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California Employment Law Notes

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Employees Had Reasonable Expectation Of Privacy But Failed To Prove Employer Violated Their Rights

Hernandez v. Hillsides, Inc., 47 Cal. 4th 272 (2009)

Plaintiffs Abigail Hernandez and Maria-Jose Lopez were employed by Hillsides Children Center, a private nonprofit residential facility for neglected and abused children, including victims of sexual abuse. They shared an enclosed office where they performed clerical work during daytime business hours. The director of the facility discovered that late at night (after Hernandez and Lopez had left for the day) an unknown person had repeatedly used a computer in the shared office to access the Internet and view pornographic websites. Concerned that the culprit might be a staff member who worked with the children, the director installed a hidden camera in the office without notifying Hernandez and Lopez. Since neither Hernandez nor Lopez was suspected of any wrongdoing, the camera was never operated during business hours and the women were not monitored by the surveillance system. After discovering the hidden camera, the women filed this action, asserting a violation of their right to privacy. The trial court granted defendants' summary judgment motion, but the court of appeal reversed, holding there were triable issues that plaintiffs had suffered an intrusion into a protected zone of privacy that was so unjustified and offensive as to constitute a privacy violation. The Supreme Court reversed the court of appeal and reinstated summary judgment for defendants, holding that although there may have been an intrusion into the zone of privacy, there was no triable issue because the intrusion was not "highly offensive and sufficiently serious to constitute a privacy violation." Among other things, the Supreme Court noted the surveillance was drastically limited in nature and scope in that it exempted plaintiffs from its reach and defendants were motivated by strong countervailing concerns (protection of the children).

Employer May Be Liable For Injuries To Pedestrians Caused By Executive Returning Home From Conference

Jeewarat v. Warner Bros. Entm't, 2009 WL 2784605 (Cal. Ct. App. 2009)

After returning home from a three-day business conference, an executive from Warner Brothers was involved in an automobile accident that killed one and injured two other pedestrians. Plaintiffs sought to impose liability on the employer based on principles of respondeat superior. The employer filed a motion for summary judgment based on the "going and coming rule," which provides that an employer is not subject to vicarious liability for accidents that occur during an employee's commute to or from the workplace. Plaintiffs contended on appeal that the business conference was a "special errand" and that the employer, therefore, was not shielded from liability by the going and coming rule. The trial court granted summary judgment to the defendants, but the Court of Appeal reversed, holding that the executive was involved in a special errand for the employer and, therefore, he was acting within the course and scope of his employment until he arrived at his home or deviated from the errand for personal reasons. *Compare M.P. v. City of Sacramento*, 2009 WL 2712833 (Cal. Ct. App. 2009) (city was not liable for alleged sexual assaults committed by firefighters during the "Porn Star Costume Ball").

Former In-House Counsel May Proceed With Claims For Termination In Violation Of Sarbanes-Oxley Act

Van Asdale v. International Game Tech., 2009 WL 2461906 (9th Cir. 2009)

Attorneys Shawn and Lena Van Asdale sued their former employer, International Game Technology ("IGT"), for retaliatory discharge in violation of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, arising from their alleged reporting of possible shareholder fraud in connection with a merger with another company (Anchor Gambling). The defendants first asserted the Van Asdales were precluded by the attorney-client privilege from prosecuting this action against their former employer/client, but the district court and the Ninth Circuit disagreed. The district court granted defendants' motion for summary judgment, but the Ninth Circuit reversed. The Court of Appeals held the district court erred in invoking the "sham affidavit" rule (which requires a court to disregard an affidavit that contradicts the witness' early deposition testimony) because there were only "minor conflicts" between Shawn's earlier deposition testimony and his subsequent declaration. Further, the Court concluded the Van Asdales had an objectively reasonable belief (as well as a subjective belief) that there had been shareholder fraud preceding the merger and that they had raised a genuine issue of material fact whether their protected activity was a contributing factor to their terminations – which occurred within three months of their having allegedly accused high-level IGT (former Anchor) executives of intentionally withholding material information prior to the merger. *Compare Mueller v. County of Los Angeles*, 2009 WL 2462886 (Cal. Ct. App. 2009) (summary judgment affirmed with respect to negligent investigation, whistleblower and intentional infliction of emotional distress claims).

