Proskauer

California Employment Law Notes

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Insurance Claims Adjusters Were Exempt From FLSA

In re Farmers Ins. Exch., 466 F.3d 853 (9th Cir. 2006)

In this class action case, more than 2,000 current and former insurance claims adjusters sought overtime pay under the Fair Labor Standards Act (FLSA), alleging that Farmers had improperly classified them as exempt administrative employees. The Ninth Circuit applied a regulation issued by the United States Department of Labor (29 C.F.R. § 541.203), which provides that "[i]nsurance claims adjusters generally meet the duties requirements for the administrative exemption" of the FLSA. The district court had not applied the regulation presumably because it was not in effect at the time plaintiffs had filed these actions. *Cf. Hodge v. Superior Court*, 145 Cal. App. 4th 278 (2006) (plaintiff-employees should have been permitted to avoid jury trial by dismissing statutory claims for unpaid overtime and proceeding to trial on unfair competition claim).

Disability Harassment Judgment Reversed, $15 Million Punitive Damages Award Reduced

Roby v. McKesson HBOC, 2006 WL 3775897 (Cal. Ct. App. Dec. 26, 2006)

After doing a “stellar” job for 25 years and working as a customer service support liaison for McKesson, Charlene Roby developed a panic disorder and began missing substantial amounts of time from work. McKesson fired Roby for abusing its attendance policy, though many of her absences were attributable to her mental disability. The jury found McKesson liable for wrongful termination, harassment, discrimination, and failure to accommodate a mental disability under the Fair Employment and Housing Act. The jury also found McKesson and Roby's supervisor, Karen Schoener, liable for mental disability harassment in the amounts of $600,000 and $500,000, respectively. The Court of Appeal reversed the judgment (as to the harassment verdicts) on the ground that “evidence that Schoener treated Roby with general scorn and contempt and [that Schoener] failed to show any sympathy for [Roby’s] disability…is not sufficient to create liability for harassment based on a hostile work environment." *Cf. In re The Exxon Valdez*, 2006 WL 3755189 (9th Cir. Dec. 22, 2006) ($4.5 billion punitive damages award reduced to $2.5 billion in case involving large oil spill).

Court Refuses To Apply “Look-Back” Statute Of Limitations To Claim For Unpaid Vacation

Church v. Jamison, 143 Cal. App. 4th 1568 (2006)

In this action arising from the alleged malpractice of John Church's attorney, the trial court granted the attorney’s motion for judgment on the pleadings on the ground that the attorney could not be held liable for legal malpractice because the statute of limitations had not run on Church's claim for unpaid vacation at the time the attorney filed the lawsuit. In the underlying employment case, Church alleged that he had not been paid for vacation benefits that he had earned during the first year of his employment (1998) when his employment ended on May 1, 2001. Although Church's attorney filed the complaint on April 30, 2002, the employer had argued successfully in the underlying employment case that Church's right to sue for vacation benefits from 1998 was barred by the “look-back” statute of limitations by 2002. The Court of Appeal in the malpractice action (this case) disagreed with the trial court in the employment case and refused to apply the “look-back” statute of limitations and in so doing refused to follow a prior Court of Appeal opinion as well as the interpretation of this question by the California Labor Commissioner. *Cf. O'Donnell v. Vencor Inc.,* 465 F.3d 1063 (9th Cir. 2006) (Equal Pay Act claims related back to earlier-filed complaint and were equitably tolled).

Absent Class Members Were Barred From Bringing New Action For Unpaid Overtime

Alvarez v. May Dep't Stores Co., 143 Cal. App. 4th 1223 (2006)

Plaintiffs in this case are 56 current and former Area Sales Managers employed by May Department Stores who alleged that they were improperly classified as exempt administrative employees and that they were not paid statutory overtime that was owed to them. The trial court sustained without leave to amend May's demurrer based on the doctrine of collateral estoppel. (This was the third class action filed by plaintiffs' attorneys against May; in the two prior actions, filed in 1997 and 1999, the trial courts denied plaintiffs' motions for class certification.) The issue here was whether collateral estoppel could bar this latest case since the other lawsuits were brought by other Area Store Managers who were not named plaintiffs in this particular action. The Court of Appeal agreed with the trial court and affirmed dismissal of the action based on collateral estoppel, holding the prior denial of class certification did not bar plaintiffs' substantive right to bring a lawsuit, it simply precluded them from serving as representatives of other litigants in a class action such as this one. To hold otherwise would mean that "the losing class plaintiff could merely insert the name of a different individual to be the class representative, subject[ing] the employer to a revolving door of endless litigation." *Compare Aguiar v. Cintas Corp*., 144 Cal. App. 4th 121 (2006) (trial court should have used subclasses rather than deny plaintiffs' motion for certification of class action for violation of the Los Angeles Living Wage Ordinance).

