take vacation. Further, "an employer has the authority to 'front-load' the vacation benefit, permitting the employee to take a one week paid vacation during the second year, even before it is fully earned…"

PAGA Employee Can Obtain Contact Information For All Employees Statewide

Williams v. Superior Court, 3 Cal. 5th 531 (2017)

Michael Williams was an employee of Marshalls of CA in Costa Mesa, California. After slightly more than a year of employment, Williams brought a representative action against Marshalls under the Labor Code Private Attorneys General Act of 2004 ("PAGA"), alleging Marshalls had failed to provide its employees with meal and rest breaks, accurate wage statements, reimbursements for necessary business-related expenses and to pay all earned wages during employment. During discovery, Williams served special interrogatories, seeking the names and contact information of all nonexempt Marshalls employees in California who had worked for the company in the previous two years. Marshalls objected, and the trial court ordered Marshalls to produce contact information only for the employees who had worked at the Costa Mesa store, denying contact information for employees who worked at the other 128 Marshalls stores in California. Williams filed an unsuccessful petition for writ of mandate with the Court of Appeal in which he sought to compel the trial court to vacate its discovery order and to enter a new order granting Williams' motion to compel production of a list of all employees statewide. In this opinion, the California Supreme Court reversed the lower court and held that a litigant in a PAGA lawsuit should be accorded discovery as broad as would be available in a class action.

Statute Of Limitations For Filing DFEH Complaint Runs From The Last Day Of Employment

Aviles-Rodriguez v. Los Angeles Cmty. Coll. Dist., 2017 WL 3712199 (Cal. Ct. App. 2017)

Guillermo Aviles-Rodriguez was employed as a professor for the Los Angeles Community College District ("LACCD"). Although Aviles-Rodriguez was notified on March 5, 2014 that his tenure had been denied by the Board of Trustees of the LACCD, his employment did not end until June 30, 2014, which was the last day of the academic year. Aviles-Rodriguez filed his complaint with the DFEH on June 29, 2015, alleging racial discrimination. The LACCD demurred to the complaint that was later filed in court on the ground that Aviles-Rodriguez had failed to file his DFEH complaint within one year "from the date upon which the alleged unlawful practice… occurred." The trial court agreed and dismissed the lawsuit, but the Court of Appeal reversed, holding that the one-year statute of limitations for filing a complaint with the DFEH began to run on the last day of his employment and not on the earlier date on which he learned of the denial of tenure.

Age Discrimination Lawsuit Was Properly Dismissed

Merrick v. Hilton Worldwide, Inc., 2017 WL 3496030 (9th Cir. 2017)

Sixty-year-old Charles Merrick was terminated from his job as Director of Property Operations at the Hilton La Jolla Torrey Pines Hotel as part of a reduction in force. Merrick sued for age discrimination under the Fair Employment and Housing Act, among other things. The district court granted summary judgment in favor of Hilton, and the United States Court of Appeals for the Ninth Circuit affirmed, holding that under the three-part *McDonnell Douglas* test Merrick had succeeded in establishing a prima facie case of age discrimination and Hilton had established a legitimate, nondiscriminatory reason for the termination (having provided an individualized reason for terminating Merrick). The burden then shifted to Merrick to establish that the reasons Hilton had articulated were pretext for age discrimination, and Merrick failed to do that.

Disability Discrimination Lawsuit Was Properly Dismissed

Alamillo v. BNSF Ry. Co., 2017 WL 3648514 (9th Cir. 2017)

