Proskauer

California Employment Law Notes

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Criminal Conviction Of Former Employee Who Threatened Company Officials Is Upheld

United States v. Sutcliffe, 2007 WL 2948662 (9th Cir. Oct. 11, 2007)

Sutcliffe, a computer technician, was convicted of three counts of making interstate threats (via the Internet) to injure another and five counts of transferring social security numbers with the intent to aid and abet unlawful activity. Global Crossing terminated Sutcliffe's employment shortly after he was hired because he had failed to provide his social security number or disclose past criminal convictions on his job application. He also threatened the HR director. After his termination, he began picketing outside Global Crossing's building with a sign referring to a website he had created. On the website, Sutcliffe displayed the personal information of over 1,000 employees, including their payroll information, social security numbers, birthdates and residential addresses; some of this information was hyperlinked to an article about identity theft. After Global Crossing obtained a restraining order against Sutcliffe, he added content to his website in which he threatened the process server, the company's assistant general counsel (to whom he said he was "dead-icated") and the chairman of the company. The Ninth Circuit affirmed the criminal conviction and the sentence of 46 months of imprisonment. *Cf. People v. Ayala,* 155 Cal. App. 4th 604 (2007) (upholding $171,000 restitution payment to restaurant employees who lost wages after defendant falsely claimed to have found a severed finger in a bowl of chili).

Disability Leave Policy Did Not Affect Managers' Exemption From Overtime

Sumuel v. ADVO, Inc., 155 Cal. App. 4th 1099 (2007)

In this class action, Tiffany Sumuel and Rudy Halim sued ADVO for unpaid overtime, asserting that ADVO's policy in California of not paying supplemental salary replacement benefits to its sick or disabled managers until after they supplied proof of receipt of SDI benefits violated the "salary basis test" applicable to determining exemption from overtime. The Court affirmed summary judgment in ADVO's favor, holding that ADVO's policy qualified as a "bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability" and that it did not violate the salary basis test. *Cf. Thomas v. Home Depot USA, Inc.,* 2007 WL 2854259 (N.D. Cal. Sept. 27, 2007) (Private Attorney General Act claims are subject to one-year statute of limitations).

Employee's Age Discrimination Lawsuit Can Proceed Against Google

Reid v. Google, Inc., 155 Cal. App. 4th 1342 (2007)

Brian Reid, who was employed for fewer than two years as Google's Director of Operations and its Director of Engineering, sued Google after his termination, alleging age and disability discrimination, intentional and negligent infliction of emotional distress and related claims. Reid was 54 years old at the time of his termination. Although the trial court granted Google's motion for summary judgment, the Court of Appeal reversed. The Court considered the statistical evidence Reid submitted that showed a "statistically significant negative correlation between age and performance rating" and observed that Google had failed to offer conflicting expert testimony to dispute Reid's expert's statistical findings. Google's counsel's arguments about why the statistics were not sound were insufficient to overcome the evidence itself. Further, evidence of a "youthful atmosphere," allegedly ageist comments, a demotion and "changed rationales" for Reid's termination supported reversal of the summary judgment.

New Employer May Have Misappropriated Trade Secrets And Interfered With Prior Employer's Business

San Jose Constr., Inc. v. S.B.C.C., Inc., 2007 WL 2965616 (Cal. Ct. App. Oct. 12, 2007)

Richard Foust was a project manager for San Jose Construction ("SJC") for 4½ years before he became dissatisfied with his job and accepted a position at a higher salary with South Bay Construction ("South Bay"), one of SJC's competitors. Foust believed that SJC's clients would follow him to another company, so he took information regarding pending projects to enable him to "move forward with those projects" at South Bay. Foust's assistant copied documents and downloaded data from SJC's files and computers, which were subsequently uploaded onto South Bay's computers and placed into its project binders. At the direction of South Bay, Foust returned some documents to SJC and "erased" some data from South Bay's computers. In the ensuing litigation against South Bay, SJC alleged misappropriation of its trade secrets, interference with contract and prospective economic advantage and unfair competition. The trial court granted South Bay's motion for summary judgment, but the Court of Appeal reversed, finding triable issues of material fact regarding whether South Bay misappropriated SJC's trade secrets by using or acquiring them through Foust. *Cf. Venhaus v. Shultz,* 155 Cal. App. 4th 1072 (2007) (neither willful nor intentional conduct must be proved to prevail on claim for negligent interference with prospective economic advantage).

