Proskauer

California Employment Law Notes

March 2008

Marijuana Compassionate Use Act Did Not Protect Employee From Termination

Ross v. Ragingwire Telecommunications, Inc., 42 Cal. 4th 920 (2008)

In accordance with the Compassionate Use Act of 1996 (Proposition 215), Gary Ross had a physician's recommendation to use marijuana for his chronic back pain. Ragingwire offered Ross a job as a lead systems administrator subject to his passing a drug test, which he failed when he tested positive for THC (the active chemical found in marijuana). Ragingwire terminated Ross' employment because he failed the drug test. Ross sued Ragingwire for disability discrimination (on the theory that marijuana use is a reasonable accommodation for his back pain), wrongful termination in violation of public policy and breach of contract. The Court of Appeal affirmed dismissal on demurrer of Ross' complaint, holding that an employer need not accommodate a disability by allowing an employee to use a drug that is illegal under federal if not state law. Similarly, the Court held there was good cause as a matter of law to terminate Ross' employment. The California Supreme Court affirmed. *Cf. Dible v. City of Chandler*, 515 F.3d 918 (9th Cir. 2008) (police officer's First Amendment rights were not violated when he was terminated for participating in a sexually explicit website with his wife).

Employer That Failed To Make Directed Changes In 401(k) Plan May Be Liable To Employee

LaRue v. DeWolff, Boberg & Associates, Inc., 552 U.S. ___, 128 S. Ct. 1020 (2008)

James LaRue directed DeWolff, his former employer, to make certain changes to the investments in his individual 401(k) account, but DeWolff failed to effect those changes as directed. LaRue alleged that DeWolff breached its fiduciary duty to him under ERISA by failing to carry out his instructions, which resulted in a loss to his 401(k) account of approximately $150,000. Although the lower courts concluded LaRue had no claim for relief under ERISA, the United States Supreme Court reversed, holding that Section 502(a)(2) of ERISA provides for suits to enforce the liability-creating provisions of Section 409 (concerning breaches of fiduciary duty that harm plans such as LaRue's defined contribution plan).

San Francisco Health Care Security Ordinance Probably Is Not Preempted By ERISA

Golden Gate Restaurant Ass'n v. City & County of San Francisco, 512 F.3d 1112 (9th Cir. 2008)

In 2006, the San Francisco Board of Supervisors passed and the mayor signed into law the San Francisco Health Care Security Ordinance which, among other things, requires employers with more than 20 employees to make healthcare expenditures on behalf of their employees. The ordinance was scheduled to go into effect on January 1, 2008 before the district court determined that it was preempted by federal law, specifically the Employee Retirement Income Security Act of 1974 ("ERISA"), and enjoined its implementation. Two weeks later, the Ninth Circuit concluded the City has a "probability, even a strong likelihood, of success in their argument that the ordinance is not preempted by ERISA" and, therefore, ordered that the district court's judgment be stayed pending resolution of the City's appeal on the merits. *Compare Luke v. Collotype Labels USA, Inc.,* 159 Cal. App. 4th 1463 (2008) (maintenance engineer's wrongful termination claim was preempted by NLRA).

Television Station Did Not Discriminate Against Caucasian News Anchor

Hicks v. KNTV Television, Inc., 2008 WL 585033 (Cal. Ct. App. Mar. 5, 2008)

Bradford Hicks, a white man, was the 5:00 p.m. weeknight news anchor for KNTV. After KNTV chose not to renew Hicks' contract, it selected an African-American man to fill the position Hicks had vacated. Hicks alleged race discrimination and wrongful termination, asserting that KNTV was under "pressure in the industry to hire minorities and KNTV was bound by the affirmative action programs of General Electric, NBC's parent company, and by its own affirmative action program." The trial court granted summary judgment in favor of KNTV, and the Court of Appeal affirmed, holding that KNTV produced sufficient unrebutted evidence that its reason for refusing to negotiate a new contract with Hicks was unrelated to his race and instead had to do with KNTV's perception that his on-air style was "aloof, distant, standoffish, unapproachable, stiff and too anchor-like." The Court held the fact that KNTV's assessment of Hicks was based upon subjective criteria did not demonstrate pretext for discrimination — "absent some evidence that the station made its decision based upon race, the mere use of subjective criteria does not permit us to second guess the employer's business judgment." *Cf. Jones v. Lodge at Torrey Pines P'ship*, 42 Cal. 4th 1158 (2008) (individual supervisors and managers may not be held personally liable for retaliation under FEHA).