DWP Employee's Retaliation Claim For Opposing Discrimination Should Not Have Been Dismissed

Taylor v. City of Los Angeles, 144 Cal. App. 4th 1216 (2006)

Eric Taylor, an electrical engineer employed by the Los Angeles Department of Water and Power, alleged that he suffered from multiple acts of retaliation by his supervisor (Bruce Hamer) after Taylor acted as a "supporting and material witness" on behalf of a former subordinate (Donald Coleman) in Coleman's claim that he had been discriminated against when his employment was terminated for cause. Although the trial court sustained without leave to amend defendants' demurrer to the retaliation claim, the Court of Appeal reversed the judgment, holding that Taylor had sufficiently alleged "adverse action" under both the "materiality test" under California law and the more liberal "deterrence test" adopted by the United States Supreme Court in *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006). Although Taylor's employment was not terminated, he alleged that Hamer stripped him of his supervisory position; threatened to terminate his 4-10 work schedule; barred him from completing supervisory certification courses; embarrassed him in front of a subordinate; excluded him from meetings; deprived him of information necessary to carry out his duties; undermined him, etc., all allegedly in retaliation for his having supported Coleman's discrimination claim. The appellate court further held that a supervisor such as Hamer could be held personally liable for retaliation under the Fair Employment and Housing Act, and that the City's alleged failure to prevent retaliation could be unlawful under the same Act. Compare Collins v. Hertz Corp. 144 Cal. App. 4th 64 (2006) (summary judgment for employer affirmed in discrimination, harassment, and retaliation case in which plaintiffs failed to follow procedural rules for opposing motion).

UPS Violated ADA By Excluding Deaf Drivers Who Failed To Satisfy DOT Hearing Standard

Bates v. United Parcel Serv., 465 F.3d 1069 (9th Cir. 2006)

One of the requirements applied by UPS to those applicants seeking to drive the familiar brown “package cars” was that they pass the physical examination (including a hearing exam) that the DOT requires of drivers of commercial vehicles of a gross vehicle weight rating (GVWR) of at least 10,001 pounds. (UPS’s vehicles had a GVWR of 9,318 pounds or less.) Plaintiffs in this case (a class of deaf UPS applicants and employees) challenged the company’s application of the DOT standard, which did not apply to the vehicles in question. The Ninth Circuit affirmed the judgment in favor of plaintiffs, holding that UPS had failed to satisfy its burden under the business necessity defense of the Americans with Disabilities Act. However, the Court reversed the judgment in favor of plaintiffs with respect to their claim for violation of the Unruh Act, which does not apply to employment discrimination cases such as this. *Cf. Walsh v. Nevada Dep’t of Human Resources*, 2006 WL 3704779 (9th Cir. Dec. 18, 2006) (state defendants and individuals are immune from ADA liability); *Gunther v. Lin*, 144 Cal. App. 4th 223 (2006) (in the absence of intentional violation of public accommodation requirements of ADA, plaintiffs are not entitled to recovery of penalties under California law).

Corporate Employer Was Immune From Liability For “Cyberthreats” Made By Its Employee

Delfino v. Agilent Technologies, Inc., 2006 WL 3635399 (Cal. Ct. App. Dec. 14, 2006)

Michelangelo Delfino and Mary E. Day sued Agilent Technologies after a series of threatening e-mails and Yahoo! Message Board postings about them were created by one of Agilent's former employees (who used the pseudonym "crack_smoking_jesus"). Agilent moved for summary judgment pursuant to the Communications Decency Act of 1996 (CDA), which grants immunity to "interactive computer service providers." Plaintiffs alleged causes of action for intentional and negligent infliction of emotional distress. The Court of Appeal affirmed summary judgment in favor of Agilent, holding that an employer that provides its employees with Internet access through the company's internal computer system is an "interactive service provider" immune from liability under the CDA. The Court further held that Agilent was a "publisher or speaker of information" that came from "another information content provider" (the former employee) and was entitled to immunity under the CDA on that ground as well. Finally, the Court held that irrespective of the immunity provided by the CDA, plaintiffs had failed to show that Agilent should be held responsible for its former employee's acts under theories of ratification, respondeat superior, negligent supervision or negligent infliction of emotional distress. *Compare Hawkins v. Wilton*, 144 Cal. App. 4th 936 (2006) (triable issues of fact existed concerning apartment complex manager/security guard's actions being within course and scope of his employment when he shot plaintiff); *Sababin v. Superior Court*, 144 Cal. App. 4th 81 (2006) (triable issues regarding injuries allegedly suffered by hospital patient due to employees' failure to follow patient's care plan for maintaining the health of her skin).

