Proskauer

California Employment Law Notes

July 2008

Employer Bears Burden Of Showing Reasonableness Of Layoff Criteria In Age Discrimination Case

Meacham v. Knolls Atomic Power Lab., 554 U.S. ___, 128 S. Ct. 2395 (2008)

When the United States government ordered Knolls (one of the contractors that maintains the nation's fleet of nuclear-powered warships) to reduce its workforce, the company conducted an involuntary reduction in force, resulting in the layoff of 31 employees, 30 of whom were age 40 or older. Twenty-eight of the laid-off employees filed suit asserting a disparate impact claim under the Age Discrimination in Employment Act. At trial, the employees prevailed by showing that Knolls' layoff criteria failed the "business necessity" test and because there existed alternative criteria that could have achieved the same results without disadvantaging a protected group of employees. After an earlier review by the Supreme Court, the Second Circuit Court of Appeals reversed the judgment, holding that the burden remained with the employees who were required to prove (and did not) that Knolls' reasons for the layoff were unreasonable. In a 7-to-1 ruling, the Supreme Court reversed the Second Circuit and held that when an employer defends against a disparate-impact claim on the basis of "reasonable factors other than age" ("RFOA"), the employer must not only produce evidence raising the defense, but also must persuade the factfinder of its merit. *See also Kentucky Retirement Systems v. EEOC*, 554 U.S. ___, 128 S. Ct. 2361 (2008) (disability benefits formula did not discriminate against older workers who became disabled after retirement age); *cf. Hearns v. San Bernardino Police Dep't*, 2008 WL 2579243 (9th Cir. July 1, 2008) (discrimination complaint containing excessively detailed factual allegations was improperly dismissed under F.R.C.P. 8).

Employer That Provides Unlimited Sick Leave Is Subject To Requirements Of "Kin Care" Statute

McCarther v. Pacific Telesis Group, 163 Cal. App. 4th 176 (2008)

Kimberly McCarther alleged that her employer, SBC Services, violated Cal. Labor Code § 233 (the "kin care" leave statute) when it failed to pay her for her absence for seven consecutive workdays in 2004 to care for two of her children who were ill. McCarther and another employee sued on behalf of themselves and all similarly situated employees. Section 233 states that an employee may use in any calendar year the amount of sick leave accrued by the employee during a six-month period "to attend to an illness of a child, parent, spouse, or domestic partner of the employee." The collective bargaining agreement between plaintiffs' union and the employer provided that "there is no cap or limit on the number of days that employees may be absent from work and receive full sickness absence payments…" In interpreting the statute, the Court of Appeal held that Section 233 plainly applies to the "sickness absence" policy at issue in this case even though that policy provided employees with an unlimited number of days of paid sick leave. *Cf. Farrell v. Tri-County Metro. Transp. Dist.*, 2008 WL 2552261 (9th Cir. June 27, 2008) (employee was properly awarded lost wages for absences from work that were caused by emotional condition that resulted from employer's wrongful denial of FMLA leave).

Court Affirms Judgment And Attorney's Fees Award To Employee Who Suffered Retaliation

Steele v. Youthful Offender Parole Bd., 162 Cal. App. 4th 1241 (2008)

