Proskauer

California Employment Law Notes

July 2011

Class Of 1.5 Million Female Wal-Mart Employees Was Improperly Certified

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ___, 2011 WL 2437013 (2011)

The United States Supreme Court held that this class of as many as 1.5 million current and former female Wal-Mart employees was improperly certified by the lower court. The three lead plaintiffs claimed they were discriminated against on the basis of their gender and that Wal-Mart's policy of providing deference to local managers' subjective pay and promotion decisions satisfied the commonality test for certifying a class action under Fed. R. Civ. P. 23(a)(2). Plaintiffs sought injunctive and declaratory relief, punitive damages and backpay for the class members. In a 5-to-4 majority opinion, the Court rejected plaintiffs' showing of commonality, including the fact that they submitted only 120 affidavits (one for every 12,500 class members) purportedly evidencing gender discrimination. In the second part of the opinion, the Court unanimously held that plaintiffs' claims for backpay were improperly certified under Fed. R. Civ. P. 23(b)(2) because the monetary relief was not incidental to the injunctive or declaratory relief sought.

Arizona Law Requiring Use Of E-Verify Is Upheld

Chamber of Commerce v. Whiting, 563 U.S. ___, 131 S. Ct. 1968 (2011)

In 1996, Congress created E-Verify, which is "an internet-based system that allows an employer to verify an employee's work-authorization status." In 2007, Arizona enacted the Legal Arizona Workers Act, which allows Arizona to suspend or revoke the licenses necessary to do business in the state if an employer knowingly or intentionally employs an unauthorized alien. Among other things, the Arizona law also requires that "every employer, after hiring an employee, shall verify the employment eligibility of the employee" by using E-Verify. In this case, the Chamber of Commerce challenged the Arizona law on the ground that it is expressly and impliedly preempted by federal immigration law, but the Supreme Court rejected those claims, upholding the statute.

U.S. Court Has Jurisdiction Over Argentinean Employees' Claims Against Mercedes-Benz Argentina

Bauman v. Daimler Chrysler Corp., 2011 WL 1879210 (9th Cir. 2011)

In this case, 22 Argentinian residents (including a Chilean national) sued DaimlerChrysler Aktiengesellschaft ("DCAG") in federal court in California, alleging that one of DCAG's subsidiaries, Mercedes-Benz Argentina ("MBA"), collaborated with state security forces to kidnap, detain, torture and kill plaintiffs and their relatives during Argentina's "Dirty War" in the 1970s. (Some of the plaintiffs are former employees of MBA.) In an opinion by Judge Reinhardt, the Ninth Circuit held that the district court has personal jurisdiction in California over DCAG through the contacts of its subsidiary and agent, Mercedes-Benz USA, in view of the "interest of California in adjudicating important questions of human rights...." *See also McCollum v. California Dep't of Corrections and Rehabilitation*, 2011 WL 2138221 (9th Cir. 2011) (court has no jurisdiction over Wiccan chaplain's claim that he should be eligible for employment in the paid-chaplaincy program).

Employee Was Not Sexually Harassed By His Male Supervisor, But Could Proceed With Retaliation Claim

Kelley v. The Conco Cos., 196 Cal. App. 4th 191 (2011)

Patrick Kelley, an apprentice ironworker, complained to his employer, Conco, that he had been subjected to a “barrage of sexually demeaning comments and gestures by his male supervisor” (David Seamen). After Kelley’s union suspended him from its apprenticeship program, he was not rehired by Conco. Kelley sued for sexual harassment and retaliation in violation of the Fair Employment and Housing Act. The trial court granted summary judgment to the employer, but the Court of Appeal reversed the dismissal of Kelley’s claim of retaliation. However, with respect to the claim of sexual harassment, the Court affirmed dismissal: “Unquestionably, the language used by both Seaman and by one of Kelley’s coworkers… was graphic, vulgar, and sexually explicit. The literal statements expressed sexual interest and solicited sexual activity. There was however, ‘no credible evidence that the harasser was homosexual’ or that the harassment was ‘motivated by sexual desire.’” The Court further held that Kelley had failed to establish he was subjected to harassment that was so severe and pervasive as to alter the conditions of his employment or that he suffered severe emotional distress as a result of Seaman’s conduct. With respect to the retaliation claim, the Court held that Kelley’s evidence established a clear inference that he was subjected to retaliation by at least some of his coworkers as a result of his complaints about Seaman.

ADA “Impliedly Amended” The National Bank Act’s Termination-at-Pleasure Clause

Quinn v. U.S. Bank, N.A., 196 Cal. App. 4th 168 (2011)

Robert Quinn, a former senior vice president of U.S. Bank, alleged he was denied accommodation, harassed and terminated because of a physical disability in violation of the Fair Employment and Housing Act. U.S. Bank obtained summary judgment from the trial court on the ground that Quinn's FEHA claims were preempted by the dismissal-at-pleasure clause of the National Bank Act, 12 U.S.C. § 24. The Court of Appeal determined that the "seminal California case" on the subject, *Peatros v. Bank of America*, 22 Cal. 4th 147 (2000), is not "binding precedent" because the lead opinion was a plurality, not a majority opinion. Consequently, the Court held that "to the extent FEHA is not inconsistent with section 24 as impliedly amended by the ADA, it is not preempted" and, therefore, FEHA's longer statute of limitations applies, but Quinn's claims against his supervisor are preempted because there is no individual supervisor liability under the ADA. *See also People ex rel. Harris v. Pac Anchor Transp., Inc.*, 195 Cal. App. 4th 765 (2011) (California's Unfair Competition Law is not preempted by the Federal Aviation Administration Authorization Act).

