Proskauer

# California Employment Law Notes

**March 2011**

## NASA Employees' Privacy Was Not Invaded By Background Check

*NASA v. Nelson*, 562 U.S. ___, 131 S. Ct. 746 (2011)

Twenty-eight contract employees of the Jet Propulsion Laboratory ("JPL"), which is owned by NASA but operated by Cal Tech, had never been subjected to a government background investigation. In 2004, a recommendation of the 9/11 Commission prompted the President to order new, uniform identification standards for federal employees, including contractor employees. The Department of Commerce implemented this directive by mandating that contract employees with long-term access to federal facilities complete a standard background check. JPL informed employees that anyone failing to complete the background check process would be denied access to JPL and would face termination by Cal Tech. The JPL employees in this case filed suit challenging the background-check process as a violation of their constitutional right to informational privacy. The district court denied the employees' motion for a preliminary injunction, but the Ninth Circuit Court of Appeals reversed the district court. In this opinion, the United States Supreme Court reversed the Ninth Circuit, holding unanimously that the government has an interest in conducting basic background checks in order to ensure the security of its facilities and to employ a competent, reliable workforce to carry out the people's business.

## Pregnancy Harassment Claim Was Properly Dismissed, And Employee Waived Attorney-Client Privilege By Using Employer's Computer

*Holmes v. Petrovich Dev. Co.*, 191 Cal. App. 4th 1047 (2011)

Gina Holmes sued her employer for harassment based on pregnancy, retaliation, constructive discharge, violation of the right to privacy and intentional infliction of emotional distress. The trial court granted summary adjudication to the defendants with respect to the claims for harassment, retaliation and constructive discharge, and a jury decided against Holmes with respect to the claims for invasion of privacy and intentional infliction of emotional distress. The Court of Appeal affirmed the judgment in favor of the employer, concluding there was "an absence of evidence from which a reasonable jury could objectively find that Petrovich created a hostile work environment for a reasonable pregnant woman." The Court also concluded there was not sufficient evidence of constructive discharge or retaliation. Finally, the Court held that the trial court did not abuse its discretion by denying Holmes' motion in limine to prevent defendants from introducing at trial emails that she had sent to her attorney on the company's computer. Noting that Holmes had used her employer's email account to communicate with her attorney after she was warned that it was to be used only for company business and that emails were not private, the Court affirmed that Holmes had no reasonable expectation of privacy in the emails she sent to her attorney any more than she would have if she were "consulting her attorney in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that [her] discussion of her complaints about her employer would be overheard by him." *See also People v. Nazary*, 191 Cal. App. 4th 727 (2011) (videotape from a hidden camera of employee being confronted by management for suspected embezzlement and theft were properly shown to the jury because employee "could reasonably expect that [the confrontation] might be overheard or recorded").

**U.S. Supreme Court Recognizes "Cat's Paw" Liability Theory**

*Staub v. Proctor Hosp.*, 562 U.S. ___, 131 S. Ct. 1186 (2011)

Vincent Staub, a former angiography technician for Proctor Hospital, was a member of the United States Army Reserve. Staub alleged that his employment was terminated in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") because his supervisor (Janice Mulally) and her supervisor (Michael Korenchuk) were hostile to Staub's military obligations (e.g., Staub's absence from work to attend monthly drill and training sessions). Mulally complained that "everyone else [had] to bend over backwards to cover [Staub's] schedule for the Reserves," and Korenchuk referred to Staub's military obligations as "a bunch of smoking and joking and a waste of taxpayers' money." Staub was issued a Corrective Action disciplinary warning for purportedly failing to stay in his work area when he was not working with a patient, and his employment was eventually terminated by Linda Buck (the vice president of human resources) based on Staub's ignoring the directive in the Corrective Action. Although Staub convinced a jury that he was terminated in violation of the statute, the Seventh Circuit Court of Appeals reversed, holding that an employer is not liable for the anti-military animus of a supervisor who was not charged with making the ultimate employment decision, and in this case, Buck had that responsibility. The United States Supreme Court disagreed and reversed the Seventh Circuit, holding that "if a supervisor performs an act motivated by anti-military animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."