Antonio Alamillo, who worked as a locomotive engineer for BNSF, missed several calls and was suspended on at least two occasions before being terminated. Around the same time, Alamillo began to suspect he was experiencing a medical problem and was soon diagnosed with obstructive sleep apnea ("OSA") for which he was prescribed a CPAP machine. Alamillo sued for disability discrimination. The district court granted summary judgment to BNSF, and the United States Court of Appeals for the Ninth Circuit affirmed, holding that Alamillo had failed to establish a prima facie case of disability discrimination. There was no evidence that his OSA was a substantial motivating reason for the decision to terminate his employment because BNSF did not know that Alamillo was allegedly disabled when it made the decision to initiate disciplinary proceedings against him. Further, even if Alamillo had established a prima facie case of discrimination, BNSF's asserted reason for terminating Alamillo was his recurrent absenteeism, and there was no evidence that that reason was pretext for discrimination. The Court also affirmed dismissal of Alamillo's claims for failure to reasonably accommodate his alleged disability (BNSF was not required to offer "leniency" as an accommodation) and failure to engage in the interactive process because no reasonable accommodation could have cured his prior absenteeism.

Claims For Retaliation And Intentional Infliction Of Emotional Distress Should Not Have Been Dismissed

Light v. California Dep't of Parks & Recreation, 14 Cal. App. 5th 75 (2017)

Melony Light worked as an assistant, office technician and eventually a staff services analyst at the Ocotillo Wells District of the California Department of Parks and Recreation. Light alleged that she had been retaliated against for having been a witness in an investigation of another employee's complaint of discrimination. She also alleged intentional infliction of emotional distress. The trial court granted summary judgment in favor of the Department, but the Court of Appeal reversed in part, holding that Light had raised a triable issue of material fact that she had suffered an adverse employment action by the Department following her participating in the other employee's discrimination complaint. Among other things, Light was isolated, moved to a different office, "verbally and to some extent physically attacked," denied previously promised training for a new position, rejected for promotion and she suffered a reduction in her scheduled hours to zero. Further, there was "direct evidence the Department intended to and did retaliate against Light for participating in [the other employee's] complaint." The appellate court also reversed the dismissal of the claim for intentional infliction of emotional distress, holding that workers' compensation did not provide the exclusive remedy for alleged emotional distress arising from discrimination and retaliation. Finally, the court affirmed dismissal of the intentional infliction of emotional distress claim against one of the supervisors whose actions did not constitute "extreme or outrageous" conduct. *See also United States ex rel. Campie v. Gilead Sciences, Inc.*, 862 F.3d 890 (9th Cir. 2017) (employee adequately pled a claim for retaliation in violation of the False Claims Act).

Former Elementary School Teacher's Discrimination Claims Were Properly Stricken Under Anti-SLAPP Statute

Okorie v. Los Angeles Unified Sch. Dist., 2017 WL 3499226 (Cal. Ct. App. 2017)

Dioka Okorie sued his employer, the Los Angeles Unified School District and others, alleging discrimination, harassment and retaliation. In response, the District filed an anti-SLAPP motion seeking dismissal of Okorie's lawsuit on the ground that Okorie's complaint was based on protected activity engaged in by the District as part of its internal investigation into an allegation of molestation that was made against Okorie by a former student. The trial court granted the motion and dismissed Okorie's lawsuit. The Court of Appeal affirmed, holding that Okorie's claims were based on protected activity on the part of the District and that Okorie did not show a probability of prevailing on his discrimination claims. *Compare Bonni v. St. Joseph Health Sys.*, 13 Cal. App. 5th 851 (2017) (whistleblower surgeon's retaliation claim should not have been dismissed under anti-SLAPP statute because it was unrelated to hospital peer review process).

Telemarketers Were Independent Contractors, Not Agents Of Company

Jones v. Royal Admin. Servs., 2017 WL 3401317 (9th Cir. 2017)

