Proskauer

California Employment Law Notes

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Sexual Harassment And Retaliation Claims Were Properly Dismissed On Summary Judgment

Haberman v. Cengage Learning, Inc., 2009 WL 4693065 (Cal. Ct. App. 2009)

Alicia M. Haberman sued her former employer, Cengage Learning, as well as her former supervisor and Cengage's national sales manager for sexual harassment, retaliation, breach of contract and intentional infliction of emotional distress. The trial court granted defendants' motion for summary judgment, and the Court of Appeal affirmed on the ground that the acts of alleged harassment fell "far short" of establishing a pattern of continuous, pervasive harassment necessary to show a hostile working environment under the Fair Employment and Housing Act. Among other things, the individual defendants' oral and e-mail comments to Haberman were not sexual in nature, were not compliments of or requests to date her and generally did not evidence conduct sufficiently severe or pervasive as to alter her conditions of employment and create a hostile work environment. Similarly, the Court affirmed dismissal of Haberman's claims for retaliation and intentional infliction of emotional distress.

Supreme Court Approves $3.8 Million Judgment In Favor Of Terminated Disabled Employee

Roby v. McKesson Corp., 47 Cal. 4th 686 (2009)

Charlene J. Roby was employed by McKesson Corporation for 25 years. By the end of her career, she was a customer service liaison at a local distribution center where she processed forms and handled customer problems related to product delivery. Three years before her termination, Roby began experiencing "panic attacks" that temporarily (and with little notice) restricted her ability to perform her job. During these panic attacks, Roby suffered heart palpitations, shortness of breath, dizziness, trembling and excessive sweating. The following year, McKesson instituted a complex attendance policy that put particular emphasis on 24-hour advance notice for all absences. Roby's frequent absences resulted in tension with her new supervisor, Karen Schoener. Additionally, Roby's medication caused her body to produce an unpleasant odor and her condition resulted in a nervous disorder that caused her to dig her fingernails into the skin of her arms, producing open sores. Schoener made negative comments about Roby's body odor and her "disgusting" sores and excessive sweating. After Roby's employment was terminated for excessive unexcused absences, she filed this lawsuit for disability discrimination, harassment and wrongful termination. The jury awarded Roby more than $19 million, including $15 million in punitive damages. The court of appeal reduced the judgment to $3.405 million, but held there was insufficient evidence to support a verdict that Schoener and McKesson had harassed Roby on the basis of her disability. The Supreme Court reversed the court of appeal's judgment, holding that although some of Schoener's actions toward Roby were "official employment actions," they could provide evidentiary support for her claim of harassment. Accordingly, the Supreme Court reinstated that portion of the damages award that was attributable to harassment. The Supreme Court also held that given the relatively slight degree of reprehensibility that existed in this case, no more than a one-to-one ratio between punitive and compensatory damages was appropriate. *Compare Mangano v. Verity, Inc.*, 179 Cal. App. 4th 217 (2009) (trial court did not abuse its discretion in excluding evidence of plaintiff's "purported disability" and defendant's proposed separation agreement).

Neither Damages Nor Jury Trial Was Available In ADA Retaliation Case

Alvarado v. Cajun Operating Co., 2009 WL 4724267 (9th Cir. 2009)

Tannislado Alvarado, a cook at Church's Chicken, filed a retaliation claim against his employer (Cajun), alleging, among other things, that he was terminated because he had complained about the pain he felt in his hands when he worked in the restaurant's walk-in refrigerator. The district court granted Cajun's motion in limine to bar Alvarado from seeking compensatory and punitive damages for his ADA retaliation claim and also precluded him from having a jury trial since only equitable relief was available to him under the statute. Relying on *Kramer v. Banc of Am. Sec.*, 355 F.3d 961 (7th Cir.), *cert. denied*, 542 U.S. 932 (2004), the Ninth Circuit affirmed, holding that compensatory and punitive damages are not available for ADA retaliation claims – nor is a jury trial. *See also Becerril v. Pima County Assessor's Office*, 587 F.3d 1162 (9th Cir. 2009) (ADA discrimination and reasonable accommodation claims asserted by employee with TMB were properly dismissed); *Fleming v. Yuma Regional Med. Ctr.*, 587 F.3d 938 (9th Cir. 2009) (Sec. 504 of the Rehabilitation Act extends to a claim of discrimination brought by independent contractor).

