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Law & the Workplace℠

Unionized Employees Were Required To Arbitrate Age Discrimination Claims

14 Penn Plaza LLC v. Pyett, 556 U.S. ___, 129 S. Ct. 1456 (2009)

Plaintiffs, members of the Service Employees International Union (the "SEIU"), filed a complaint with the EEOC alleging age discrimination under the Age Discrimination in Employment Act and, after receiving their right-to-sue letters, filed suit against their employer alleging age discrimination. In response, the employer filed a motion to compel arbitration of the claims pursuant to the Federal Arbitration Act on the ground that the collective bargaining agreement negotiated by the SEIU required union members to submit all claims of employment discrimination to binding arbitration. The district court denied the employer's motion to compel arbitration on the ground that "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable." The Court of Appeals for the Second Circuit affirmed the ruling, but the United States Supreme Court reversed, holding that such a provision is enforceable as a matter of federal law. (Paul Salvatore of Proskauer Rose LLP's New York office successfully argued this case on behalf of the employer.)

Releases Barred Subsequent Lawsuit For Allegedly Unpaid Overtime

Chindarah v. Pick Up Stix, Inc., 171 Cal. App. 4th 706 (2009)

Two former employees of Pick Up Stix (a restaurant) filed a complaint seeking unpaid overtime, penalties and interest due to the misclassification of their jobs as exempt from the overtime pay requirements of state law. The putative class included current and former general managers, assistant managers and lead cooks employed during the four years preceding the filing of the complaint. After the employer's attempt to settle the lawsuit through mediation failed, it settled directly with as many putative class members as possible, offering each of them an amount based upon a figure that had been offered during the unsuccessful mediation. Those who settled were required to sign a release of claims and agreement not to participate in any class action involving such claims. Eight current and former employees who had signed the settlement agreements joined the putative class action, alleging that Labor Code §§ 206 and 206.5 prohibited the release of a claim for unpaid wages. The trial court disagreed and granted the employer's motion for summary judgment on the ground that there was a bona fide dispute over whether any wages were owed and thus the Labor Code provisions did not void the releases. The Court of Appeal affirmed the judgment. *See also Watkins v. Wachovia Corp.*, 2009 WL 1019560 (Cal. Ct. App. 2009) (employees who had released their claims could not pursue class action seeking allegedly unpaid overtime from employer); *cf. Safeco Ins. Co. of Am. v. Superior Court*, 2009 WL 1153433 (Cal. Ct. App. 2009) (class representative who is not a member of the class she purports to represent may obtain precertification discovery for the purpose of finding a new class representative).

"Me Too" Evidence Was Admissible In Pregnancy Discrimination Lawsuit

Johnson v. United Cerebral Palsy/Spastic Children's Found., 2009 WL 1154132 (Cal. Ct. App. 2009)

Dewandra Johnson, who was employed as a counselor for this charitable foundation, alleged that she had been terminated while and because she was pregnant. Johnson also alleged that her supervisor (Raquel Jiminez) had a discriminatory animus against pregnant and heterosexual women and that Jiminez gave preferential treatment to gay and lesbian employees and specifically recruited gays and lesbians to fill positions within the Foundation. In its summary judgment motion, the Foundation asserted that it had conducted a good faith investigation into Johnson's time sheets and billing records and concluded that Johnson had falsified such records and that that was the basis for the termination of her employment. The trial court granted the Foundation's motion for summary judgment, but the Court of Appeal reversed, holding that Johnson had produced substantial evidence that the stated reason for her firing was pretextual and/or that the employer had acted with discriminatory animus in firing her. Further, the appellate court held that the declarations Johnson had submitted from other employees recounting alleged pregnancy discrimination at the hands of defendants required reversal of the summary judgment.