Lisa Steele worked as an office assistant/receptionist for the YOPB. In her spare time, Steele competed in several bikini contests that were sponsored by a local radio station. On the day of the final contest, Raul Galindo, chairman of the YOPB, asked Steele if she was going to participate in any other bikini contests, and Steele told Galindo that there was one scheduled for that night. Galindo attended the contest and, after it was over, tried to kiss Steele on the mouth. Steele told a co-worker about the incident who in turn told another co-worker (Kym Kaslar) who later filed a DFEH complaint, claiming she was retaliated against for reporting the incident. Although Steele told the YOPB that she was not offended by Galindo's behavior, Galindo was reprimanded for fraternizing with the staff and for being involved in a "social situation of questionable taste." Steele was subsequently reprimanded for various performance deficiencies and misconduct. Eventually, Steele resigned her employment but before she left, she was asked to and did sign statements denying the kissing incident and any inappropriate conduct on Galindo's part. In her subsequent lawsuit, Steele alleged she had been constructively terminated because she was a potential witness in Kaslar's retaliation case and because the YOPB wanted the DFEH investigators to rely exclusively on the (false) statements Steele had been asked to sign before she quit. The jury awarded Steele $9,046 in lost wages and $146,705 in attorney's fees. The Court of Appeal affirmed the judgment, finding substantial evidence of constructive termination of Steele's employment that was causally linked to her potential participation as a witness in Kaslar's DFEH proceeding. *Cf. CBOCS West, Inc. v. Humphries*, 553 U.S. ___, 128 S. Ct. 195 (2008) (retaliation claim may be asserted under 42 U.S.C. § 1981); *Gómez-Pérez v. Potter*, 553 U.S. ___, 128 S. Ct. 1931 (2008) (federal employee may sue for retaliation under ADEA).

Police Officer Had Reasonable Expectation Of Privacy In Text Messages Sent And Received On Pager

Quon v. Arch Wireless Operating Co., 2008 WL 2440559 (9th Cir. June 18, 2008)

Arch Wireless contracted to provide wireless text-messaging services for the City of Ontario, including its police department. Pursuant to the city's general Computer Usage, Internet and E-mail Policy, the use of the city's computers and other electronic equipment, networks, etc., was limited to city-related business, access was not confidential and "users should have no expectation of privacy or confidentiality when using these resources." Sergeant Jeff Quon, a member of the city's SWAT team, signed an employee acknowledgement of the Policy; he also attended a meeting in which he and others were informed that text messages were considered to be the same as e-mail and could be audited by the department. Quon was later told that the content of his text messages would not be audited so long as he paid the department for any charges associated with texting more than 25,000 characters in a billing cycle. When a lieutenant in the department "grew weary" of being a bill collector for officers who exceeded the 25,000 character limit, the department contacted Arch Wireless and requested transcripts of the text messages. After the department received the transcripts from Arch, an investigation was conducted by internal affairs to determine "if someone was wasting city time not doing work when they should be." The investigation revealed that many of Quon's messages were personal in nature and were sexually explicit.

Quon (and those with whom he had texted) sued Arch for violation of the Stored Communications Act ("SCA") and the Ontario Police Department and its chief for violating the Fourth Amendment and the privacy protection provision of the California Constitution. The Ninth Circuit held that Arch violated the SCA by turning over the text transcripts to the city, which was only a "subscriber" and not "an addressee or intended recipient of such communication." The Court further determined that Quon and those with whom he texted had a reasonable expectation of privacy in the text messages given the informal policy and "operational reality" of the department. Although the chief of police was shielded from liability by qualified immunity, the city and department were not. *See also Nelson v. NASA*, 2008 WL 2468884 (9th Cir. June 20, 2008) ("low-risk" NASA contract employees were entitled to injunction precluding in-depth background investigations).

Employer Properly Paid 1.5 Times Regular Rate For Overtime Worked On Holiday

Advanced-Tech Sec. Services, Inc. v. Superior Court, 163 Cal. App. 4th 700 (2008)

Ester Roman, who was employed as a security guard for Advanced-Tech, worked 12 hours on Labor Day 2006 and eight hours on Memorial Day 2007. Advanced-Tech's employee handbook stated that employees who worked on designated holidays, including Labor Day and Memorial Day, would be paid 1.5 times their regular rate of pay for all hours worked on such holidays. Roman contended that on holidays, the premium rate (1.5 times her regular rate) was in fact her regular rate and that any overtime she was owed for work on such days should be paid at 1.5 times the higher rate. Relying on the Fair Labor Standards Act, which specifically exempts premium holiday pay from inclusion in the calculation of the regular rate, the Court of Appeal issued a writ of mandate directing the superior court to set aside its order denying Advanced-Tech's motion for summary adjudication and to enter a new order granting the motion in favor of the employer.