**U.S. Supreme Court Recognizes Third Party Retaliation Claim**

*Thompson v. North Am. Stainless, LP*, 562 U.S. ___, 131 S. Ct. 863 (2011)

Eric Thompson and his fiancée, Miriam Regalado, were both employees of North American Stainless ("NAS"). Three weeks after Regalado filed a charge with the EEOC against NAS, alleging sex discrimination, NAS fired Thompson. Thompson subsequently filed a lawsuit against NAS, claiming the company had fired him in order to retaliate against Regalado for filing her charge with the EEOC. The district court dismissed Thompson's claim on the ground that Title VII "does not permit third party retaliation claims." The Sixth Circuit Court of Appeals affirmed the dismissal. The United States Supreme Court reversed the Sixth Circuit, finding it "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." *Compare Munoz v. Mabus*, 630 F.3d 856 (9th Cir. 2010) (naval employee failed to establish that denial of training was in retaliation for his having filed age and race discrimination claims against the Navy).

**Sexual Harassment Claim Was Barred By Statute Of Limitations**

*Trovato v. Beckman Coulter, Inc.*, 192 Cal. App. 4th 319 (2011)

Irene Trovato, who was employed as a sales representative for Beckman Coulter, submitted a letter of resignation on May 14, 2007, with an effective date of May 25, 2007. On May 8, 2008, Trovato filed an administrative complaint against Beckman and her former supervisor, Michael Allyn. On May 22, 2008, Trovato sued Beckman and Allyn, alleging sexual harassment and retaliation in violation of the Fair Employment and Housing Act ("FEHA"). Beckman and Allyn filed a motion for summary judgment based on FEHA's one-year statute of limitations on the ground that the undisputed evidence established that the last act of harassment and retaliation occurred on or about January 31, 2007, when Allyn gave Trovato her 2006 performance review. The trial court granted the motion for summary judgment, and the Court of Appeal affirmed, rejecting Trovato's assertion that the "continuing violation" doctrine saved her claim.

**Studio That Provided Financing For Motion Picture Is Not Liable For Injury To Production Company Employee**

*Angelotti v. The Walt Disney Co.*, 2011 WL 653812 (Cal. Ct. App. 2011)

Anthony Angelotti was injured while rehearsing a stunt for a film that was being produced by Second Mate Productions, Inc. Angelotti sued Second Mate as well as The Walt Disney Company, which provided the financing for the film. Angelotti alleged that Disney had assumed a duty to ensure that the production complied with occupational safety regulations, that it had retained control over the film production and affirmatively contributed to his injury by providing unsafe equipment and failing to ensure his safety. The trial court granted summary judgment to Second Mate on the ground that the workers' compensation exclusivity rule precluded any recovery against the production company. The court granted summary judgment to Disney on the ground that Disney did not assume a duty of care and did not affirmatively contribute to Angelotti's injury. The Court of Appeal affirmed. *See also Cortez v. Abich*, 51 Cal. 4th 285 (2011) (employee of unlicensed contractor may sue homeowner under Cal-OSHA for injuries he sustained during residential remodeling project in which significant portions of the house were demolished and rebuilt and new rooms were added); *Cabral v. Ralphs Grocery Co.*, 2011 WL 677396 (Cal. S. Ct. 2011) (Ralphs was liable for death of driver who suddenly veered off the freeway and collided with the rear of a Ralphs tractor-trailer that was parked alongside an interstate highway where truck driver was having a snack).

**Gay Employee Could Proceed With Retaliation But Not Harassment Claim Under Title VII**

*Dawson v. Entek Int'l*, 630 F.3d 928 (9th Cir. 2011)

Shane Dawson, a former temporary production line worker for Entek, ran a production line that rolled up battery separators. Dawson, who is gay, worked with 24 other male employees. Dawson's employment was terminated two days after he had complained to human resources that he was being called "a homo and a fag and a queer" by other employees at Entek. Although the district court granted summary judgment to the defendants, the Ninth Circuit Court of Appeals reversed the dismissal, concluding that the "gravity of Dawson's complaints coupled with the time frame are such that a reasonable trier of fact could find in favor of Dawson on his retaliation claim." Accordingly, the Ninth Circuit reversed the dismissal of the Title VII retaliation claim. However, the Court affirmed dismissal of the Title VII hostile work environment claim on the ground that Dawson was not verbally harassed for appearing non-masculine or for otherwise not fitting the male stereotype. *See also Green v. Laibco, LLC*, 192 Cal. App. 4th 441 (2011) (employer that failed to produce meaningful evidence of its financial condition at trial is not entitled to reversal of $1.2 million punitive damages award against it in wrongful termination case).