Plumbing Company Was Not Liable For Former Employee's Murder Of Customer

Phillips v. TLC Plumbing, Inc., 172 Cal. App. 4th 1133 (2009)

Trisha Phillips, the daughter and successor in interest of decedent Judith Phillips, filed a complaint against TLC, alleging negligent hiring and retention of James Joseph Cain after Cain, a former employee of TLC, murdered Judith. While Cain was employed as a plumbing service repairman for TLC, he was dispatched on a service call to Judith's residence on two separate occasions. Shortly thereafter, Cain and Judith began a social relationship that evolved into a romantic one. Approximately a month later, TLC terminated Cain (who was on parole after having been convicted of domestic violence and/or an arson offense involving his wife) for misuse of a company vehicle, drug and alcohol use and for apparently threatening a coworker. Some two years after his termination from TLC, Judith ended the relationship and applied for a restraining order against Cain, who subsequently shot and killed her. The trial court granted TLC's motion for summary judgment on the ground that there was no employment relationship between TLC and Cain at the time he shot and killed Judith and because "it was not reasonably foreseeable that Cain would enter into a personal relationship with Judith which would later lead to Cain's shooting and killing her years after he provided plumbing services to her." The Court of Appeal affirmed. *Cf. Burns v. The Neiman Marcus Group, Inc.*, 2009 WL 1126948 (Cal. Ct. App. 2009) (plaintiff, whose secretary spent in excess of $1 million at Neiman Marcus with unauthorized checks drawn on plaintiff's personal bank account, could not proceed with negligence claim against Neiman Marcus).

Complaint Alleging Violation Of UTSA, Unfair Competition Was Not Subject To Dismissal Under Anti-SLAPP Law

World Fin. Group, Inc. v. HBW Ins. & Fin. Services, Inc., 2009 WL 1019118 (Cal. Ct. App. 2009)

WFG filed a complaint against its direct competitor, HBW, and six of its agents for alleged breach of contract, misappropriation of trade secrets, conversion, unfair competition, interference with prospective economic advantage and unjust enrichment. In response, HBW filed a motion to dismiss the complaint as a SLAPP suit pursuant to Code of Civil Procedure § 425.16. In its anti-SLAPP motion, HBW asserted that all of WFG's claims were based on defendants' speech and conduct in furtherance of the exercise of their right to free speech in connection with a public issue (i.e., "the pursuit of lawful employment pursuant to Bus. & Prof. Code § 16600" as well as "workforce mobility and free competition"). The trial court denied HBW's anti-SLAPP motion, and the Court of Appeal affirmed, holding that because the statements at issue were "merely incidental to WFG's claims, they are insufficient to subject any cause of action, much less the entire complaint, to the anti-SLAPP law." Compare *Hansen v. California Dep't of Corrections and Rehabilitation*, 171 Cal. App. 4th 1537 (2009) (former employee's whistleblower lawsuit was properly stricken under anti-SLAPP statute).

Former Employee Proved No Damages As A Result Of Alleged Defamation

The Nethercutt Collection v. Regalia, 172 Cal. App. 4th 361 (2009)

Michael Regalia sued The Nethercutt Collection for wrongful termination and slander after he was terminated as its president. The jury rejected the wrongful termination claim, but awarded Regalia $750,000 in damages for "assumed harm" to his reputation arising from two statements attributable to the employer: (1) that Regalia had demanded a commission or finder's fee of about $230,000 to which he was not entitled and (2) that Regalia was fired because other employees would not work for him and/or would leave if he remained employed. The Court of Appeal reversed the judgment on the ground that because Regalia had not proved slander per se (i.e., statements that would injure him in respect to his office, profession, trade or business, etc.) he was required but had failed to prove actual damages.

Mandatory Tip Pool Was Legal But Shift Managers Could Not Share In Tips

Grodensky v. Artichoke Joe's Casino, 171 Cal. App. 4th 1399 (2009)

Card dealer Harvey Grodensky filed a putative class action challenging a mandatory tip-pooling policy that Artichoke Joe's Casino had implemented for its dealers. The trial court determined (and the Court of Appeal affirmed) that the casino had not violated the minimum wage law by the tip-pooling arrangement but had violated Labor Code § 351 by requiring the dealers to share their tips with shift managers. The Court of Appeal found no error in the trial court's issuance of a pre-trial protective order prohibiting any communications regarding the lawsuit between the casino and dealers while determination of the class certification motion was pending. The Court also affirmed that Grodensky and the putative class had a private right of action under Labor Code § 351 and that the trial court did not abuse its discretion by ordering the disgorgement of the sums taken from the dealers' tips and distributed to the shift managers. *Compare Etheridge v. Reins Int'l Cal., Inc.*, 172 Cal. App. 4th 908 (2009); *Budrow v. Dave & Buster's of Cal., Inc.*, 171 Cal. App. 4th 875 (2009) (restaurant employees who do not provide direct table service may share in tip pool).