Retail Managers' Class Action Was Properly Decertified

Keller v. Tuesday Morning, Inc., 179 Cal. App. 4th 1389 (2009)

Plaintiffs in this case filed a class action against Tuesday Morning (a retailer that sells brand name merchandise at discounted prices), alleging TM had misclassified the managers as exempt from overtime. Although the trial court had initially denied class certification to the managers, it subsequently granted their motion for certification in light of the California Supreme Court's opinion in *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004). Almost three years later, a different trial court judge granted TM's motion to decertify the class on the ground that the individual inquiry predominated over any common inquiry because TM's numerous stores varied in size, layout, socioeconomic makeup, the number of employees and the manner in which the managers conducted their supervisorial duties. The court also concluded that each manager's background and management style varied from store to store. The Court of Appeal affirmed the trial court's judgment decertifying the class based on the declarations of four TM managers, an expert witness for TM, its vice president of store operations and five of TM's attorneys. In contrast, the managers who filed declarations on behalf of the class were impeached by their own deposition testimony.

Employees May Agree To Two On-Duty Meal Periods

McFarland v. Guardsmark, LLC, 538 F. Supp. 2d 1209 (N.D. Cal. 2008), *aff'd*, 2009 WL 4643227 (9th Cir. 2009)

Johnny McFarland is a security officer for Guardsmark who alleged that on some occasions when he and other officers worked in excess of 10 hours in a day, they were not properly provided with a second meal period as required under California law. Pursuant to Labor Code § 512, an employee may waive the first meal period if the work day does not exceed six hours and may waive the second meal period if the work day does not exceed 12 hours and the first meal period was not waived. Plaintiff alleged that an "on-duty" meal period is the same as a waived meal period and, therefore, if the first meal period is provided on duty, the second one cannot be. On cross motions for summary judgment, the district court held that Guardsmark's position "is the correct one…where the employee agrees to take an 'on duty' meal period, and gets paid for working during the time he is eating, there is no 'waiver' of the meal period" within the meaning of Section 512. The district court rejected a contrary interpretation of the statute as set forth in the DLSE Manual on the ground that the Manual is a "void regulation." The Ninth Circuit affirmed and adopted the "district court's thorough decision" and rejected plaintiff's additional argument, which was raised for the first time on appeal, that his signed employment agreement did not represent an actual agreement to take two on-duty meal periods in a single day.

Class Members Who Did Not Receive Notification Of Settlement Were Not Included Therein

Bates v. Rubio's Restaurants, Inc., 179 Cal. App. 4th 1125 (2009)

The parties in this wage-and-hour class action litigation entered into a $7.5 million settlement, which provided for three payments of $2.5 million to approved class members. After the initial $2.5 million payment was distributed among 529 approved class members, defendant Rubio's Restaurants realized it had failed to provide the names of 140 potential class members to the settlement administrator. Initially, the trial court decided the 140 late-identified class members should receive notice and be folded into the existing settlement agreement. Later, however, the trial court reconsidered this ruling on its own motion and vacated it. In the same minute order, the judge recused himself from any further proceedings in the interests of justice. The Court of Appeal affirmed the trial court's judgment in its entirety, holding that Rubio's had failed in its appeal to address either the power of the judge to reconsider his own ruling or the standard of review to be applied by the Court of Appeal with respect to an order overturning a prior ruling after reconsideration. *See also Barboza v. West Coast Digital GSM, Inc.*, 179 Cal. App. 4th 540 (2009) (class counsel's obligations to the class did not end with the entry of judgment and the hearing on the motion for attorney's fees but continued until all class issues were resolved, which could include enforcement of judgment).

