Proskauer

# California Employment Law Notes

**May 2011**

### State Limitations On Arbitration Agreements Are Preempted By Federal Law

*AT&T Mobility v. Concepcion*, 563 U.S. ___, 2011 WL 1561956 (2011)

In this landmark new opinion, the United States Supreme Court held that the Federal Arbitration Act ("FAA") prohibits states from conditioning the enforceability of an arbitration agreement on the availability of class action arbitration procedures. Although this case arose in the consumer context (it involved AT&T's charging sales tax for "free phones"), it has far-reaching implications for employers in California and elsewhere. In recent years, the California Supreme Court has fashioned special rules for the enforceability of employment arbitration agreements, including in *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007) (subjecting class action waivers to a rigorous, four-factor test)and *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83 (2000) (requiring employers to pay all costs and expenses unique to arbitration such as the arbitrator's fees). The continued viability of these and similar rules is now in serious doubt. In the wake of this important new opinion, employers are well advised to reconsider the relative costs and benefits of adopting a mandatory arbitration regime for their workforce.

### Employee Who Complained Orally About FLSA Violation Is Protected From Retaliation

*Kasten v. Saint-Gobain Performance Plastics Corp*., 563 U.S. ___, 131 S. Ct. 1325 (2011)

Kevin Kasten alleged that his former employer, Saint-Gobain, terminated his employment because he orally complained to Saint-Gobain about the location of its time clocks, which prevented workers from receiving credit for the time they spent putting on and taking off their work clothes (in violation of the Fair Labor Standards Act). The sole question presented by the case is whether an oral complaint of a violation of the FLSA is "protected conduct" under the Act's anti-retaliation provision, which prohibits retaliation against an employee who "has filed any complaint… under or related to [the Act]." The United States Supreme Court concluded that "[s]everal functional considerations indicate that Congress intended the anti-retaliation provision to cover oral, as well as written, 'complaints.'" *Compare Tides v. The Boeing Co.*, 2011 WL 1651245 (9th Cir. 2011) (whistleblower provision of the Sarbanes-Oxley Act protects employees who disclose certain types of information to federal regulatory and law enforcement agencies, Congress and employee supervisors – but not to the media); *Cafasso v. General Dynamics C4 Sys., Inc.*, 2011 WL 1053366 (9th Cir. 2011) (former employee's claim against government contractor for violation of the False Claims Act was properly dismissed pursuant to Fed. R. Civ. P. 9(b)).

**Employee With Bipolar Disorder Who Threatened Co-Workers Was Not Discriminated Against On The Basis Of Her Disability**

*Wills v. Superior Court*, 194 Cal. App. 4th 312 (2011)

Linda Wills, who worked as a clerk for the Orange County Superior Court, was terminated from her employment after she told co-workers she was going to add them to her "Kill Bill" list and forwarded a cell phone ringtone to several people, including a co-worker, that said in a "shrieking directive": "I'm going to blow this b_ _ _ _ up if you don't check your messages right now!... F_ _ _ you!" She also sent "disturbing and threatening" emails to co-workers. After Wills's "manic episode" ended, her doctor submitted a letter to the employer explaining that Wills suffered from bipolar disorder and that at no time did she pose a danger to anyone. After Wills's employment was terminated for threatening and having inappropriate communications with co-workers, she sued for disability discrimination. The trial court granted summary judgment to the employer, and the Court of Appeal affirmed, holding that Wills had failed to exhaust administrative remedies under the Fair Employment and Housing Act when she filed a claim with the DFEH for "denial of family/medical leave" and made no mention of disability discrimination, harassment or retaliation. The Court of Appeal also concluded that even if Wills had exhausted administrative remedies as to her disability discrimination claim, it was properly dismissed because under FEHA, an employer may "distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against co-workers." In so holding, the Court distinguished several opinions of the United States Court of Appeals for the Ninth Circuit construing the Americans with Disabilities Act.

**Telecommunications Installer's Disability Discrimination Claim Was Properly Dismissed On Summary Judgment**

*DFEH v. Lucent Technologies, Inc.*, 2011 WL 1549232 (9th Cir. 2011)

The California Department of Fair Employment and Housing and Steven Carauddo alleged Lucent violated the Fair Employment and Housing Act when it terminated Carauddo's employment as an installer because he could not lift more than 30 pounds due to a back injury. The district court granted summary judgment to Lucent, and the Ninth Circuit Court of Appeals affirmed, holding that Lucent had not violated the FEHA by (1) failing to interact with Carauddo (it was Carauddo's fault, not Lucent's, if there was a failure to interact); (2) failing to reasonably accommodate the disability (the installer position required lifting and carrying up to 50 pounds, and Lucent was not required to modify the position or extend the disability period indefinitely); (3) discriminating against Carauddo (there was a legitimate, nondiscriminatory reason for Lucent's actions); and (4) failing to prevent discrimination. The Court also affirmed summary judgment of Carauddo's claim for wrongful termination in violation of public policy on the same grounds. *Compare Cuiellette v. City of Los Angeles*, 2011 WL 1522390 (Cal. Ct. App. 2011) ($1.57 million judgment upheld in favor of disabled LAPD officer who was able to perform the essential functions of a position into which he had been placed before being terminated).