City Ordinance Requiring Grocery Store Purchaser To Retain Workforce For 90 Days Is Preempted

California Grocers Ass'n v. City of Los Angeles, 176 Cal. App. 4th 51 (2009)

On December 21, 2005, the Los Angeles City Council adopted the Grocery Worker Retention Ordinance, which prohibited large “grocery establishments” from discharging employees for 90 days after the sale or transfer of the assets or a controlling interest in the business. The purported rationale for the ordinance was to “ensure stabilization of this vital workforce, which results in preservation of health and safety standards.” In this case, a trade association of grocery store operators and suppliers challenged the ordinance on the ground that it is preempted by the California Retail Food Code by which the Legislature expressed its intent to “fully occupy the field of health and sanitation standards for retail food facilities.” The trial court and the Court of Appeal agreed, holding that the city ordinance was preempted by state law as well as the National Labor Relations Act. *Cf. Lockhart v. MVM, Inc.*, 175 Cal. App. 4th 1452 (2009) (FEHA disability discrimination and related claims were properly dismissed because plaintiff was performing services for her employer at a federal correctional facility at Terminal Island in San Pedro, which is a federal enclave).

Court Properly Rejected Reliance Upon Employer’s Uniform Policy To Certify Class

Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935 (9th Cir. 2009)

Raymond Vinole and Ken Yoder filed this class action, alleging that the proposed class of current and former Countrywide External Home Loan Consultants was misclassified as exempt outside sales employees and that they were impermissibly denied overtime and other wages. Before plaintiffs filed their motion for class certification and prior to the pretrial motion deadline and discovery cutoff, Countrywide filed a motion to deny class certification, which the district court granted. Concluding that plaintiffs had "ample time" to prepare and present their certification argument, the Ninth Circuit found "no rule or decisional authority prohibit[ing] Countrywide from filing its motion to deny certification before plaintiffs filed their motion to certify." The Court further held the district court did not abuse its discretion under FRCP 23(b)(3) because the record supported its conclusion that individual issues predominated over common issues. In particular, the Court held that a "district court abuses its discretion in relying on an internal uniform exemption policy to the near exclusion of other factors relevant to the predominance inquiry." In so holding, the Ninth Circuit refused to follow *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602 (C.D. Cal. 2005). *Accord In re Wells Fargo Home Mortgage*, 571 F.3d 953 (9th Cir. 2009). *See also Ali v. U.S.A. Cab Ltd.*, 2009 WL 2197069 (Cal. Ct. App. 2009) (trial court did not abuse its discretion in denying class certification in case against taxi cab company that classified its drivers as independent contractors rather than employees).

Order Approving Wage & Hour Class Action Settlement Is Vacated

Clark v. American Residential Servs., 175 Cal. App. 4th 785 (2009)

Derain Clark and Maxine Gaines filed a class action lawsuit against American Residential Services, seeking unpaid minimum and overtime wages, payment for missed meal and rest periods and other violations. Eighteen months after the lawsuit was filed, the parties engaged in a one-day mediation with a respected mediator and agreed to settle the matter for $2 million, out of which Clark and Gaines would receive $25,000 each. The other class members would receive an average of $561.44. Notice of the proposed settlement elicited objections from 20 putative class members who alleged the settlement resulted in their recovering only about one percent of the total value of their claims and that no evidence was presented to the court to justify the settlement. After a hearing, the trial court approved the settlement, and the objectors filed this appeal. The Court of Appeal vacated the settlement because the trial court lacked sufficient information to make an informed evaluation of the fairness of the settlement – among other things, the objectors asserted that class counsel's evaluation of the case was based on a "staggering mistake of law," concerning which the trial court apparently made no independent assessment. The appellate court also concluded it was an abuse of discretion to permit incentive or enhancement awards of $25,000 each to Clark and Gaines (more than 44 times the average payout to other class members) as well as costs totaling more than $44,500 when the notice to class members stated that plaintiffs' counsel were requesting reimbursement "of costs up to $40,000."