Deceased Husband's Employer Did Not Owe Duty Of Care To Wife Who May Have Been Exposed To Chemicals

Oddone v. Superior Court, 179 Cal. App. 4th 813 (2009)

After Geraldine Oddone's husband, James, died from a brain tumor, she filed a lawsuit against his employer, Technicolor, Inc., alleging that her husband brought home from work toxic vapors and chemicals on his clothing and person and that she was injured by exposure to those substances. Technicolor filed a demurrer in response to the complaint on the ground that it owed no duty of care to Geraldine, which the trial court sustained without leave to amend. The Court of Appeal affirmed the dismissal. *See also Cabral v. Ralphs Grocery Co.*, 179 Cal. App. 4th 1 (2009) (tractor-trailer driver who stopped his vehicle in an emergency parking area on the side of the freeway owed no duty to an erratically driving motorist (plaintiff's decedent) who collided with the big rig).

Some Claims Against Former Employee Were Barred By Compulsory Cross-Complaint Statute

Align Tech., Inc. v. Tran, 179 Cal. App. 4th 949 (2009)

In 2008, Align Technology sued Bao Tran, its former Corporate Counsel – Technology and Licensing, for, among other things, breach of contract and conversion of patents that belonged to the company. Tran demurred to the complaint on the ground that it was barred by the compulsory cross-complaint statute, Cal. Code Civ. Proc. § 426.30(a), because in response to a prior lawsuit Align had filed against Tran in 2005, Tran had filed a cross-complaint for wrongful termination, and Align had failed to assert the current claims when it answered Tran's cross-complaint. The trial court sustained Tran's demurrer without leave to amend and dismissed Align's complaint. The Court of Appeal held that the allegations in the complaint included claims that were barred on their face by the compulsory cross-complaint statute because they were logically related to Tran's cross-complaint and they should have been asserted in the prior suit. However, the Court reversed the judgment on the ground that Align may be able to assert claims against Tran that did not exist when it answered Tran's cross-complaint and held that on remand the trial court should sustain Tran's demurrer but it should grant Align leave to amend. *See also Epic Communications, Inc. v. Richwave Tech., Inc.*, 179 Cal. App. 4th 314 (2009) (trial court erred in quashing service of process based on fact that a claim for misappropriation of intellectual property arising from California contacts was prosecuted by a non-resident plaintiff); *Jasmine Networks, Inc. v. Superior Court*, 2009 WL 5103552 (Cal. Ct. App. 2009) (plaintiff that sold its right to trade secrets during bankruptcy proceeding did not forfeit its standing to prosecute trade secret misappropriation action against competitor).

Employer Should Not Have Been Compelled To Disclose Portions Of Attorney Opinion Letter

Costco Wholesale Corp. v. Superior Court, 47 Cal. 4th 725 (2009)

Costco retained a law firm to provide legal advice regarding whether certain of its warehouse managers in California were exempt from California's wage and overtime laws. After the attorney interviewed two warehouse managers, she produced for Costco a 22-page opinion letter, which she and Costco understood would remain confidential and subject to the attorney-client privilege. Several years later, plaintiffs filed this class action against Costco, asserting the company had misclassified some of its managers as exempt from overtime. In the course of the litigation, plaintiffs sought to compel discovery of the attorney's letter, arguing that the letter contained unprivileged matter and that Costco had placed the contents of the letter in issue in the lawsuit and had thereby waived the privilege. Over Costco's objection, the trial court ordered a discovery referee to conduct an in camera review of the opinion letter to determine the merits of Costco's claims of attorney-client privilege and work product. The referee produced a heavily redacted version of the letter which included portions of text involving "factual information about various employees' job responsibilities." The referee also determined that while the attorney was interviewing the two Costco managers, she was acting not as an attorney but as a fact finder. The trial court adopted the findings and conclusions of the referee and ordered Costco to produce a version of the letter in the same form as recommended and redacted by the referee. Costco petitioned the court of appeal for a writ of mandate, which was denied. The Supreme Court reversed the court of appeal, holding that the attorney-client privilege attached to the letter in its entirety, irrespective of the letter's content. The Court further held that Evidence Code § 915(a) prohibits disclosure of the information claimed to be privileged as a confidential communication between attorney and client in order to rule on the privilege. Finally, the Court held that a party seeking extraordinary relief from a discovery order that wrongfully invades the attorney-client relationship need not establish that its case will be harmed by disclosure of the evidence in question. *Compare Mohawk Industries, Inc. v. Carpenter*, 558 U.S. ___, 130 S. Ct. 599 (2009) (disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine).