Defendant That Removes Action To Federal Court Bears Burden Of Proof Regarding Damages

Guglielmino v. McKee Foods Corp., 2007 WL 2916193 (9th Cir. Oct. 9, 2007)

Plaintiffs sued McKee Foods in this putative class action in state court, alleging violation of the California Labor Code, fraud, breach of contract and related claims. McKee timely removed the action to federal court and asserted that even though plaintiffs affirmatively alleged that the damages suffered by each of them were less than $75,000 (the jurisdictional minimum for federal court jurisdiction in a diversity case such as this), the damages in fact exceeded $75,000 when alleged economic damages, attorneys' fees and punitive damages were included. The district court denied plaintiffs' motion to remand on the ground that McKee had established by a preponderance of the evidence that the damages exceeded $75,000 for each plaintiff. The Ninth Circuit affirmed the judgment. *Cf. Ryman v. Sears, Roebuck & Co.,* 2007 WL 2964370 (9th Cir. Oct. 12, 2007) (when a federal court is required to apply state law and there is no relevant precedent from the state's highest court, the federal court should follow the law as indicated by the state's intermediate appellate court).

Trustee Of Estate Did Not Sexually Harass Widow

Hughes v. Pair, 154 Cal. App. 4th 1469 (2007)

Suzan Hughes, the third wife of Herbalife founder Mark Hughes, sued Christopher Pair, one of the three trustees of Mark's estate, for sexual harassment under Civil Code § 51.9 (which prohibits sexual harassment in certain business, service and professional relationships) and intentional infliction of emotional distress. (Although this case does not involve an employment relationship, the Court of Appeal held that the Legislature intended section 51.9 to be applied in a fashion consistent with the FEHA and Title VII.) The Court affirmed summary judgment in favor of Pair after concluding that Hughes had failed to establish either quid pro quo sexual harassment or conduct so severe or pervasive as to constitute sexual harassment. As for the latter form of harassment, the Court noted that Pair had not physically touched Hughes and that Pair's "coarse and vulgar" comments to Hughes were ambiguous and were part of an "isolated incident." Similarly, the Court held that Pair's actions were not sufficiently extreme or outrageous and Hughes' alleged emotional injuries were not severe enough to lead to liability for intentional infliction of emotional distress. *Cf. Nichols v. City of Taft,* 155 Cal. App. 4th 1233 (2007) ($471,000 attorney's fees award to plaintiff who settled her sexual harassment case for $175,000 is reversed).

Wrongful Termination And Retaliation Claims Can Proceed Against Screen Actors Guild

Metoyer v. Screen Actors Guild, 2007 WL 2781909 (9th Cir. Sept. 26, 2007)

SAG terminated the employment of Dr. Patricia Heisser Metoyer (SAG's national executive director of affirmative action) after PricewaterhouseCoopers concluded she had authorized payment of $30,000 of funds available for Guild use to friends, business partners and her husband's production company. Metoyer responded by filing a lawsuit alleging race discrimination, wrongful termination and retaliation in violation of 42 U.S.C. § 1981 and violation of state anti-discrimination law. Although the district court granted summary judgment to SAG, the Ninth Circuit reversed in part and held Metoyer could proceed with her claims for wrongful termination and retaliation under state and federal law. *Cf. Beck v. UFCW,* 2007 WL 3197089 (9th Cir. Nov. 1, 2007) (employee's $191,000 gender discrimination judgment against union is affirmed).