Employer Could Recover Training Costs From Employee But Could Not Withhold Same From Final Check

City of Oakland v. Hassey, 2008 WL 2428205 (Cal. Ct. App. June 17, 2008)

The city sued Kenny D. Hassey for breach of contract after he failed to reimburse it for the costs of training him to become a police officer with the Oakland Police Department. Oakland had entered into a memorandum of understanding with the Oakland Police Officers' Association authorizing the city to require employees who went through training at its academy to reimburse the city for those costs if the employee left the department before completing five years of service. Hassey resigned from the department after he was told he was "not performing to standards and that he should consider resigning in lieu of termination." Hassey signed a document titled "training costs repayment agreement" in which he acknowledged he owed repayment of $8,000 of his training costs, to be paid in 24 monthly installments of $333.34. Oakland withheld Hassey's final paycheck and his retirement balance to cover some of the money he owed for the training costs. The Court of Appeal held that Oakland had not violated federal or state law by requiring Hassey to repay the training costs, although it may have done so by withholding his final paycheck to offset part of the debt. *Cf. Curcini v. County of Alameda*, 2008 WL 2310283 (Cal. Ct. App. June 5, 2008) (overtime, meal and rest break compensation requirements of Labor Code do not apply to county employees).

Trial Court Properly Granted Motion To Strike Class Allegations In Misclassification Case

In re BCBG Overtime Cases, 163 Cal. App. 4th 1293 (2008)

BCBG Maxazria filed a motion to strike class allegations from the complaint Christina Denkinger filed in which she and other putative class representatives alleged that BCBG misclassified its managers and assistant managers as exempt from overtime because they spend more than 50 percent of their time performing duties delegated to non-exempt employees. In support of its motion to strike, BCBG submitted declarations from 25 current and former managers and assistant managers in support of its contention that plaintiffs could not prove the elements of typicality or commonality necessary for class certification. Plaintiffs asserted the motion to strike was an improper attempt to circumvent the class certification process, but the trial court granted the motion because "class certification may be determined at any time during the litigation." The Court of Appeal affirmed dismissal of the class allegations after concluding that the motion to strike was not filed before plaintiffs had had a chance to conduct discovery on class certification issues. *Compare Bufil v. Dollar Fin. Group, Inc.*, 162 Cal. App. 4th 1193 (2008) (employee is not collaterally estopped from prosecuting new suit alleging meal and rest break violations involving subclasses following denial of certification of larger class); *Sharp v. Next Entm't, Inc.*, 163 Cal. App. 4th 410 (2008) (conflict-of-interest rules did not bar union's law firm from representing a class of non-unionized employees in prosecuting wage-and-hour claims).

Employee Who Reported Disability During Investigation Into His Alleged Wrongdoing Was Not Discriminated Against

Arteaga v. Brink's, Inc., 163 Cal. App. 4th 327 (2008)

Brink's employee Carlos Arteaga was the subject of an internal investigation into various shortages totaling $7,668 that occurred while he was acting in his capacity as an ATM messenger. The investigation was conducted after one of Arteaga's managers noticed there had been 16 shortages in five months on runs in which Arteaga had been the messenger. Shortly after he learned of the investigation, Arteaga informed Brink's for the first time that he was feeling a combination of "pain" and "numbness" in his arms, fingers, shoulders and feet and that he was feeling "stress" after being "accused over and over of stealing money." Arteaga filed a workers' compensation claim. Following the investigation, Arteaga's employment was terminated as a result of the multiple shortages. Arteaga then sued Brink's for disability discrimination and for failure to engage in a good-faith interactive process with him in order to determine effective reasonable accommodations for his alleged disability. The trial court granted summary judgment to Brink's, and the Court of Appeal affirmed, holding that (1) Arteaga was not disabled because his symptoms (pain and numbness) did not make it difficult for him to achieve the life activity of working and (2) Brink's terminated him for a legitimate, nondiscriminatory reason – "the closeness in time between Arteaga's disclosure of his symptoms and his subsequent termination does not create a triable issue as to pretext, especially since his performance had been questioned before he disclosed his symptoms, and he was eventually terminated for those performance issues." *Compare Gribben v. United Parcel Serv.*, 528 F.3d 1166 (9th Cir. 2008) (employee with congestive heart failure and cardiomyopathy may have been disabled under the ADA, but was not retaliated against).