Employee Failed To Show Retaliation For Filing A Workers' Compensation Claim

Gelson's Markets, Inc. v. WCAB, 179 Cal. App. 4th 201 (2009)

Paul Fowler worked as an order puller/machine operator for Gelson's until he suffered an industrial injury to his neck. Following surgery seven months later in which a cervical fusion was performed on Fowler, he sought to return to work. When Gelson's refused to reinstate Fowler because of the contradictory and ambiguous information it had received from his physician, he filed a petition for increased workers' compensation benefits pursuant to Labor Code § 132a, claiming he had suffered discrimination for having filed the workers' compensation claim. The WCAB determined that the physician's return-to-work release was unambiguous and that Gelson's unreasonably refused to reinstate Fowler. However, the Court of Appeal annulled the decision of the WCAB and held that "Fowler made no showing that Gelson's would have returned to work a nonindustrially injured employee whose physician provided the same releases, but discriminated against Fowler by not returning him to work." *See also George v. CUIAB*, 179 Cal. App. 4th 1475 (2009) (state employee alleging retaliation could pursue both internal administrative civil service remedies as well as those available under the Fair Employment and Housing Act).

Employee With Mistaken But Good Faith Belief He Was Owed Overtime May Have Been Wrongfully Terminated

Barbosa v. IMPCO Techs., Inc., 179 Cal. App. 4th 1116 (2009)

Manuel Barbosa worked as a carburetor assembler for IMPCO where he supervised up to eight other assemblers. As non-exempt employees, Barbosa and the other assemblers were eligible for paid overtime when it was worked. After two of the employees in Barbosa's "cell" told him they were missing two hours of overtime pay, Barbosa complained to the company. In response to Barbosa's complaint, the company paid him and the other employees an additional two hours of overtime. Later, however, the company checked the security entrance gate records and determined the employees could not have worked the overtime Barbosa had claimed. Although Barbosa offered to pay the money back after he realized he had been "confused," IMPCO terminated him for falsifying time records. Barbosa sued IMPCO for wrongful termination in violation of public policy. The trial court granted IMPCO's motion for nonsuit on the ground that Barbosa's alleged good faith belief that he and the others were owed the money was irrelevant. The Court of Appeal reversed the nonsuit, holding that an employee's good faith but mistaken belief is protected from employer retaliation in the whistleblowing context.

Non-Compete/Non-Solicitation Agreement Was Void As A Matter Of Law

Dowell v. Biosense Webster, Inc., 179 Cal. App. 4th 564 (2009)

Three former employees of Biosense and their subsequent employer (St. Jude Medical Center) sued Biosense to enjoin it from enforcing certain non-compete and customer non-solicitation clauses the employees had signed while they were employed by Biosense. Although the principal place of business of both companies is California and the employees are California residents, the agreements contained New Jersey choice-of-law and venue provisions. St. Jude and the employees filed this declaratory relief action against Biosense in which they also alleged unfair competition pursuant to Cal. Bus. & Prof. Code § 17200. Biosense filed a cross-complaint alleging unfair competition and "employee raiding" of its employees by St. Jude and further asserted that St. Jude was guilty of "unclean hands" because it had its non-California employees sign agreements that contained similar provisions to those found in the Biosense agreements. The trial court declared that Biosense's non-compete and non-solicitation clauses violated Cal. Bus. & Prof. Code § 16600 and were void *ab initio*, denied St. Jude's request for injunctive relief and determined that Biosense shall take nothing by way of its cross-complaint. Both parties appealed, and the Court of Appeal affirmed the trial court's judgment, holding that Biosense's contract was not "narrowly tailored to protect trade secrets and confidential information" as Biosense asserted.

Employer May Make Deductions From Exempt Employees' Leave Balances For Partial-Day Absences

The California Division of Labor Standards Enforcement has opined that while it is impermissible to deduct *from a salary* of an exempt employee for partial-day absences, deductions from accrued sick leave and vacation balances generally do not violate California law or cause the loss of an employee's exempt status. DLSE Opinion Letter (Nov. 23, 2009), *available at* http://www.dir.ca.gov/dlse/OpinionLetters-byDate.htm.

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