Proskauer

California Employment Law Notes

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California Supreme Court Revises Jury Instructions And Trial Procedures In Discrimination Cases

Harris v. Superior Court, 56 Cal. 4th 203 (2013)

Wynona Harris alleged her employment was terminated by the City of Santa Monica because of her pregnancy in violation of the California Fair Employment and Housing Act. The city claimed Harris had been fired for poor job performance – she had two preventable traffic accidents and two late arrivals to work during her first six months on the job. Over the city's objection, the jury was instructed according to California Civil Jury Instruction ("CACI") 2500 that Harris only had to prove that her pregnancy was "a motivating factor/reason for the discharge." The jury found by a vote of 9 to 3 that Harris's pregnancy was "a motivating reason" for her discharge and awarded her damages in the amount of $177,905 (including $150,000 in emotional distress damages). The court of appeal reversed the judgment and remanded the case for a new trial on the ground that the judge should have given a "mixed motive" jury instruction as requested by the city. Harris sought review by the California Supreme Court, which affirmed the appellate court's judgment overturning the verdict and ordered that new jury instructions be given on retrial.

The Supreme Court held that on remand the trial court should consider in the first instance whether discrimination was "a substantial motivating factor/reason" for the termination. If the employee succeeds in proving that discrimination was "a substantial motivating reason" for the adverse employment action, the burden shifts to the employer to prove that it would have made the same decision in any event for legitimate, non-discriminatory reasons. If the employer succeeds in proving it would have made the same decision, then the employee may recover *no damages* from the employer and is limited to declaratory or injunctive relief (not including reinstatement) and an award of reasonable attorney's fees under Cal. Gov't Code § 12965(b).

Employee Who Exhausted Four Months Of Pregnancy Leave Was Entitled To Further Disability Leave

Sanchez v. Swissport, Inc., 2013 WL 635266 (Cal. Ct. App. 2013)

In a case of first impression, the California Court of Appeal determined in this case whether an employee who has exhausted all permissible leave (four months) under the California Pregnancy Disability Leave Law ("PDLL") may state a claim for failure to accommodate a disability under the California Fair Employment and Housing Act ("FEHA"). The Court answered the question in the affirmative, holding that Ana G. Fuentes Sanchez could proceed with her FEHA disability claim despite the fact that her employer had provided her more than 19 weeks of leave associated with her pregnancy. The Court reasoned that the four months of leave provided by the PDLL "augment, rather than supplant, [the leave remedies] set forth elsewhere in the FEHA."

Store Manager's Disability And Harassment Claims Were Properly Dismissed

Lawler v. Montblanc N. Am., LLC, 704 F.3d 1235 (9th Cir. 2013)

Cynthia Lawler alleged disability discrimination, harassment, retaliation and intentional infliction of emotional distress ("IIED") associated with the termination of her employment. The district court granted summary judgment in favor of Montblanc, and the Ninth Circuit Court of Appeals affirmed, holding that Montblanc had shown that Lawler could not perform the essential functions of a store manager because due to her disability (psoriatic arthritis) she was unable to work. The Court similarly held there was no triable issue of whether Montblanc had either retaliated against or harassed Lawler and affirmed dismissal of those claims. Finally, the Court affirmed dismissal of the IIED claim after concluding that while Lawler's manager "may have inconsiderately and insensitively communicated his dissatisfaction with Lawler's managerial performance, this is not conduct from which California tort law protects employees." The Court also declined to draw an adverse inference against the employer based on its failure to preserve after 30 days a security tape that Lawler contended captured an exchange between her and the company's president/CEO. *See also Furtado v. State Personnel Bd.*, 212 Cal. App. 4th 729 (2013) (correctional lieutenant was properly demoted to a non-peace officer position because he could not perform the essential functions of the peace officer job).

Sexual Assault Victim's Motion To Strike Supervisor's Defamation Claim Was Properly Granted

Aber v. Comstock, 212 Cal. App. 4th 931 (2013)

Lisa Aber sued her employer and two co-employees (Michael Comstock, Aber's supervisor, and James Cioppa) for sexual harassment and sexual battery, among other things. Comstock filed a cross-complaint against Aber in which he alleged defamation and intentional infliction of emotional distress. In response to Comstock's cross-complaint, Aber filed a special motion to strike under Code of Civil Procedure § 425.15 (an "anti-SLAPP" motion). The trial court granted Aber's motion to strike and ordered Comstock to pay her attorney's fees. In this opinion, the Court of Appeal affirmed dismissal of Comstock's cross-complaint on the ground that Aber's statements were made in or in connection with matters under review by an official proceeding or body (i.e., the police, a nurse, the company's HR manager) and that Comstock failed to demonstrate a likelihood that he would prevail on the merits of his claims (i.e., he failed to submit admissible evidence that Aber had made defamatory statements about him and, in any event, any defamatory statements would be privileged). The Court also affirmed dismissal of Comstock's claim for intentional infliction of emotional distress because the "complained-of conduct must be outrageous, that is, beyond all bounds of reasonable decency" and must result in severe emotional distress – and there was no evidence of that in this case.