NASA's Employment Questionnaire Waiver May Violate Employees' Privacy Rights

Nelson v. NASA, 512 F.3d 1134(9th Cir. 2008)

NASA began requiring plaintiffs (long-time, “low-risk” contract employees of the Jet Propulsion Laboratory) to undergo a National Agency Check with Inquiries (“NACI”), which includes, among other things, a request for background information, the names of three references and disclosure of any illegal drug use within the past year, along with any treatment or counseling received for such use. 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 district court denied plaintiffs’ motion for a preliminary injunction, but 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. In this subsequent opinion on the merits, the Ninth Circuit reviewed and reversed the district court’s denial of preliminary injunctive relief and held plaintiffs have “demonstrated serious questions as to certain of their claims on which they are likely to succeed on the merits, and the balance of hardships tips sharply in their favor.” *Cf. Lanier v. City of Woodburn*, 2008 WL 659551 (9th Cir. Mar. 13, 2008) (city’s policy requiring job applicants to pass a pre-employment drug test violated the Fourth Amendment); *CashCall, Inc. v. Superior Court*, 159 Cal. App. 4th 273 (2008) (precertification discovery appropriate for purpose of identifying class members who may become substitute plaintiffs in place of named plaintiffs who were not members of the purported class in case involving alleged violation of privacy rights).

Intake Questionnaire Filed With The EEOC Was A “Charge” Within The Meaning Of The ADEA

Federal Express Corp. v. Holowecki, 552U.S. ___, 128 S. Ct. 1147 (2008)

Patricia Kennedy submitted a “Form 283” (an intake questionnaire) and an accompanying affidavit to the EEOC before filing suit against Federal Express, alleging age discrimination under the Age Discrimination in Employment Act (“ADEA”). Federal Express moved to dismiss the lawsuit on the ground that Kennedy had not filed a “charge” with the EEOC at least 60 days before filing suit as required in 29 U.S.C. § 626(d). The district court granted the motion to dismiss, but the United States Court of Appeals for the Second Circuit reversed, holding that although the term “charge” is not specifically defined in the ADEA, the forms that Kennedy did file were sufficient. The United States Supreme Court affirmed, deferring to the EEOC’s interpretation, but noting “the employer’s interests… were given short shrift, for it was not notified of respondent’s complaint until she filed suit.” (Justices Scalia and Thomas dissented.) *Cf. Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. ___, 128 S. Ct. 1140 (2008) (appellate court erred in failing to remand case to district court for statement of whether it had applied a *per se* rule excluding evidence from employees of other supervisors (so-called “me-too” evidence) in age discrimination case).

Forfeiture Provision In Incentive Compensation Plan Does Not Violate California Labor Code

Schachter v. Citigroup, Inc., 159 Cal. App. 4th 10 (2008)

During his employment, David B. Schachter, a former securities salesperson for Salomon Smith Barney, participated in Smith Barney's voluntary Capital Accumulation Plan, which allowed him to direct Smith Barney to pay him five percent of his total compensation in the form of restricted stock; the stock was purchased at a 25% discount below its then-current market price. Pursuant to the Plan, if the participating employee remained employed for two years from the time the shares issued, title to the shares fully vested with the employee. However, if the employee voluntarily terminated his or her employment or was terminated for cause during the two-year period, he or she forfeited the shares as well as the money that was used to purchase them. When Schachter later voluntarily terminated his employment, he forfeited the shares and filed suit, alleging the forfeiture violated Labor Code §§ 201 and 202 (requiring immediate payment of all wages due upon termination of employment). The trial court granted defendants' motion for summary judgment, and the Court of Appeal affirmed, holding that Schachter was paid all the wages he was owed and that in any event the Plan's forfeiture provisions are lawful. *Cf. Noble v. Draper*, 159 Cal. App. 4th 810 (2008) (fraud claims are not precluded by plaintiffs' prior pursuit of wage claims before the Labor Commissioner).

Talent Agencies Act Applies To Personal Managers As Well As Agents

Marathon Entm't, Inc. v. Blasi, 42 Cal. 4th 974 (2008)

Marathon Entertainment and Rosa Blasi entered into an oral contract by which Marathon would serve as Blasi's personal manager in exchange for 15% of Blasi's earnings from entertainment employment obtained during the course of the contract. Marathon sued Blasi after she reneged on her agreement to pay 15% of her earnings to Marathon. Blasi obtained a stay of the action and filed a petition with the Labor Commissioner alleging that Marathon had violated the Talent Agencies Act by soliciting and procuring employment for Blasi without a talent agency license. The Labor Commissioner agreed with Blasi, voided the parties' contract and barred Marathon from recovery. Marathon appealed the Labor Commissioner's ruling to the superior court for a trial de novo where Blasi's motion for summary judgment was granted. The court of appeal reversed in part, holding that under the law of severability of contracts, it was possible that Blasi's obligation to pay Marathon could be severed from any unlawful parts of the management agreement. The California Supreme Court agreed and affirmed the appellate court's judgment, remanding the action for further proceedings.