Auto Sales Consultants' Class Action Was Properly Dismissed

Areso v. CarMax, Inc., 195 Cal. App. 4th 996 (2011)

Leena Areso, who worked as a commissioned sales consultant for CarMax, filed this class action lawsuit, asserting that she and the members of the putative class were owed unpaid overtime. Areso argued that CarMax's uniform payment of approximately $150 per vehicle is piece-rate compensation rather than a commission because it is not based on a percentage of the sale amount. The Court of Appeal affirmed summary judgment in favor of CarMax, concluding that the payment system was a commission within the meaning of Labor Code § 204.1 because "[p]aying salespeople a uniform fee for each vehicle is proportionate – a one to one proportion. The compensation will rise and fall in direct proportion to the number of vehicles sold." *See also Flores v. Lamps Plus, Inc.*, 195 Cal. App. 4th 389 (2011) (yet another opinion concluding that the "provide" rather than "ensure" standard governs an employer's obligation with respect to meal and rest breaks); *United Parcel Service, Inc. v. Superior Court*, 196 Cal. App. 4th 57 (2011) (employees who miss both meal and rest breaks in a single workday may be entitled to up to two premium payments under Labor Code § 226.7).

California Overtime Rules Apply To Out-of-State Residents Who Work In The State

Sullivan v. Oracle Corp., 2011 WL 2569530 (Cal. S. Ct. 2011)

In this case, the California Supreme Court answered three questions certified to it by the United States Court of Appeals for the Ninth Circuit as follows: (1) California's overtime law applies to work performed in California for a California employer by nonresident workers; (2) the Unfair Competition Law ("UCL") applies to violations of the overtime law; and (3) the UCL does not apply to claims brought under the federal Fair Labor Standards Act ("FLSA") for overtime work performed in other states by nonresidents. *See also Probert v. Family Centered Servs. of Alaska*, 2011 WL 2473954 (9th Cir. 2011) (FLSA does not cover homes where "severely emotionally disturbed" children reside).

Unlicensed Junior Accountants May Be Exempt From Overtime

Campbell v. PricewaterhouseCoopers, 2011 WL 2342740 (9th Cir. 2011)

Two thousand unlicensed junior accountants brought this wage-and-hour class action against PwC, alleging they were improperly classified as exempt from overtime. The parties filed cross-motions for partial summary judgment, and the district court granted the employees' motion, holding as a matter of law that they were not exempt under the professional or administrative exemptions. The Ninth Circuit reversed on the ground that a material question of fact existed as to whether the employees' duties met the requirement of a "learned" or "artistic" profession (and are therefore exempt) even though they are not licensed. The Court also held there were "numerous factual disputes in the record" that precluded summary judgment with respect to the administrative exemption.

Attorney Who "Excessively Reviewed" Privileged Documents Misappropriated By His Client Was Properly Disqualified

Clark v. Superior Court, 196 Cal. App. 4th 37 (2011)

While he worked as VeriSign's chief administrative officer, Grant Clark signed VeriSign's nondisclosure agreement, which included a provision that he would not remove VeriSign's confidential or privileged information and that he would return any such documents in his possession upon termination of his employment. Clark was terminated effective December 31, 2008, and in January 2009 he filed a lawsuit against VeriSign through his attorneys, Higgs, Fletcher & Mack LLP. The trial court disqualified the Higgs firm from continuing to represent Clark after Clark conceded in his deposition that he used privileged VeriSign documents as the basis for his securities fraud and breach of contract claims. The Court of Appeal denied Clark's petition for a writ of mandate after determining that Higgs received and "excessively reviewed" privileged documents from Clark. *See also Moody v. Staar Surgical Co.*, 195 Cal. App. 4th 1043 (2011) (employer's attorney was properly sanctioned $1,500 for asking a question of a witness at trial after being instructed by the judge not to inquire into a particular area).

