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By **Anthony J. Oncidi***

Employer May Be Liable For Death Resulting From Drunk Employee's Automobile Accident

Purton v. Marriott Int'l, Inc., 218 Cal. App. 4th 499 (2013)

In December 2009, the Marriott Del Mar Hotel held its annual holiday party as a "thank you" to its employees and management. Marriott did not require its employees to attend the party. Michael Landri was employed as a bartender at the hotel. Landri, who did not work on the day of the party, drank a beer and a shot of Jack Daniel's whiskey at home before arriving at the party; Landri took a flask to the party, which he estimated held about five ounces, filled to some degree with whiskey. Landri re-filled his flask with more whiskey from the bar at least once (but possibly more than once) during the party. At approximately 9:00 p.m., Landri left the party and drove (or was driven) home. Landri did not drink any more after leaving the party. After arriving home safely, Landri decided to get back on the road to drive another intoxicated co-worker to the co-worker's house. During the second trip, Landri (who had a blood alcohol level of 0.16) drove over 100 miles per hour and rear-ended Dr. Jared Purton's vehicle, killing Dr. Purton. The trial court granted Marriott's motion for summary judgment on the ground that Landri was not acting within the scope of his employment at the time of the accident, but the Court of Appeal reversed the judgment, holding that "a trier of fact could conclude the party and drinking of alcoholic beverages benefitted Marriott by improving employee morale and furthering employer-employee relations… [and] that Landri was acting within the scope of his employment while ingesting alcoholic beverages at the party." The fact that Landri had arrived home safely before venturing out again did not cut off Marriott's liability as a matter of law. *Compare Rayii v. Gatica*, 2013 WL 4446778 (Cal. Ct. App. 2013) (judgment affirmed where jury determined negligent driver was not acting within the course and scope of his employment at the time of the accident).

*Anthony J. Oncidi is a Partner in and the Chair of Proskauer's Labor and Employment Law Department in Los Angeles, where he exclusively represents employers and management in all areas of employment and labor law. His telephone number is 310.284.5690 and his email address is aoncidi@proskauer.com.

Prevailing Employer Entitled To Recover Its Costs In Discrimination Case

Williams v. Chino Valley Indep. Fire Dist., 218 Cal. App. 4th 73 (2013)

Loring Winn Williams sued the Fire District for disability discrimination under the California Fair Employment and Housing Act. The Fire District succeeded in getting the case dismissed on summary judgment – after filing a successful petition for writ of mandate when the motion was initially denied. The Fire District subsequently filed a memorandum of costs, and the trial court awarded the Fire District $5,368.88 in costs pursuant to Code of Civ. Proc. § 1032(b). On appeal, Williams asserted that no costs should have been awarded because his discrimination claim – though unsuccessful – was not "frivolous, unreasonable, or groundless." The Court of Appeal affirmed the award of costs to the employer on the ground that "ordinary costs are obtainable by the prevailing defendant as a matter of right, and they are not subject to [the standard set forth in] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978)." *Note also* Cal. Senate Bill No. 462 (amending Lab. Code § 218.5 to limit employer recovery of prevailing-party attorney's fees to cases in which the employee brought the action in "bad faith").

Discrimination Claims Were Barred By Statute Of Limitations

Acuna v. San Diego Gas & Elec. Co., 217 Cal. App. 4th 1402 (2013)

Esperanza Acuna filed three separate complaints against her employer (San Diego Gas & Electric) with the Department of Fair Employment and Housing ("DFEH"): One in March 2006 for racial discrimination and harassment and retaliation for filing a workers' compensation claim; one in February 2007 for disability discrimination; and one in October 2008 for retaliatory termination. Acuna filed her civil lawsuit in November 2009 (within one year of the date of the right-to-sue letter issued in response to her third DFEH complaint). SDG&E demurred to the complaint on the ground that it was barred by the one-year statute of limitations. The trial court sustained the demurrer without leave to amend and dismissed Acuna's lawsuit. The Court of Appeal affirmed dismissal of all claims except the claims for retaliation and wrongful termination, which the court determined had been timely filed. As to the dismissed claims, the Court rejected Acuna's argument that her 2006 and 2007 DFEH claims were saved either by the continuing violation or equitable tolling doctrines.