Employer Breached Contract By Quickly Terminating Employees With "No Match" Letters From Social Security

Aramark Facility Services v. SEIU, 2008 WL 2405677 (9th Cir. June 16, 2008)

Aramark received letters from the Social Security Administration indicating that information relating to 48 of Aramark's employees at Staples Center did not match the SSA's database. Suspecting immigration violations, Aramark told the employees they had three days to correct the mismatches by proving they had begun the process of applying for a new social security card. Seven to 10 days later, Aramark fired 33 employees who had failed to timely comply. Local 1877 of the employees' union, the Service Employees International Union, filed a grievance on behalf of the fired workers, contending the terminations were without just cause and in breach of the CBA. An arbitrator ruled for SEIU and awarded the workers back pay and reinstatement, finding there was no convincing information that any of the workers were undocumented. The district court vacated the award on the ground that it violated public policy as expressed in the Immigration Reform and Control Act of 1986. The Ninth Circuit reversed the district court, holding that Aramark had failed to establish constructive knowledge of any immigration violations particularly in light of the short notice that had been provided to the workers.

Injuries Sustained By Professional Stuntman Were Covered By Workers' Compensation

Caso v. Nimrod Productions, Inc., 163 Cal App. 4th 881 (2008)

Christopher Caso, a professional stuntman, suffered severe head injuries while performing a stunt during the production of a television show. Caso and his wife (who sought damages for loss of consortium) sued defendants (the director and the stunt coordinators and their respective loan-out corporations) for negligence. The trial court granted defendants' motion for summary judgment on the ground that the individual defendants were special employees of Touchstone Television Productions who had been acting within the scope of that employment at the time of the accident. Accordingly, the Casos' lawsuit was barred by the California Workers' Compensation Act, Cal. Labor Code § 3601. Further, the trial court concluded the loan-out corporations had relinquished all control over their employees and could not be held vicariously liable for the employees' acts. The Court of Appeal affirmed summary judgment in favor of defendants. *See also Antelope Valley Press v. Poizner*, 162 Cal App. 4th 839 (2008) (newspaper deliverers were employees and not independent contractors for purposes of workers' compensation coverage); *Tomlin v. WCAB*, 162 Cal. App. 4th 1423 (2008) (police officer who was injured while training during his vacation for an upcoming department physical fitness test was eligible for workers' compensation benefits); *Golden v. CH2M Hill Hanford Group, Inc.*, 528 F.3d 681 (9th Cir. 2008) (Price-Anderson Act preempted Hanford Nuclear Reservation employee's claim for injuries arising from exposure to radioactive materials but his claim for emotional distress associated with exposure to non-radioactive heavy metals would not be preempted); *cf. Ericson v. Federal Express Corp.*, 162 Cal. App. 4th 1291 (2008) (property owner was not liable for injuries sustained by employee of independent contractor who was injured during assault on the premises).