$22.5 Million Verdict Reversed Where Employer Admitted Its Vicarious Liability For Employee's Negligence

Diaz v. Carcamo, 2011 WL 2473597 (Cal. S. Ct. 2011)

Jose Carcamo, a truck driver for defendant Sugar Transport, caused Dawn Renae Diaz to suffer severe permanent injuries as a result of a traffic accident on Highway 101. Diaz sued Carcamo and Sugar Transport, alleging that Sugar Transport was both vicariously liable for Carcamo's negligent driving and directly liable for its own negligence in hiring and retaining Carcamo. At trial, Sugar Transport offered to admit vicarious liability if Carcamo were found negligent. Sugar Transport contended that such an admission should bar Diaz from further pursuing her claims for negligent entrustment, hiring and retention of Carcamo. Over Sugar Transport's objection, the trial court admitted evidence of Carcamo's two prior accidents; that he was in the U.S. illegally; that he had used a phony Social Security number to obtain employment; that he had been fired from or quit without good reason three of his last four driving jobs; that he had lied on his application; and that the only reference from his prior employers consisted of a "very negative evaluation." The California Supreme Court reversed the judgment (over $22.5 million in damages) after concluding Sugar Transport was prejudiced by admission of evidence concerning Carcamo after it admitted to vicarious liability for his actions.

Manager's Defamation Action Against Striking Union Could Proceed

Price v. Operating Eng'rs Local Union No. 3, 195 Cal. App. 4th 962 (2011)

During the course of a strike, members of the union placed copies of a flyer on the doors and cars of the neighbors of the employer's vice president and general manager Jim Price that said: "Neighbors, beware of this man: Jim Price"; "protect your family, safeguard your property"; and "complain to [his apartment complex] about the sort of person they've let in your community." The flyer listed Price's business cell phone number and his apartment number and encouraged Price's neighbors to complain to him directly. Another flyer stated: "Resident Jim Price tried to take away workers' pension benefits"; "threatened workers with arrest for publicizing their fight for workplace justice"; and "threatened to use armed guards against the workers to shut down their strike." In response to Price's lawsuit against the union for defamation and violation of Civil Code §§ 51.7 and 52.1, the union moved to strike the complaint under the anti-SLAPP statute (Cal. Code Civ. Proc. § 425.16). The trial court denied the motion on the ground that the union's disparaging statements about Price involved an issue of private as opposed to public interest. The Court of Appeal affirmed the judgment. *See also Fox v. Vice*, 563 U.S. ___, 131 S. Ct. 2205 (2011) (when a lawsuit involves both frivolous and non-frivolous claims, a court may grant reasonable fees to the defendant, but only for fees the defendant incurred as a result of the frivolous claims).

Termination Of Employee On FMLA Leave Who Submitted Inadequate Medical Information Did Not Violate Federal Law

Lewis v. United States, 641 F.3d 1174 (9th Cir. 2011)

Janet Lewis worked for the United States Air Force as the director of a child development center on the Elmendorf Air Force Base. In 2006, Lewis requested 120 days of leave without pay pursuant to the Family Medical Leave Act ("FMLA"). The employer requested a medical certification to support Lewis's request for FMLA leave. In response, Lewis submitted three documents: (1) a prescription from her psychiatrist; (2) a letter from her psychiatrist; and (3) a WH-380 (medical leave form). Although Lewis's supervisor told her the documents she had submitted were insufficient to support her request for FMLA leave, Lewis refused to submit more information. The employer converted Lewis's status to absent without leave ("AWOL") and subsequently terminated her employment. Lewis sued for unlawful removal from employment pursuant to 5 U.S.C. § 7702. The district court granted summary judgment to the employer, and the Ninth Circuit affirmed, holding that because Lewis's WH-380 form stated only that she was diagnosed with "Post-Traumatic Stress Disorder and needed therapy, medical treatment, bed rest, two prescription medications, and 120 days off work," she had failed to provide a "summary of the medical facts that support the diagnosis." The Court noted that "the form contains no explanation as to why Lewis was unable to perform her work duties and no discussion about whether additional treatments would be required for her condition. When Lewis refused to submit any further documentation, her medical certification remained deficient." *See also Davis v. Superior Court*, 196 Cal. App. 4th 669 (2011) (granting petition for writ of mandate directing trial court to enter its final judgment so that employee could file a notice of appeal).

False Claims Act Lawsuit Was Barred By Public Disclosure Of Records

Schindler Elevator Corp. v. United States ex rel. Kirk, 563 U.S. ___, 131 S. Ct. 1885 (2011)

Daniel Kirk, a former employee of Schindler Elevator Corporation, filed this lawsuit under the False Claims Act ("FCA"), alleging Schindler had submitted false or fraudulent claims for payment to the United States. Kirk alleged the company had falsely certified its compliance with the Vietnam Era Veterans' Readjustment Assistance Act of 1972. To support his allegations, Kirk relied upon information that his wife had received from the Department of Labor ("DOL") in response to three Freedom of Information Act ("FOIA") requests she had made. Schindler moved to dismiss Kirk's lawsuit on a number of grounds, including that the FCA's public disclosure bar deprived the district court of jurisdiction. The Supreme Court resolved a conflict among the circuit courts of appeals and held that a "report" as used in the FCA's public disclosure bar carries its ordinary meaning and that the DOL's written responses to Mrs. Kirk's FOIA requests were therefore "reports." *See also County of Kern v. Jadwin*, 2011 WL 2611819 (Cal. Ct. App. 2011) (employer's state law FCA claim that was filed against former employee who had successfully sued for violation of his employment rights was frivolous and brought to harass employee).

Related Professionals

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