**Rehabilitated Drug Addict's Disability Claims Were Properly Dismissed**

*Lopez v. Pacific Maritime Ass'n*, 2011 WL 711884 (9th Cir. 2011)

When Santiago Lopez first applied to be a longshoreman in 1997, his application was rejected because he tested positive for marijuana. The PMA, which represents the shipping lines, stevedore companies and terminal operators that run the ports along the west coast, follows a "one-strike rule," which eliminates from consideration for employment any applicant who tests positive for drug or alcohol during a pre-employment screening process. After he became "clean and sober" in 2004, Lopez reapplied but was rejected because of the one-strike rule. In response, Lopez filed this action, alleging a violation of the Americans with Disabilities Act and the Fair Employment and Housing Act. The district court granted summary judgment to the employer, and the Ninth Circuit affirmed on the ground that "nothing about the history of the one-strike rule leads us to conclude that [the PMA] adopted the rule with a discriminatory purpose." The Ninth Circuit also rejected Lopez's argument that the one-strike rule had a disparate impact upon recovering drug addicts. *See also Harris v. Maricopa County Superior Court*, 631 F.3d 963 (9th Cir. 2011) (award of $125,000 in prevailing party attorney's fees to defendant employer was improperly calculated).

**Employees Who Quit Company That Was Closing Suffered "Employment Loss" Under WARN Act**

*Collins v. Gee West Seattle LLC*, 631 F.3d 1001 (9th Cir. 2011)

On September 26, 2007, Gee West informed its 150 employees that although it was actively pursuing the sale of the business, it would be closing its doors and would terminate all but a few business office employees on October 7, 2007 if a buyer was not found by then. Between the time of the announcement and the day operations ceased on October 5, 2007, 120 of the 150 employees stopped reporting to work. The plaintiff employees in this lawsuit alleged Gee West had violated the WARN Act because it had failed to give 60-days' notice to the employees before closing its doors. The district court granted summary judgment to the employer on the ground that the employees had voluntarily departed, but the Ninth Circuit Court of Appeals reversed, holding that the term "voluntary departure" as used in the WARN Act does not include an employee's departure from a job because the business is closing. *Cf. Candari v. Los Angeles Unified School Dist.*, 2011 WL 783587 (Cal. Ct. App. 2011) (employer has the burden of demonstrating the availability of comparable employment positions before projected earnings of alternative employment opportunities *not sought* by the discharged employee are considered for purposes of mitigation).

**Two One-Hour Premium Payments May Be Owed Per Day For Missed Meal And Rest Periods**

*United Parcel Serv., Inc. v. Superior Court*, 192 Cal. App. 4th 1043 (2011)

Pursuant to Labor Code § 226.7(b), "[i]f an employer fails to provide an employee a meal period or rest period… the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." In this case, UPS argued that only one premium payment is allowable per work day regardless of the number or type of breaks that were not provided. The trial court disagreed with UPS, and the company filed a petition for writ of mandate challenging the trial court's ruling. Relying upon an unpublished federal district court opinion, the Court of Appeal denied the petition for writ of mandate, holding that employees may recover up to two additional hours of pay on a single work day for meal period and rest break violations – one for failure to provide a meal period and another for failure to provide a rest period. *See also Tien v. Tenet Healthcare Corp.*, 2011 WL 523611 (Cal. Ct. App. 2011) (trial court properly denied class certification for missed meal periods and rest breaks, following *Brinker/Brinkley's* "provide not ensure" standard); *Coleman v. Estes Express Lines, Inc.*, 631 F.3d 1010 (9th Cir. 2011) (district court is limited to consideration of the complaint in determining whether to remand wage-and-hour class action that was removed to federal court under the Class Action Fairness Act of 2005).