District Manager Was Properly Classified As Independent Contractor

Beaumont-Jacques v. Farmers Group, Inc., 217 Cal. App. 4th 1138 (2013)

Erin Beaumont-Jacques worked as a district manager for various insurance companies pursuant to a District Manager Appointment Agreement. After Beaumont-Jacques voluntarily terminated the relationship, she sued for breach of contract, breach of the implied covenant of good faith and faith dealing, sex discrimination and violation of Business and Professions Code § 17200 (all on the basis of her claim that she was really an employee and not an independent contractor). The trial court granted the insurance companies' motion for summary judgment after determining as a matter of law that Beaumont-Jacques was an independent contractor and not an employee. The Court of

Appeal affirmed, holding that Beaumont-Jacques exercised "meaningful discretion" in recruiting agents for and, when selected, training and motivating those agents to sell defendants' insurance products. *See also Happy Nails & Spa of Fashion Valley, L.P. v. Su*, 217 Cal. App. 4th 1459 (2013) (decision of the Cal. Unemp. Ins. App. Bd. that cosmetologists were independent contractors and not employees collaterally estopped the Labor Commissioner from assessing employment-related penalties); *Estrada v. City of Los Angeles*, 218 Cal. App. 4th 143 (2013) (volunteer police reserve officer was not an employee even though he received workers' compensation benefits from the city).

Whistleblower Employee Must Exhaust Administrative Remedies Before Suing For Retaliatory Discharge

MacDonald v. State of Cal., 2013 WL 4522792 (Cal. Ct. App. 2013)

Aaron MacDonald worked for the State of California and the California State Assembly and was fired shortly after complaining that one of his supervisors was "illegally and/or inappropriately smoking" at the office. In response, MacDonald sued for retaliatory discharge in violation of Labor Code § 1102.5 and retaliatory and discriminatory discharge in violation of Labor Code § 6310. Defendants demurred to MacDonald's complaint, and the trial court sustained the demurrers and dismissed the lawsuit. The Court of Appeal affirmed, holding that although Sections 1102.5 and 6310 are silent regarding administrative remedies, Labor Code § 98.7(a) provides in pertinent part that "Any person who believes that he or she has been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner may file a complaint with the division within six months after the occurrence of the violation." The Court concluded that even though the "administrative remedy is couched in permissive, as opposed to mandatory, language," where an administrative remedy is provided by statute, relief must be sought from the administrative body and that remedy exhausted before the courts will act. *See also Wade v. Ports Am. Mgmt. Corp.*, 218 Cal. App. 4th 648 (2013) (labor arbitration pursuant to a collective bargaining agreement had preclusive effect with respect to plaintiff's common law racial discrimination claim).

Bankrupt Employee Was Not Estopped From Prosecuting Undisclosed Discrimination Action

Quin v. County of Kauai Dep't. of Transp., 2013 WL 3814916 (9th Cir. 2013)

Kathleen M. Ah Quin contends that her employer (the Kauai Department of Transportation) discriminated against her because she is a woman. While pursuing her discrimination action, Quin filed for Chapter 7 bankruptcy protection and failed to list the lawsuit as an asset in her bankruptcy schedules where she was required to disclose same. After Quin's lawyer became aware of the potential effect of the bankruptcy proceeding – and after the district court was notified and vacated all dates and deadlines and scheduled a status conference – Quin moved to reopen her bankruptcy case in order to amend her bankruptcy schedules to list the pending lawsuit as an additional asset. The district court held that Quin was judicially estopped from proceeding with the discrimination lawsuit and granted summary judgment in favor of the employer. The United States Court of Appeals for the Ninth Circuit reversed (over a strong dissent from Circuit Judge Bybee), holding that the district court should not have applied a presumption of deceit on Quin's part (in not initially disclosing the existence of the

lawsuit) and should, instead, have inquired into whether the omission in the bankruptcy proceeding was in fact inadvertent or mistaken. *See also Smith v. Clark County School Dist.*, 2013 WL 4437599 (9th Cir. 2013) (employee provided sufficient explanations for the inconsistencies between her ADA disability claim and her Public Employees' Retirement System ("PERS") and FMLA claims to survive summary judgment).