Medical Service Reps May Not Have Been Subject To The Motor Carrier Exemption From Overtime

Gomez v. Lincare, Inc., 2009 WL 1124268 (Cal. Ct. App. 2009)

Lincare provides respiratory services and medical equipment setup to patients in their homes. Plaintiffs were Lincare service representatives who drove vans containing liquid and compressed oxygen (defined by the federal government as "hazardous materials") and worked on call in the evenings and on weekends. Plaintiffs sought compensation for the on-call time they spent resolving customer questions by telephone and for all the time they were on call, even when they were not responding to customer calls. The trial court granted Lincare's motion for summary adjudication on the ground that plaintiffs were covered by the motor carrier exemption and therefore were exempt from California's overtime law. The Court of Appeal reversed, holding that Lincare had failed to prove that each plaintiff drove a vehicle containing hazardous materials for some period of time on each and every workday. The Court also held that plaintiffs had sufficiently alleged the breach of an express contract (so Lincare's demurrer should not have been sustained). The Court affirmed summary adjudication of plaintiffs' claims for failure to pay for on-call time worked after a less-than-eight-hour-weekday shift and for breach of an implied-in-fact contract.

Detention Officers' State Law Wage Claims Were Not Subject To Exclusive Federal Remedy

Naranjo v. Spectrum Sec. Services, 172 Cal. App. 4th 654 (2009)

Gustavo Naranjo worked as a detention officer for Spectrum, which provides security services in holding facilities and detention centers throughout Los Angeles County under a contract with federal Immigration and Customs Enforcement ("ICE"). The terms of Spectrum's contract with ICE rely on wage and fringe benefit determinations by the Secretary of the U.S. Department of Labor pursuant to the McNamara-O'Hara Service Contract Act of 1965 ("SCA"). In this putative class action, Naranjo alleged violations of the California Labor Code involving meal and rest period requirements, failure to pay additional compensation upon the resignation or discharge of employees, and failure to provide employees with itemized records of their wages and deductions. Spectrum defended on the ground that Naranjo's claims were preempted by the SCA. The trial court agreed and granted Spectrum's motion for

summary judgment, but the Court of Appeal reversed, holding that Naranjo's claims neither conflicted with nor hindered the achievement of the SCA's goals. *Cf. Solis v. Matheson*, 2009 WL 1036083 (9th Cir. 2009) (overtime provisions of FLSA apply to a business located on an Indian reservation and owned by Indian tribal members); *Ahlmeyer v. Nevada Sys. of Higher Educ.*, 555 F.3d 1051 (9th Cir. 2009) (the ADEA is the exclusive federal remedy for age discrimination in employment).

Fishing Agreement Providing Employment For Only One Trip Was Enforceable

Day v. American Seafoods Co., 557 F.3d 1056 (9th Cir. 2009)

Jesse Day entered into a contract to work for American Seafoods Co. for one fishing voyage. In this lawsuit, Day sought payment for "unearned wages" for a period of time longer than the single voyage and contended that extrinsic evidence would establish an oral understanding for a longer period. The district court declined to admit parol evidence on the question, and the Ninth Circuit affirmed, holding that "on the basis of the explicit contractual language and the integration clause, the district court [correctly] held that Day could not offer extrinsic evidence to rebut the unambiguous duration agreed upon in the contract."

Labor Commissioner Approves Seasonal Alternative Workweek Schedule

In a March 23, 2009 opinion letter, the Division of Labor Standards Enforcement determined that an employer could adopt a schedule that would rotate between four 9-hour days and one 4-hour day during the summer months and five 8-hour days during the rest of the year – so long as the employer complied with the requirements for adopting an alternative workweek as provided in Labor Code § 511 and the applicable Wage Order. *See* www.dir.ca.gov/dlse/OpinionLetters-byDate.htm.

California Employment Law Notes

Proskauer's nearly 200 Labor and Employment lawyers are capable of addressing the most complex and challenging labor and employment law issues faced by employers.

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