**Claims Adjusters Were Properly Classified As Exempt Administrative Employees**

*Hodge v. Aon Ins. Servs.*, 2011 WL 311169 (Cal. Ct. App. 2011)

Plaintiffs in this case are claims adjusters employed by a third party administrator (Cambridge Integrated Services Group, Inc.). Depending on the entity with which it contracts and the terms of the contract, Cambridge adjusts general liability, vehicle-related and workers' compensation claims. In their claim alleging violation of the Unfair Competition Law, plaintiffs alleged they had been misclassified as exempt administrative employees and that they were owed unpaid overtime. After a bench trial (plaintiffs chose to proceed without a jury following an initial jury trial in which they did not "fare well"), the trial court entered a judgment in favor of Cambridge. The Court of Appeal affirmed the judgment after concluding that the work performed by the adjusters is "directly related to management policies or general business operations" of Cambridge's self-insured, noninsurance-related clients. The Court also concluded the adjusters exercised sufficient discretion and independent judgment to qualify for the exemption and that they are involved in work of substantial importance to the company's clients. *See also In re United Parcel Serv. Wage & Hour Cases*, 2011 WL 653863 (Cal. Ct. App. 2011) (although it was the prevailing party in various wage/hour claims, employer was entitled only to recovery of litigation costs and not attorney's fees).

**Pharmaceutical Sales Reps Were Properly Classified As Exempt Outside Sales Employees**

*Christopher v. SmithKline Beecham Corp.*, 2011 WL 489708 (9th Cir. 2011)

Michael Christopher and Frank Buchanan were employed as pharmaceutical sales representatives ("PSRs") of SmithKline d/b/a GlaxoSmithKline ("Glaxo") and were classified as outside salesmen exempt from the Fair Labor Standards Act. PSRs work outside of a Glaxo office and spend much of their time traveling to the offices of and working with physicians within their assigned geographic territories. The PSRs make calls on physicians to encourage them to prescribe Glaxo products to their patients. After the district court granted summary judgment to Glaxo, plaintiffs moved unsuccessfully to alter or amend the judgment based on the district court's failure to consider an *amicus* brief filed by the current Secretary of the Department of Labor in a similar case pending before the Second Circuit Court of Appeals, *In re Novartis Wage & Hour Litigation*, 611 F.3d 141 (2d Cir. 2010). In affirming summary judgment for Glaxo, the Ninth Circuit concluded "we owe no deference to the Secretary's current interpretation of the regulations, and, in any event, we respectfully disagree with that interpretation." The Court concluded that "[w]hile not all steps in the PSR's daily activities constitute 'selling,' that fact does not render the totality of those activities non-exempt promotion."

**Offshore Oil Crews Were Not Entitled To 24 Hours Of Compensation During Each Work Day**

*Seymore v. Metson Marine, Inc.*, 2011 WL 680344 (Cal. Ct. App. 2011)

Plaintiffs Andrew Seymore and Kenneth Blonden were employed by Metson Marine as crew members on Metson's offshore oil spill recovery vessels. Crew members worked 14-day rotational hitches, alternating with 14-day rest periods and were paid to work a 12-hour daily shift during the two-week period, except on crew-change days, when they worked only six hours. Crew members were paid an hourly rate for the full 12-hour shift regardless of whether they actually performed any work during those 12 hours, and they received a regular hourly rate for the first eight hours, time and one-half for the next four hours and, on those occasions that they actually worked more than 12 hours in a day, they were paid double time for all hours worked in excess of the usual 12-hour shift. The remaining 12 hours were designated as "off duty" even though crew members (who slept on the vessels) remained on stand by in that they were required to be able to return to the ship within 30 to 45 minutes of an emergency call. Plaintiffs sued Metson for one additional day of premium pay per hitch, based on their working seven consecutive days in a workweek, and additional compensation for the 12 hours they were on call during the 14-day hitches. The trial court granted summary judgment to Metson, but the Court of Appeal reversed, holding that Metson had violated Labor Code § 510 by not paying the employees incremental overtime compensation for one additional day of every 14-day hitch they worked. The Court further held the employees were entitled to be compensated for four (but not 12) hours of standby time during each 24-hour working day. *See also Sonic-Calabasas A, Inc. v. Moreno*, 2011 WL 651877 (Cal. S. Ct. 2011) (employee's waiver in arbitration agreement of right to file a wage claim with the Labor Commissioner is contrary to public policy and is unconscionable).