Employee's Stress Resulting From Co-Workers' Negative Reactions To Her Is Not Compensable

Verga v. WCAB, 159 Cal. App. 4th 174 (2008)

Rosemary Verga sought workers' compensation benefits for an alleged psychiatric injury she sustained while working for United Airlines. However, the WCAB found Verga was not actually subjected to harassment or persecution. Instead, she was "a difficult person to get along with [who was] impolite, unpleasant, and co-workers never knew when she might get upset." The Court of Appeal affirmed the WCAB's order denying compensation, holding that "to allow an employee to harass co-workers and, when they respond unfavorably, to claim a stress-related injury to the employee's psyche would increase, not reduce, workers' compensation claims and create the potential for abuse of the system."

Social Worker Was An Employee Within The Meaning Of The FEHA And Was Sexually Harassed

Bradley v. California Dep't of Corrections & Rehabilitation, 158 Cal. App. 4th 1612 (2008)

Sallie Mae Bradley worked temporarily at a California prison as a licensed clinical social worker. Bradley sued the California Department of Corrections ("CDC") for sexual harassment directed at her by the prison's Muslim chaplain, Omar Shakir. The jury awarded her $300,000 in non-economic damages and $139,000 in past and future economic damages. The Court of Appeal held that Bradley was a special employee of the CDC within the meaning of the Fair Employment and Housing Act. Further, the Court held that the jury's conclusion that the CDC did not take immediate corrective action to end Shakir's harassment was supported by substantial evidence. The Court noted that "Shakir was engaged in classic stalking behavior, terrorizing, intimidating and humiliating Bradley and taking full advantage of his free access to her at work to accomplish his inappropriate goals. The sum total of CDC's [inadequate] response was to refer the complaint to a bogged-down investigative process and to caution Bradley to protect herself." *Cf. Fichman v. Media Ctr.*, 512 F.3d 1157 (9th Cir. 2008) (directors of a non-profit organization are not employees within the meaning of the ADEA and ADA).

Former Employer's Claims Were Properly Dismissed Under Anti-SLAPP Statute

Nygård, Inc. v. Uusi-Kerttula, 159 Cal. App. 4th 1027 (2008)

After quitting his employment with Nygård, Timo Uusi-Kerttula gave an interview about his work experiences to a Finnish magazine. Nygård then sued Timo and the magazine for a variety of claims, including breach of contract and defamation. The trial court granted defendants' motion to strike pursuant to the anti-SLAPP statute, Cal. Code Civ. Proc. § 425.16. The Court of Appeal affirmed dismissal of the complaint, holding that defendants had met the criteria of the statute and had established a probability of prevailing in their defenses against Nygård's claims. *See also Neville v. Chudacoff*, 2008 WL 650658 (Cal. Ct. App. Mar. 12, 2008) (employer's attorney's letter to customers accusing former employee of misappropriation of trade secrets was protected by anti-SLAPP statute); *cf. Burdette v. Carrier Corp*., 158 Cal. App. 4th 1668 (2008) (some of employee's defamation claims were precluded by prior federal court judgment).

Administrative Employee's Overtime And Meal Period Claims Were Properly Dismissed

Combs v. Skyriver Communications, Inc., 159 Cal. App. 4th 1242 (2008)

Mark Combs sued his former employer, Skyriver Communications, and Skyriver's former interim CEO, Massih Tayebi, for violations of the California Labor Code, the Unfair Competition Law and the Private Attorneys General Act of 2004. Combs, who was employed as the manager of capacity planning and later as the director of network operations, alleged he had been misclassified as an exempt employee. The trial court granted Tayebi's motion for summary judgment and dismissed Combs' remaining claims in response to Skyriver's motion for nonsuit. As part of his case in chief, Combs produced evidence that he was responsible for maintaining, developing and improving Skyriver's computer network. Although he supervised "one or two employees," Combs testified he spent the majority of his time performing the same functions as the employees who reported to him. The Court of Appeal affirmed dismissal, holding that the "administrative-production worker dichotomy" was inapplicable in this case because Combs performed "specialized functions" that were unlike the "routine and unimportant" functions performed by the insurance claims representatives in *Bell v. Farmers Ins. Exch*., 87 Cal. App. 4th 805 (2001).