Employer Waived Insurance Coverage By Failing To Timely Notify Carrier Of Claim

Westrec Marina Mgmt., Inc. v. Arrowood Indemn. Co., 163 Cal. App. 4th 1387 (2008)

Westrec sued its insurance carrier, Arrowood, after the carrier refused to provide a defense to an employment discrimination lawsuit on the ground that Westrec had failed to timely report the third-party claim as required under the terms of two successive directors and officers liability insurance policies issued by Arrowood. Bette Clark filed a complaint with the California Department of Fair Employment and Housing on April 14, 2003, alleging gender bias by Westrec and requesting a right-to-sue letter. On June 23, 2003, Clark's attorney sent a letter to Westrec "alleging discriminatory and demeaning treatment by male employees based upon sex." Westrec failed to notify Arrowood of the DFEH filing or the attorney's letter within 30 days after the expiration of the policy. Clark filed her lawsuit on December 19, 2003, and Westrec notified Arrowood of the action on January 30, 2004, tendered its defense and requested indemnity. Arrowood declined to defend or indemnify on the ground that Westrec had not timely notified it of the "claim," which it deemed to be the DFEH filing and/or the attorney's letter. Arrowood prevailed following a nonjury trial on Westrec's breach of contract claim. The Court of Appeal affirmed, holding that Westrec had failed to timely report the claim to its insurance carrier and thereby waived coverage.

Statute Of Limitations For Trade Secrets Claim Dates From Time Of Owner's Knowledge

CypressSemiconductor Corp. v. Superior Court, 163 Cal. App. 4th 575 (2008)

The trade secret owner in this case, Silvaco Data Systems, develops and licenses electronic design automation software. In late 1998, a former Silvaco employee, working for Circuit Systems, Inc. (“CSI”), incorporated Silvaco’s “SmartSpice” trade secrets into CSI’s product, “DynaSpice.” Silvaco sued the employee as well as CSI and in 2003 entered into a settlement agreement and stipulated judgment. CypressSemiconductor (“Cypress”), one of CSI’s customers that had purchased DynaSpice, learned of the judgment against CSI in August of 2003. In September 2003, Silvaco contacted Cypress directly and demanded that it cease its use of Silvaco’s trade secrets (as incorporated in the DynaSpice software). When Cypress continued to use the product after receiving notice from Silvaco, the latter company sued the former for trade secret misappropriation under the California Uniform Trade Secrets Act (“CUTSA”). Cypress defended in part based on CUTSA’s three-year statute of limitations, which it contended commenced running in 2000 when Silvaco discovered CSI’s misappropriation. Silvaco, however, argued that because Cypress did not know of CSI’s misappropriation until August of 2003, the statute of limitations did not commence running until that date because one of the elements of a trade secret misappropriation claim is the defendant’s knowledge of the wrongfulness of its conduct. The Court of Appeal held that a plaintiff may have more than one claim for misappropriation, each with its own statute of limitations, when more than one defendant is involved. However, the Court further held that the statute commences running when the plaintiff knows or has reason to know the third party has knowingly acquired, used or disclosed its trade secrets. In this case, the Court held that Cypress was entitled to a jury trial to determine when Silvaco first had reason to know that a CSI customer such as Cypress had obtained or used DynaSpice knowing, or with reason to know, that the software contained Silvaco’s trade secrets.

California Law Limiting Use Of State Funds To Deter Union Organizing Is Unconstitutional

Chamber of Commerce v. Brown, 554 U.S. ___, 128 S. Ct. 2408 (2008)

Assembly Bill 1889, enacted in 2000, prohibited private employers that receive state funds – whether by reimbursement, grant, contract, use of state property or pursuant to a state program – from using such funds to "assist, promote, or deter union organizing." Violators were to be liable to the state for the amount of funds used for the prohibited purposes plus a civil penalty equal to twice the amount of those funds. The Chamber of Commerce challenged the law on the ground that it was preempted by the National Labor Relations Act. The Ninth Circuit held the law was not preempted by the NLRA, but the United States Supreme Court reversed, holding by a vote of 7 to 2 (Breyer and Ginsburg, JJ., dissenting) that the state statute was preempted by federal labor law. *Cf. Adkins v. Mireles*, 526 F.3d 531 (9th Cir. 2008) (Labor Management Relations Act preempted employees' claims against their union).

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