Individual Managers Could Be Liable For Unpaid Wages Under The FLSA

Boucher v. Shaw, 572 F.3d 1087 (9th Cir. 2009)

Three former employees of the Castaways Hotel, Casino and Bowling Center and their local union sued the employees' individual managers for unpaid wages under the federal Fair Labor Standards Act (the "FLSA") and Nevada law. Although the Nevada Supreme Court determined there could be no individual liability under state law, the Ninth Circuit concluded the three individual managers (the Chairman/CEO, the CFO and the head of labor and employment matters – two of whom also owned the Castaways) could be considered "employers" within the meaning of the FLSA: "Where an individual exercises control over the nature and structure of the employment relationship… that individual is an employer within the meaning of the Act, and is subject to liability."

Company May Be Liable For Unpaid Wages For Time Spent Transmitting Data

Rutti v. Lojack, Inc., 2009 WL 2568661 (9th Cir. 2009)

Mike Rutti filed this putative class action on behalf of all Lojack technicians who installed alarms in customers' automobiles. Rutti sought payment under the Fair Labor Standards Act for time spent on preliminary and postliminary activities performed by technicians in their homes both before and after their shifts. The district court granted summary judgment in favor of Lojack, but the Ninth Circuit vacated the judgment insofar as it precluded Rutti from seeking payment for the postliminary activity of sending daily portable data transmissions to the company and remanded the matter to the district court for further proceedings. The Court concluded that although Rutti was not entitled to reimbursement for his commute time or the preliminary activities spent "receiving, mapping, and prioritizing jobs and routes for assignment," he might be entitled to reimbursement for the postliminary activity of sending a daily transmission to Lojack from his home via a Lojack-supplied portable data terminal – because the evidence "does not compel a finding that the daily transmission of the record of the day's jobs takes less than ten minutes."

Employer's Reason For Termination Was Possible Pretext For Discrimination

EEOC v. The Boeing Co., 2009 WL 2501837 (9th Cir. 2009)

Boeing terminated the employment of plaintiffs Antonia Castron and Renee Wrede after they received low scores on reduction-in-force ("RIF") assessments, which Boeing used to evaluate employees when determining whom to layoff. The EEOC established a prima facie case of gender discrimination associated with the layoffs and in response Boeing articulated legitimate, nondiscriminatory reasons for its decisions to terminate Castron and Wrede (primarily, low RIF scores). Although the district court found insufficient evidence of pretext, the Ninth Circuit reversed the grant of summary judgment to Boeing and held that sexist comments from Castron's supervisor as well as circumstantial evidence that he "deliberately set Castron up to fail because of her sex" warranted a jury trial on the disputed issues. Further, the Court observed that "[c]oworker testimony is particularly relevant here because it would allow a jury to infer that Boeing's proffered reason for termination – a poor RIF evaluation – was not only inaccurate, but is simply unworthy of credence."

Employees Of Wal-Mart's Suppliers Could Not Sue Wal-Mart For Poor Working Conditions

Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009)

Plaintiffs (all foreign employees of Wal-Mart suppliers) filed this class action complaint against Wal-Mart based on the working conditions in their employers' factories located in China, Bangladesh, Indonesia, Swaziland and Nicaragua. Plaintiffs relied upon a code of conduct that Wal-Mart developed for its suppliers in 1992, entitled "Standards for Suppliers," which requires foreign suppliers to adhere to local laws and industry standards regarding working conditions such as pay, hours, forced labor, child labor and discrimination. The complaint alleged that Wal-Mart does not monitor its suppliers and that it knows they often violate the Standards adopted by Wal-Mart. Among other things, plaintiffs alleged they are third-party beneficiaries of the Standards, that Wal-Mart is plaintiffs' joint employer and that Wal-Mart negligently breached its duty to monitor the suppliers and to protect plaintiffs. The district court granted Wal-Mart's motion to dismiss, holding that Wal-Mart owed no contractual or other duty to plaintiffs; the Ninth Circuit affirmed dismissal of the action. *Cf. Bauman v. DaimlerChrysler Corp.*, 2009 WL 2634795 (9th Cir. 2009) (claims asserted by Argentinian residents against their former employer (Mercedes Benz Argentina) under the Alien Tort Claims Act were properly dismissed for lack of personal jurisdiction).