Physician's Discrimination Claims Were Properly Dismissed

Johnson v. Riverside Healthcare Sys., 516 F.3d 759 (9th Cir. 2008)

Christopher Lynn Johnson alleged he was discriminated against on the basis of his race and sexual orientation and asserted claims under 42 U.S.C. § 1981, the Unruh Civil Rights Act and the California Fair Employment and Housing Act. The district court granted defendants' motion to dismiss, and the Ninth Circuit affirmed, holding that Johnson had failed to plead a hostile work environment because the two incidents he alleged (only one of which he witnessed) were isolated in time and occurred over a 28-month period. The Court affirmed dismissal of Johnson's Unruh Act claim on the ground that he was more like an employee than a customer and his FEHA claim on the ground that it was barred by the applicable statute of limitations. *See also Surrell v. California Water Serv. Co.*, 2008 WL 638369 (9th Cir. Mar. 11, 2008) (summary judgment affirmed for employer in race and disability discrimination case in absence of evidence to support claims); *Williams v. The Boeing Co.*, 2008 WL 509229 (9th Cir. Feb. 27, 2008) (Section 1981 compensation discrimination claim was subject to four-year statute of limitations); *compare Hammond v. County of Los Angeles*, 2008 WL 740375 (Cal. Ct. App. Mar. 20, 2008) (nursing instructor's claims of race discrimination and harassment under FEHA were improperly dismissed and were not barred by the statute of limitations).

Non-Compete Covenant Was Not Too Broad To Be Enforced

Alliant Ins. Services, Inc. v. Gaddy, 159Cal. App. 4th 1292 (2008)

Alliant Insurance Services purchased a competing insurance brokerage company from G. Scott Gaddy for $4.1 million and then employed him under a senior management agreement. Both the purchase and employment agreements contained covenants whereby Gaddy agreed not to compete with Alliant or to solicit Alliant's or Gaddy's clients for three years following termination of employment. Once Gaddy's employment was terminated, he began soliciting clients in violation of the non-solicitation provision. The trial court granted a preliminary injunction against Gaddy on the ground that the non-solicitation covenant was enforceable and in view of the evidence that Gaddy had misappropriated Alliant's trade secrets in violation of the Uniform Trade Secrets Act. The Court of Appeal affirmed, holding the non-solicitation covenant was not overly broad even though it extended to all 58 counties within the state. The Court further held that because Gaddy became an employee of Alliant following the sale of the business, the scope of the non-solicitation covenant could properly extend beyond those clients Gaddy had transferred to Alliant in the transaction.

Employer Entitled To Recover Its Attorney's Fees In Discrimination Case

Villanueva v. City of Colton, 2008 WL 638269 (Cal. Ct. App. Mar. 11, 2008)

After Daniel Villanueva was demoted from Lead Operator to Operator II, he sued the city for discrimination based on race, national origin, ethnicity or skin color and for retaliation for his having complained about the alleged discrimination. The trial court granted summary judgment to the city after concluding Villanueva had made "unsupported charges of race discrimination against a number of people" based on hearsay and after finding no evidence of racial animus or other impermissible employment activity — and, in particular, noting that in two prior grievances he had lodged he failed to allege any discrimination or harassment based on his race. The trial court also ordered Villanueva to pay the city's attorney's fees in the amount of $39,472.30. The Court of Appeal affirmed dismissal of the lawsuit and the award of attorney's fees under Cal. Gov't Code § 12965(b) because the action was "unreasonable, frivolous and meritless" and because Villanueva offered no evidence of his alleged inability to pay the city's fees. *Compare Chavez v. City of Los Angeles*, 160 Cal. App. 4th 410 (2008) (trial court erred in denying employee's motion for $871,000 in attorney's fees after recovering $11,500 from a jury after five years of litigation); *Harrington v. Payroll Entm't Services, Inc*., 72 Cal. Rptr. 3d 922 (Cal. Ct. App. Feb. 28, 2008) (employee entitled to $500 in attorney's fees after settling claim involving $44.63 in unpaid overtime for $10,500); *Lussier v. Dollar Tree Stores, Inc*., 2008 WL 614407 (9th Cir. Mar. 7, 2008) (putative class representatives were not entitled to recover their attorney's fees following their successful motion to remand wage and hour class action that employer removed to federal court under the Class Action Fairness Act of 2005).

Resident Employees Need Only Be Paid For Time During Which Work Is Performed

Isner v. Falkenberg/Gilliam & Associates, Inc., 2008 WL 712045 (Cal. Ct. App. Mar. 18, 2008)

Ron and Sharon Isner were resident employees of Falkenberg — a property management company specializing in managing nonprofit housing for the elderly. Although the Isners were required to remain on the premises and be on call on designated evenings from 5:00 p.m. until 8:00 a.m., they were otherwise free to use the on-call time as they wished. In their class action lawsuit, the Isners sought compensation not just for the hours they spent responding to emergencies but for all the hours they were on call and "confined to their apartment or the building office so as to remain within audible range of the telephone and alarm." The Court of Appeal affirmed summary judgment in favor of the employer, holding that "employees who are required to reside where they work are entitled to be compensated for time spent performing their assigned duties; they are not entitled to be compensated for time spent simply being available to perform those duties."

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