Charles Jones and Josh Watson (individuals whose cell phones are registered on the national do-no-call registry) sued Royal Administration Services for violation of the Telephone Consumer Protection Act for calls that were made by telemarketers who were employed by All American Auto Protection ("AAAP"), which went bankrupt. The district court granted summary judgment in favor of Royal on the ground that the telemarketers were acting as independent contractors rather than as Royal's agents, which means that Royal cannot be held vicariously liable for the telephone calls. The United States Court of Appeals for the Ninth Circuit affirmed, holding that AAAP was its own independent business that made sales for multiple companies without the direct supervision of a Royal employee – "AAAP provided its own equipment, set its own hours, and only received payment if one of its telemarketers actually made a sale." *See also Alvarez v. Seaside Transp. Servs., LLC*, 13 Cal. App. 5th 635 (2017) (independent contractor's employee may not recover tort damages for work-related injuries from contractor's hirer); *Espejo v. The Copley Press, Inc.*, 13 Cal. App. 5th 329 (2017) (newspaper home delivery carriers were employees, not independent contractors, but employer was entitled to reduction in award to employees based on "readily identifiable payments and credits" that had been made).

"Day Of Rest" PAGA Claims Were Properly Dismissed

Mendoza v. Nordstrom Inc., 865 F.3d 1261 (9th Cir. 2017)

In response to three questions asked of it by the United States Court of Appeals for the Ninth Circuit, the California Supreme Court opined as follows:

1. A day of rest is guaranteed for each workweek. Periods of more than six consecutive days of work that stretch across more than one workweek are not per se prohibited.
2. The exemption for employees working shifts of six hours or less applies only to those who never exceed six hours of work on any day of the workweek. If on any one day an employee works more than six hours, a day of rest must be provided during that workweek, subject to whatever other exceptions might apply.
3. An employer causes its employee to go without a day of rest when it induces the employee to forgo rest to which he or she is entitled. An employer is not, however, forbidden from permitting or allowing an employee, fully apprised of the entitlement to rest, independently to choose not to take a day of rest.

With these principles in mind, the Ninth Circuit held that the two employees in this case who sought to lead the PAGA action did not work more than six consecutive days in any one Nordstrom workweek, so their individual claims under California Labor Code §§ 551 and 552 were properly dismissed. In response, the two plaintiffs (or, more accurately, their lawyers) argued that the case should be remanded to the district court in order to permit a new PAGA representative who *did* suffer violations under the statute to "step forward" and continue litigating the case. The Ninth Circuit disagreed and affirmed dismissal of the case by the district court.

Certification Of Claims Examiners' Putative Class Action Was Properly Denied

Kizer v. Tristar Risk Mgmt., 13 Cal. App. 5th 830 (2017)

Plaintiffs Valerie Kizer and Sharal Williams filed this putative class action, alleging their former employer had misclassified them and other similarly situated claims examiners as exempt from overtime. The trial court denied the class certification motion on the ground that plaintiffs had failed to show they had worked days or hours that would have rendered them eligible for overtime pay and, therefore, they failed to establish that common issues predominated. Further, plaintiffs had failed to present evidence of a uniform employer policy or practice that generally required class members to work overtime. The Court of Appeal affirmed the denial of class certification, rejecting plaintiffs' assertion that the trial court had denied the motion because plaintiffs had failed to show the *amount* of overtime each potential class member worked – "the fact of damage is a liability issue that
focuses on the existence of harm establishing a plaintiff's entitlement to damages; it is not concerned with the amount of damage."

Summary Judgment Was Properly Granted Based On Plaintiffs' Procedurally Defective Separate Statement

Rush v. White Corp., 13 Cal. App. 5th 1086 (2017)

In this case (which does *not* involve employment issues), the trial court granted and the Court of Appeal affirmed summary judgment in favor of defendants based upon plaintiffs' "procedurally defective separate statement of facts." According to the Court, "Plaintiffs' separate statement in response [to defendants' separate statement of undisputed material facts] was 155 pages, a statement that did not comply with the Rules of Court, improperly citing to numerous undisputed material facts for specific arguments in the opposition, which undisputed material facts were then supported by multiple paragraphs of multiple declarations, at times by every paragraph of nearly every declaration on file." The trial court gave plaintiffs an opportunity to file a "supplemental separate statement" that complied with Cal. Rule of Court 3.1350, but the supplemental statement "still did not comply, and following another hearing the trial court granted the motion for summary judgment based on plaintiffs' noncompliance – as the summary judgment statute expressly provides."

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