County May Have Breached Confidentiality Agreement With Former Employee

Sanchez v. County of San Bernardino, 176 Cal. App. 4th 516 (2009)

Elizabeth Sanchez was a high-ranking county employee (the chief labor negotiator for the county) who was widely regarded as a "rising superstar" before she became involved in a "physical romantic relationship" with James Erwin, the president of the labor union that represented the county's sheriff's deputies. When Sanchez's supervisor discovered the relationship, he insisted that she resign. Thereafter, Sanchez and the county entered into a written severance agreement, which included a confidentiality provision, stating that the "facts, events and issues which gave rise to this Agreement" would remain confidential. Immediately after she resigned, newspaper articles appeared in which it was reported that Sanchez had resigned due to a conflict of interest arising out of an "improper relationship" with Erwin. Sanchez filed this lawsuit against the County and others, alleging, among other things, breach of contract, invasion of privacy and intentional infliction of emotional distress. The trial court granted summary adjudication on these claims in favor of the County, but the Court of Appeal reversed, rejecting the County's arguments that the confidentiality provision was "contrary to public policy," that its disclosures about Sanchez were privileged pursuant to Civil Code § 47(a) and that Sanchez herself had waived the confidentiality provision by disclosing information about her resignation to various third parties.

Anti-SLAPP Motion Was Properly Granted In Trade Secrets Litigation

Raining Data Corp. v. Barrenechea, 175 Cal. App. 4th 1363 (2009)

Raining Data sued two of its former employees and their new employer for misappropriation of trade secrets. Defendants then filed a cross-complaint against Raining Data and its CEO – to which Raining Data responded by filing a motion to strike all cross-claims pursuant to Code of Civil Procedure § 425.16 (the anti-SLAPP statute). The trial court granted the anti-SLAPP motion and struck the entirety of the cross-complaint and also awarded Raining Data $112,353.75 in attorney's fees. The Court of Appeal affirmed, holding that Raining Data had met its burden of demonstrating the acts underlying the filing of the cross-complaint arose from protected activity (i.e., the filing of Raining Data's complaint). The Court also affirmed the award of attorney's fees to Raining Data. *Compare The Retirement Group v. Galante*, 2009 WL 2332008 (Cal. Ct. App. 2009) (trial court erred in enjoining solicitation of former employer's customers in the absence of evidence of trade secret misappropriation).

Court Affirms FEHC Award Of Damages And Fines In Pregnancy Discrimination Case

SASCO Elec. v. California Fair Employment & Housing Comm'n, 97 Cal. Rptr. 3d 482 (Cal. Ct. App. 2009)

SASCO Electric filed a petition for administrative mandate challenging a decision in which the FEHC found SASCO liable for pregnancy discrimination against Zibute Scherl, one of its employees who, before becoming pregnant, had worked successfully as second captain in training of a yacht owned by the company. The yacht was captained by David McIntyre, a SASCO management employee with the power to hire and fire employees, who was "disappointed" by news of Scherl's pregnancy because he thought it would impact her working on the yacht and because in his experience "mothers to do not want to work in the boating business." McIntyre also had liability concerns to the extent Scherl continued to work on the yacht further into her pregnancy because of her exposure to chemicals and fumes and the potential she could slip and have a miscarriage. SASCO initially asked Scherl for a release from her physician, clearing her to work. Although she obtained the release, which included certain restrictions, Scherl never provided the release to SASCO and, in any event, McIntyre told her to "hold off" in obtaining the release and, instead, instructed her just to "wait and see what happens first." Scherl was then told that due to budgetary restrictions (which had never been mentioned before), her position was being eliminated. After her employment was terminated, McIntyre sent her an unsolicited letter of recommendation describing her as the "hardest working, responsible, boat savvy individual to work with me during my seventeen years on this vessel." McIntyre allegedly told others that "she can't drive the boat and she's pregnant," that a planned trip to Mexico was "unsafe for pregnant women" and that he laid her off instead of terminating her because "that way we can't be sued." After a four-day evidentiary hearing, an administrative law judge awarded Scherl four months of backpay, $85,000 in emotional distress damages and imposed a fine against SASCO in the amount of $25,000. SASCO petitioned the FEHC for reconsideration and then filed a writ of administrative mandamus in the superior court, which the court denied. The Court of Appeal affirmed entry of judgment against SASCO after concluding the award was supported by
substantial evidence.