Claims Arising From Employer's Failure To Carry Workers' Comp Were Subject To 3-Year Statute Of Limitations

Valdez v. Himmelfarb, 144 Cal. App. 4th 1261 (2006)

Elias Valdez alleged that he was injured in the course of his employment as a cook, janitor, dishwasher, and gardener at defendants' Malibu restaurant. Valdez sued for personal injury, unfair competition, and declaratory relief based on defendants' failure to carry workers' compensation insurance as required by statute, but defendants contended that Valdez's claims were barred by the one-year statute of limitations applicable to tort actions that was in effect when Valdez filed his lawsuit. The Court of Appeal reversed the summary judgment that had been entered in favor of defendants on the ground that a three-year statute of limitations (based on liability created by statute), not the tort statute, should have been applied. Further, the Court held that the statute of limitations had been equitably tolled while Valdez was pursuing his workers' compensation claim. Finally, the Court held that it would be an abuse of discretion for the trial court not to reconsider its entry of a $54,000 sanctions order against Valdez in light of the appellate court's opinion here. *See also Matea v. WCAB*, 144 Cal. App. 4th 1435 (2006) (employee who was injured by a shelf of lumber that gave way was entitled to compensation for psychiatric injury even though the accident occurred during the first six months of his employment); *Six Flags, Inc. v. WCAB*, 145 Cal. App. 4th 91 (2006) (workers' compensation law requiring employer to pay $250,000 death benefit to the estate of a deceased worker who had no dependents is unconstitutional); Williams v. OSHRC, 464 F.3d 1060 (9th Cir. 2006) ($91,000 OSHA penalty upheld against construction company whose employee died in a trench collapse).

Attorney Entitled To Indemnity From Law Firm For Alleged Malpractice

Cassady v. Morgan, Lewis & Bockius LLP, 145 Cal. App. 4th 220 (2006)

Ralph Cassady was employed as “of counsel” to Morgan Lewis for a 13-month period, during which time he performed legal services for a longtime client of his, Rallie P. Rallis. Years later, Rallis sued Cassady, Morgan Lewis, and other firms and attorneys with whom Cassady had been affiliated for a variety of claims, including professional negligence. After Morgan Lewis provided a defense to several other attorneys, Cassady sought indemnity pursuant to Labor Code § 2802. Although Morgan Lewis initially prevailed on a motion for summary judgment, the trial court reversed itself and granted Cassady a new trial. The Court of Appeal affirmed the trial court’s grant of a new trial on the ground that an employer must indemnify an employee for the attorney's fees and costs incurred in defending against a third-party lawsuit where such expenses are necessary and the lawsuit is based on the employee's conduct within the course and scope of his or her job duties. The Court further held that Cassady would bear the burden of proving which defense costs were attributable to his representation of Rallis while he was employed by Morgan Lewis.

Employee's Exercise Of Stock Options Was A Taxable Event

United States v. Tuff, 469 F.3d 1249 (9th Cir. 2006)

James H. Tuff received non-qualified stock options as an employee of RealNetworks, which he twice exercised in 1999 to purchase shares in the company that were worth more than $460,000. Tuff contended that he realized income only when the shares were later liquidated by Morgan Stanley (and were worth substantially less) rather than when he exercised the options. The Ninth Circuit held that Tuff realized the income when he exercised the options and not when they were liquidated.

Employees' Malicious Prosecution Claims Against Employer Should Have Been Stricken

Robinzine v. Vicory, 143 Cal. App. 4th 1416 (2006)

Kimberly and Clifford Robinzine sued their former employer, RPM Company, and a number of coworkers for employment discrimination and related claims. The Robinzines also asserted a claim for malicious prosecution, which arose from a temporary restraining order that the employer had obtained against Clifford for an alleged threat of workplace violence. (When RPM was subsequently unable to prove any threat of unlawful violence had been made against an RPM employee, the court dissolved the TRO.) Defendants moved to strike the malicious prosecution claim under the anti-SLAPP statute, arguing that the issuance of the TRO established that they had probable cause to petition for an injunction. The Court of Appeal held, consistent with prior case law, that a malicious prosecution claim cannot be predicated upon an unsuccessful civil harassment petition such as the one filed by RPM and the other defendants.

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