**Employer's Failure To Provide Itemized Wage Statements Was Not "Inadvertent"**

*Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement*, 192 Cal. App. 4th 75 (2011)

Heritage Residential, a company that operates seven residential care facilities, employed 24 workers, 16 of whom lacked social security numbers. Heritage treated the 16 employees who did not have social security numbers as independent contractors and issued them 1099 statements rather than itemized wage statements. Following a workplace inspection of Heritage's premises, the DLSE issued a citation for a $72,000 civil penalty for violation of Labor Code § 226, which requires an employer to issue itemized wage statements. During a subsequent administrative hearing, Heritage argued that it had treated those employees without social security numbers as independent contractors, and, therefore, its noncompliance with the statute had been "inadvertent." The DLSE affirmed the citation and rejected Heritage's defense of "inadvertence" – as did the trial court where Heritage filed a petition for writ of administrative mandamus. The Court of Appeal affirmed the denial of the petition, holding that "inadvertent" as used in the statute means "unintentional, accidental or not deliberate," and Heritage's failure to provide itemized wage statements was an intentional act on its part. *See also Arzate v. Bridge Terminal Transp.*, 192 Cal. App. 4th 419 (2011) (owner/operators of transport cargo trucks may have been employees and not independent contractors of company that is in the business of arranging for the transportation of its customers' cargo between ports or terminals and the customers' facilities); *Kullar v. Foot Locker Retail, Inc.*, 191 Cal. App. 4th 1201 (2011) (motion to disqualify employees' counsel who filed a second wage-and-hour class action against employer after objecting to a proposed settlement of another class action was properly denied); *Mayo Found. v. United States*, 562 U.S. ___, 131 S. Ct. 704 (2011) (doctors who serve as medical residents are not students exempt from FICA taxes).

**Former Starbucks Barista May Not Proceed With Putative Class Action**

*Price v. Starbucks Corp.*, 192 Cal. App. 4th 1136 (2011)

Drake Price worked as an entry-level Starbucks barista for approximately 13 shifts before he was fired. Following his termination, he sued Starbucks on behalf of himself and a putative class of employees seeking to recover unpaid wages, penalties and damages for Starbucks' alleged failure to timely pay him wages upon termination, failure to pay an additional hour of reporting time pay on the day he was fired and failure to issue a wage statement that complied with the Labor Code. Starbucks successfully demurred to the wage-statement claim on the ground that Drake had failed to allege any injury arising from the allegedly non-compliant wage statement, and it successfully moved to strike the allegations concerning the alleged failure to timely pay final wages because Price admitted in the complaint that he was paid his final wages on the day his employment was terminated. Finally, the trial court dismissed on summary judgment Price's claim seeking reporting-time pay and penalties based on Starbucks' paying him for only two hours instead of 3.3 hours (the average number of hours of his scheduled shifts) on the ground that "if an employee is not scheduled to work or does not work his usual shift, but must report to work for a meeting, the employee falls into the regulatory category of those employees called to work on their day off for a scheduled meeting" and who receive a two-hour minimum payment. The trial court also dismissed the derivative claims for violation of the Unfair Competition Law and the Private Attorneys General Act. The Court of Appeal affirmed dismissal of all claims.

**"Explicit Mutual Wage Doctrine" Barred Janitor's Claim For Additional Unpaid Overtime**

*Arechiga v. Dolores Press, Inc.*, 192 Cal. App. 4th 567 (2011)

Carlos Arechiga worked as a janitor for Dolores Press for almost seven years at which time his employment was terminated. Although Arechiga filed a complaint alleging various causes of action, only his claim for violation of the Unfair Competition Law went to trial. Arechiga, a non-exempt employee, claimed the $880 that he received per week was not a salary (as the employer contended) but was the amount he was to be paid for 40 hours of work per week (i.e., $22 per hour) and did not include payment for his regularly scheduled 26 hours of weekly overtime. The employer argued that under California's "explicit mutual wage agreement" doctrine, an employer and a non-exempt employee may lawfully agree to a guaranteed fixed salary so long as the employer pays the employee for all overtime. The trial court determined that the $880 weekly payment lawfully compensated Arechiga for both his regular and overtime work based on a regular hourly wage of $11.14 and an overtime hourly wage of $16.71. The Court of Appeal affirmed, holding that Labor Code § 515(d) did not "outlaw" explicit mutual wage agreements such as the one proven in this case, rejecting the Labor Commissioner's contrary interpretation.

**Related Professionals**

- **Mark Theodore**
  Partner
- **Anthony J. Oncidi**
  Partner