**Jury Should Have Been Instructed That Employer Had Burden Of Proof On FMLA Reinstatement Claim**

*Sanders v. City of Newport*, 2011 WL 905998 (9th Cir. 2011)

Diane Sanders, a utility billing clerk for the City of Newport, Oregon, began suffering health problems, which (according to her doctor) were due to "multiple chemical sensitivity" triggered by handling low-grade paper at work and poor air quality in her work area. Sanders took an FMLA leave, but the city refused to return her to work because it could not guarantee that her workplace would be safe for her due to her "sensitivity to chemicals and the lack of knowledge as to the chemicals or concentrations that may cause a reaction." After the jury found in favor of the city, Sanders appealed, asserting that the trial court's FMLA jury instruction improperly placed the burden on her to prove that she was denied reinstatement without cause. The Ninth Circuit Court of Appeals agreed with Sanders and reversed the judgment, holding that "the plain language of the pertinent DOL regulations provides that the burden is on the employer to show that he had a legitimate reason to deny an employee reinstatement." *See also Leek v. Cooper*, 194 Cal. App. 4th 399 (2011) (sole shareholder of corporate employer cannot be liable for discrimination under the California Family Rights Act in the absence of pleading and proof under alter ego doctrine).

**Engineer Of Iranian Descent Can Proceed With Race And National Origin Discrimination Claims**

*Zeinali v. Raytheon Co.*, 636 F.3d 544 (9th Cir. 2011)

Hossein Zeinali, who is of Iranian descent, sued Raytheon for race and national origin discrimination under the Fair Employment and Housing Act when it terminated his employment after he was denied a security clearance by the Department of Defense. The district court granted summary judgment to Raytheon, but the Ninth Circuit Court of Appeals reversed, holding that federal courts do have jurisdiction over employment discrimination claims that are brought against a private employer that was not responsible for the executive branch's security clearance decision. The Court further held that summary judgment was improperly granted against Zeinali in view of the evidence he submitted that Raytheon terminated him while retaining at least two similarly situated non-Iranian engineers who lacked security clearances. The Court rejected Raytheon's distinction between the other two engineers whose security clearances were revoked and Zeinali whose clearance was denied. *See also Hall v. Goodwill Indus. of S. Cal.*, 193 Cal. App. 4th 718 (2011) (FEHA claim was barred by statute of limitations, which begins to run from the date of the right-to-sue letter and not from the date plaintiff receives the letter).

**Employees May Have Committed A Crime By Violating Employer's Computer Use Policy**

*U.S. v. Nosal*, 2011 WL 1585600 (9th Cir. 2011)

In this criminal proceeding brought under the Computer Fraud and Abuse Act ("CFAA"), the United States government filed a 20-count indictment against David Nosal (a former employee of Korn/Ferry International) and his accomplices (also from Korn/Ferry) as a result of their obtaining information from their employer's computer system for the purpose of defrauding Korn/Ferry and helping Nosal set up a competing business. The government contended that under the CFAA, an employee exceeds authorized access when he or she obtains information from the computer and uses it for a purpose that violates the employer's restrictions on the use of such information. The Ninth Circuit Court of Appeals agreed with the government's interpretation of the CFAA, which distinguished earlier Ninth Circuit authority on the grounds that Korn/Ferry (unlike the employer in the other case) had a computer use policy that placed clear and conspicuous restrictions on the employees' access both to the system in general and to the particular database in question.

**Class Certification Was Properly Denied To Retail Store Managers**

*Mora v. Big Lots Stores, Inc.*, 194 Cal. App. 4th 496 (2011)

Putative class representatives Ana Mora, et al., asserted claims for unpaid overtime, meal and rest periods and related wage-and-hour violations against their former employer Big Lots Stores, Inc. and its affiliate PNS Stores, Inc. Plaintiffs asserted that they and similarly situated Big Lots store managers were misclassified as exempt employees because the actual work performed involved a significant amount of time spent on non-exempt tasks. The trial court denied the motion to certify the class on the ground that the company does not operate its stores in a standardized manner and has no systematic practice of misclassification of its managers. The Court of Appeal affirmed, holding that plaintiffs' reliance on job descriptions rather than an analysis of the actual work performed by the managers, which varied among the 178 stores in question, was insufficient to support certification of a class. *See also Starbucks Corp. v. Superior Court*, 2011 WL 1535268 (Cal. Ct. App. 2011) (trial court improperly ordered Starbucks to randomly review job applications in an effort to assist plaintiffs' counsel in finding a "suitable" class representative to sue Starbucks for alleged violation of the statute protecting job applicants from having to disclose minor marijuana convictions more than two years old).

**State Farm Had No Duty To Defend Employer Against Employee's Sexual Battery Claim**

*Shanahan v. State Farm Gen. Ins. Co.*, 193 Cal. App. 4th 780 (2011)

Cheryl Skigin (an attorney) sued her employer John M. Shanahan and various companies he owned for sexual battery, among other things. Shanahan settled the lawsuit for $700,000. Shanahan, who had a renter's insurance policy with State Farm, sued State Farm for breach of contract and breach of the covenant of good faith and fair dealing based upon State Farm's refusal to defend Shanahan against Skigin's lawsuit. State Farm asserted it had no duty to defend a charge of sexual battery because intentional acts are not covered by Shanahan's policies. The trial court granted State Farm's summary judgment motion, and the Court of Appeal affirmed. *See also*, *Lemmer v. Charney*, 2011 WL 1679858 (Cal. Ct. App. 2011) (attorney's claim against former client for fraud associated with client's representation that he would proceed with wrongful termination case against his former employer "to either settlement or trial" was properly dismissed).

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