Federal Employee Properly Exhausted Administrative Remedies Before Filing Suit

Kraus v. Presidio Trust Facilities, 572 F.3d 1039 (9th Cir. 2009)

Vickey Kraus, a federal employee of the Presidio Trust who worked as a maintenance inspector for approximately nine years, alleged that she is an African-American female, a lesbian, and an individual disabled due to dyslexia, emotional distress, anxiety, depression, a back injury with sciatica, and brain damage due to lead poisoning. She alleged discrimination based on her race, gender, sexual orientation and her various disabilities as well as retaliation for participating in the discrimination complaint process. Among other things, Kraus complained that she was denied access to the Presidio Trust's vanpool, that her supervisor unfairly evaluated her and that she was falsely accused of sexually harassing a female co-employee. The district court dismissed several of Kraus's claims on summary judgment because she had failed to make a prima facie showing of discrimination and dismissed others because Kraus had not adequately exhausted her administrative remedies. The Ninth Circuit reviewed the dismissal for failure to exhaust administrative remedies and reversed the summary judgment, holding that a federal employee seeking to proceed under Title VII need not contact an EEO "counselor" to exhaust administrative remedies; the fact that Kraus had contacted the EEO "officer" sufficed.

Messengers Were Properly Characterized As Employees For Purposes Of Unemployment Insurance

Messenger Courier Ass'n of the Americas v. CUIAB, 175 Cal. App. 4th 1074 (2009)

Two trade associations, the Messenger Courier Association and the California Delivery Association, sought declaratory relief invalidating a precedential decision by the California Unemployment Insurance Appeals Board (the "CUIAB") assessing unemployment insurance contributions and penalties against a courier service that had erroneously characterized its messengers as independent contractors rather than employees. Plaintiffs argued the CUIAB erroneously relied upon California Supreme Court authority in *S.G. Borello & Sons, Inc. v. Department of Indus. Relations*, 48 Cal. 3d 341 (1989), a case involving employee status under the Workers' Compensation Act, which they claimed is inapplicable in the unemployment insurance context. The trial court and the Court of Appeal disagreed, holding the CUIAB had not erred in its application of the law. *Compare Cortez v. Abich*, 2009 WL 2767738 (Cal. Ct. App. 2009) (homeowners who hired unlicensed contractor to remodel their home were not employers for purposes of OSHA or workers' compensation law).

Newly Enacted California Statutes

Noose Hanging = Hate Crime

Any person who hangs a noose, knowing it to be a symbol representing a threat to life and for the purpose of terrorizing another, on the property of another or on the property of a school, park or place of employment shall be punished by imprisonment in the county jail and/or fined up to $5,000 ($15,000 for subsequent convictions). **(A.B. 412)**.

Sports Betting Pools

Participation in a bet, wager or betting pool with another person or group of persons who are not acting for gain, hire or reward other than that which is at stake for every participant based on the result of a contest or event, including a sporting event, shall no longer be a misdemeanor nor a felony, but shall only be an infraction punishable by a fine not to exceed $250. *Caveat*: This exception would not apply to bets, wagers or pools made online or to betting pools with more than $2,500 at stake. *And just in time for football season...* **(A.B. 58)**.

Labor Commissioner Approves Proportionate Reduction In Exempt Employees' Hours And Compensation

In an August 19, 2009 opinion letter, the California Division of Labor Standards Enforcement reversed its own earlier interpretation of state law and concluded that employers facing "significant economic difficulties" may reduce the work schedules and compensation of exempt employees without violating the "salary basis" test required for maintaining exempt status. *See* www.dir.ca.gov/dlse/OpinionLetters-byDate.htm.

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