Rejected Applicant's ADA And Title VII Claims Were Properly Dismissed

Nilsson v. City of Mesa, 2007 WL 2669788 (9th Cir. Sept. 13, 2007)

Christine Nilsson applied for a position as a police officer with the City of Mesa, Arizona. In conjunction with her application, Nilsson signed a waiver of any and all claims against the police department. During the application process, Nilsson disclosed that she had been involved in an EEOC dispute with the Tempe police department (a prior employer), that she had been involved in civil proceedings in 1983, 1988, 1991 and 1992, that she had filed a workers' compensation claim and that she had been involved in a labor board proceeding. When Nilsson later failed a psychological evaluation, she was not hired by the Mesa police department. The district court granted summary judgment to the City, and the Ninth Circuit affirmed, holding that the waiver barred Nilsson's claims for violation of the Americans with Disabilities Act and 42 U.S.C. § 1983. Although the waiver did not bar Nilsson's retaliation claims under state or federal law, the Court held she had failed to prove that the reason the City gave for not hiring her (her failure to pass the psychological evaluation) was pretextual. *Cf. Dent v. Cox Communications Las Vegas, Inc.,* 2007 WL 2580754 (9th Cir. Sept. 10, 2007) (Department of Labor supervised settlement of overtime claim did not bar claim for unpaid wages from an earlier period).

Bank VP's Discrimination Claims Were Not Preempted By Federal Law

Ramanathan v. Bank of America, 155 Cal. App. 4th 1017 (2007)

Padmanabhan Ramanathan alleged he was discriminated against and harassed as a result of his religion (Hindu), race (Asian) and national origin. In its summary judgment motion, the Bank asserted that Ramanathan was a "Vice President" who served "at the pleasure" of the board of directors pursuant to the National Bank Act (12 U.S.C. § 24 (Fifth)). The Bank described Ramanathan's job as being a "web architect" who provided and evaluated technology solutions for the Bank's business operations. The Court of Appeal reversed the summary judgment that had been granted in favor of the Bank, holding that notwithstanding his title, Ramanathan was essentially a "computer programming consultant" and not an "officer" within the meaning of the statute. *Compare Fitz-Gerald v. SkyWest Airlines, Inc.,* 155 Cal. App. 4th 411 (2007) (flight attendants' claims for Labor Code violations were preempted by the Railway Labor Act).

Site Of Employment For Purposes Of WARN Act Is The Actual Work Site, Not Company Headquarters

Bader v. Northern Line Layers, Inc., 2007 WL 2581110 (9th Cir. Sept. 10, 2007)

The Worker Adjustment and Retraining Notification Act ("WARN") requires employers to give employees at least 60 days' notice in the event of a plant closing or mass layoff at a "single site of employment." The issue in this case was whether the site of employment of the construction worker-plaintiffs was the company's headquarters or the workers' actual work sites. The Ninth Circuit affirmed summary judgment for the employer after concluding that the plaintiffs had failed to raise a genuine issue of material fact whether 50 or more people were laid off at a single site of employment. The Court concluded the remote construction locations where plaintiffs worked did not qualify as a single site of employment under the applicable regulations.

NASA's Employment Questionnaire And General Waiver For Release Of Information May Violate Privacy Rights

Nelson v. NASA, 2007 WL 3025498 (9th Cir. Oct. 11, 2007)

NASA presented plaintiffs (long-time employees of the Jet Propulsion Laboratory) with a questionnaire that included inquiries about counseling they may have received in the past. Plaintiffs also were asked to sign a general waiver for release of additional information. The questionnaire and wavier were adopted to implement Homeland Security Presidential Directive 12 for the purpose of obtaining "secure and reliable forms of identification." The Ninth Circuit granted the injunction and prohibited NASA from obtaining the requested information because plaintiffs were "scheduled to lose their jobs" if they failed to provide the information NASA had requested.

County Was Not Liable For The Death Of Employee's Husband (Whom She Murdered)

deVillers v. County of San Diego, 2007 WL 3036789 (Cal. Ct. App. Oct. 19, 2007)

Kristin Rossum, who was employed as a toxicologist for the County of San Diego, took toxic materials from the Office of Medical Examiner ("OME") and used them to murder her husband, Greg deVillers. After Rossum was convicted of murdering deVillers, his survivors sued the County for negligently hiring Rossum and for breaching its duty to guard against the theft of drugs from the OME. The jury awarded damages to deVillers' survivors, but the Court of Appeal reversed the judgment, holding that there were no legally cognizable claims that could be maintained against the County nor was there a breach of any duty it owed to the survivors.

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