PAGA Claims Cannot Be Aggregated To Satisfy Jurisdictional Minimum Required For Removal

Urbino v. Orkin Servs. of Cal., Inc., 2013 WL 4055615 (9th Cir. 2013)

John Urbino alleged in the form of a claim under the Private Attorneys General Act of 2004 ("PAGA") that Orkin illegally deprived him and other non-exempt employees of meal periods, overtime and vacation wages and accurate itemized wage statements. Defendants removed the action to federal court on the basis of diversity of citizenship between them and Urbino, contending that the violations identified by Urbino would give rise to claims involving 811 other employees who were issued at least 17,182 paychecks and that those claims in the aggregate could result in liability in excess of the jurisdictional minimum of $75,000. The district court found the PAGA claims to be common and undivided and therefore capable of aggregation, but the United States Court of Appeals for the Ninth Circuit vacated the lower court's order, holding that all of the rights at issue in the case are held individually and they can be redressed without the involvement of other employees: "Defendants' obligation to [the employees] is not 'as a group,' but as 'individuals severally.' Thus, diversity jurisdiction does not lie because their claims cannot be aggregated." *See also Rodriguez v. AT&T Mobility Servs. LLC*, 2013 WL 4516757 (9th Cir. 2013) (lead plaintiff's waiver of any claim in excess of the $5 million jurisdictional minimum under the Class Action Fairness Act was ineffective in light of *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013)).

Judgment In Favor Of Commissioned Sales Representative Is Upheld

Reilly v. Inquest Tech., Inc., 218 Cal. App. 4th 536 (2013)

Peter Reilly sued Inquest under the Independent Wholesale Representatives Contractual Relations Act of 1990, Civil Code § 1738.10, et seq. (the "Act"), which was created to protect sales representatives who receive commissions from, but who are not employed by, a manufacturer. The jury entered a general verdict in favor of Reilly, awarding him more than $2 million for owed commissions, and determined by a special findings verdict that Inquest had violated the terms of the Act by willfully failing to provide Reilly with a written contract. Pursuant to the Act's penalty provisions, the trial court awarded Reilly treble damages. The Court of Appeal affirmed the judgment, holding that the Act did apply (Inquest did not oppose Reilly's motion for summary adjudication on this issue) and that there was sufficient evidence that Inquest breached a contract with Reilly.

Wage Claims Were Not Barred By Statute Of Limitations

Bain v. Tax Reducers, Inc., 2013 WL 4542681 (Cal. Ct. App. 2013)

Harold Bain sued Tax Reducers, Inc. ("TRI") for unpaid minimum wages, expenses and waiting time penalties. TRI contended that Bain was an independent contractor and not an employee of TRI. In an earlier administrative proceeding, the Labor Commissioner determined that Bain was an employee and awarded him $15,105.86. In a subsequent trial, the Court also determined that Bain was an employee and that his claims were governed by the three-year statute of limitations (applicable to statutory claims) and that the claims were not barred by the statute of limitations because TRI had agreed to pay wages as part of a settlement agreement. The trial court found in the alternative that Bain could rely upon the doctrine of equitable tolling. The Court of Appeal struck $7,700 in liquidated damages from the judgment on the basis of a one-year statute of limitations but otherwise affirmed it. The Court further held the action was not barred by the three-year statute of limitations; that TRI intentionally withheld Bain's wages (subjecting it to waiting-time penalties under Labor Code § 203); that Bain was an employee and not an independent contractor; and that the trial court correctly dismissed Bain's wage claims against TRI's president and majority shareholder, James Brooks Griffin, on the ground that Griffin was not Bain's employer and could not be held personally liable for failing to pay Bain's wages. *See also Farmers Ins. Exch. v. Superior Court*, 218 Cal. App. 4th 96 (2013) (California Supreme Court's act of depublishing an appellate court opinion on which a prior court order relied can constitute a "change of law" within the meaning of Code of Civ. Proc. § 1008(c)).

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Contacts

Harold M. Brody, Partner
310.284.5625 – hbrody@proskauer.com

Enzo Der Boghossian, Partner
310.284.4592 – ederboghossian@proskauer.com

Anthony J. Oncidi, Partner
310.284.5690 – aoncidi@proskauer.com

Kenneth Sulzer, Partner
310.284.5663 – ksulzer@proskauer.com

Mark Theodore, Partner
310.284.5640 – mtheodore@proskauer.com

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