Employee's Wrongful Termination And Defamation Claims Were Properly Dismissed

McGrory v. Applied Signal Tech., 212 Cal. App. 4th 1510 (2013)

John McGrory alleged his employment was terminated because he is male and because he participated in his employer's internal investigation. He also alleged defamation associated with a statement the vice president of human resources made to another employee about why McGrory had been terminated. The trial court granted summary judgment in favor of the employer, and the Court of Appeal affirmed, holding that the FEHA (specifically, Cal. Gov't Code § 12940(h)) does not shield an employee against termination or lesser discipline for either lying or withholding information during an employer's internal investigation of a discrimination claim – in fact, the Court held that "such conduct is a legitimate reason to terminate an at-will employee." Further, the Court held that there was no evidence supporting a reasonable inference that the termination was based even partly on discrimination against males. Finally, the Court affirmed dismissal of McGrory's defamation claim on the ground that the alleged statement that plaintiff was terminated because he was uncooperative in the investigation, despite receiving several warnings, was privileged under Civil Code § 47(c) (the common interest privilege).

Employee Could Proceed With Whistleblower Claims

McVeigh v. Recology San Francisco, 213 Cal. App. 4th 443 (2013)

Brian McVeigh, a former Operations Supervisor for Recology, alleged Recology fired him in retaliation for his reporting possible fraud in connection with California Redemption Value payments made by and to Recology for recycled materials. McVeigh asserted claims under the California False Claims Act and Labor Code § 1102.5. The trial court granted summary judgment to Recology, but the Court of Appeal reversed the summary judgment on three of McVeigh's claims and affirmed dismissal of two other claims. The Court affirmed summary adjudication as to one of McVeigh's claims associated with "weight tag inflation" because the false claim did not result in a loss to the state (only to the employer). However, the Court reversed summary adjudication as to McVeigh's claim that Recology presented false claims to the state; the Court also found evidence of a causal link between McVeigh's termination and his whistleblowing activities. The Court reversed summary adjudication of McVeigh's claim under Labor Code § 1102.5 because the statute protects employee reports of unlawful activity by third parties such as contractors and employees and not just reports of the unlawful activity of an employer.

Employer Was Released From Liability In Settlement Agreement Between Employee And Third Party

Rodriguez v. Oto, 212 Cal. App. 4th 1020 (2013)

Heriberto Ceja Rodriguez sued Takeshi Oto for injuries he sustained in an automobile accident. Unbeknownst to Rodriguez, at the time of the accident, Oto was driving from an event related to his employment. (Oto was driving a car he rented from Hertz, the cost of which was reimbursed to him by his employer.) Seven months after the accident, Rodriguez settled with Hertz and Oto for $25,000 and executed a written release in favor of "Takeshi Oto and The Hertz Corporation, its employees, agents, servants, successors, heirs, executors, administrators and all other persons, firms, corporations, associations or partnerships." When Rodriguez filed this lawsuit against Oto and Oto's employer (alleging negligent entrustment, among other things), Oto and the employer filed a motion for summary judgment, relying upon the language of the release agreement that Rodriguez had previously executed. The trial court granted the summary judgment motion, and the Court of Appeal affirmed, holding that the broad release Rodriguez had signed included Oto's employer. The Court also found no error in the trial court's refusal to grant Rodriguez's request for a continuance of the summary judgment hearing.

Reporters' Class Action For Unpaid Overtime Should Not Have Been Certified

Wang v. Chinese Daily News, 2013 WL 781715 (9th Cir. 2013)

Plaintiffs (reporters for the *Chinese Daily News*) alleged they were non-exempt employees entitled to overtime pay under the Fair Labor Standards Act (FLSA) and California state law. The district court granted summary judgment in favor of the reporters, finding journalists are not subject to the creative professional exemption to the FLSA or California law. The Ninth Circuit originally affirmed. However, after handing down its opinion in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), the Supreme Court vacated and remanded for reconsideration the Ninth Circuit's decision. In this opinion, the Ninth Circuit reversed the district court's certification of the class under Fed. R. Civ. P. 23(b)(2) on the ground that class certification for plaintiffs' monetary claims could not stand in light of *Wal-Mart*. The Court also vacated the district court's findings of commonality under Rule 23(a) and predominance under Rule 23(b)(3) and remanded for reconsideration.

Card Club's Tip-Pooling Arrangement Did Not Violate The Law

Avidor v. Sutter's Place, Inc., 212 Cal. App. 4th 1439 (2013)

Haim Avidor is the lead plaintiff in this putative class of current and former card dealers employed by Sutter's Place, a cardroom/casino located in San Jose ("Bay 101"). Bay 101 required its dealers to contribute a set amount of the gratuities they received from players to a common account, which was distributed to other (non-dealer) casino employees each payday. Plaintiffs contended that Bay 101 violated Labor Code § 351 by compelling its dealers to participate in this tip-pooling arrangement. Before the trial began, the trial court sustained demurrers and otherwise dismissed most of plaintiffs' claims before dismissing the last two claims after plaintiffs rested. The Court of Appeal affirmed, holding that Section 351 prohibits distributing a tip pool to an employer's agent, and plaintiffs had failed to prove that any recipients of the tip pool could be deemed an agent of the employer.

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