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By **Anthony J. Oncidi***

California Employment Law Blog

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$300,000 In Punitive Damages Upheld In Sexual Harassment Case Despite Nominal Damages Award

State of Arizona v. ASARCO LLC, 2014 WL 6918577 (9th Cir. 2014) (*en banc*)

Angela Aguilar who worked in a copper mine for approximately 11 months claimed she was sexually harassed, retaliated against, subjected to intentional infliction of emotional distress and was constructively terminated from her employment. After an eight-day trial, the jury found ASARCO liable on Aguilar's sexual harassment claims in violation of Title VII of the Civil Rights Act but not on her constructive termination or retaliation claims. The jury awarded Aguilar $1 in nominal damages and $868,750 in punitive damages. The district court reduced the award to $300,000 based on the statutory cap found in 42 U.S.C. § 1981a(b)(3)(D). ASARCO argued in this appeal that the 300,000-to-1 ratio of punitive to compensatory damages violated its due process rights under *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). Although conceding that "*Gore* is undeniably of some relevance in this context," the United States Court of Appeals for the Ninth Circuit distinguished *Gore* on the ground that Aguilar (unlike the plaintiff in *Gore*) had "asserted a claim under a statute, Title VII, which includes a carefully crafted provision, § 1981, that imposes a cap on punitive damages" and, therefore, the due process issues raised in *Gore* do not apply to employment discrimination claims brought under Title VII. The Court also noted that the district court had instructed the jury that it could not award more than $1 in nominal damages to Aguilar. Finally, the Court found no error in the district court's admission of evidence of sexually explicit graffiti found in the bathrooms that was similar to the graffiti directed at Aguilar and affirmed an award to Aguilar of $350,902.75 in attorney's fees and costs.

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Employee Who Was Sued By Former Employer Collects $271,000 From Employer

Pacific Corp. Group Holdings, LLC v. Keck, 2014 WL 7012380 (Cal. Ct. App. 2014)

PCGH sued its former employee, Thomas Keck, to collect on an unpaid promissory note. Keck defended against the action by claiming that any money he owed PCGH was offset by monies PCGH owed him for unpaid bonus and severance payments due under two employment agreements he had with PCGH. In a special verdict, the jury found that PCGH owed Keck $270,547.95 under the terms of a 2006 employment agreement. PCGH filed a motion for judgment notwithstanding the verdict or for new trial, and Keck filed a motion for additur or in the alternative for a new trial on damages on the ground that the jury had awarded him inadequate damages. The trial court granted Keck's motion and issued an additur and a conditional order granting a new trial on damages to which PCGH refused to consent. Both parties filed motions for attorneys' fees, which the trial court denied. Both parties filed appeals, but because the trial court's order granting a new trial on damages resulted in a vacatur of the underlying judgment, the Court of Appeal concluded that it lacked appellate jurisdiction to consider the parties' appeals and, thus, affirmed the trial court's orders and remanded the matter to the trial court with directions to conduct a new trial on damages. *See also Danko v. O'Reilly*, 2014 WL 7201693 (Cal. Ct. App. 2014) (adding name law firm partner as additional judgment debtor in former law firm attorney's successful breach of contract action did not violate bankruptcy stay or doctrines of res judicata or collateral estoppel).

School Teacher With Breast Cancer Could Proceed With Disability Discrimination Lawsuit

Swanson v. Morongo Unified School Dist., 2014 WL 7399317 (Cal. Ct. App. 2014)

Lauralyn Swanson was a teacher for the Yucca Valley Elementary School who was diagnosed with breast cancer and underwent a mastectomy. After the district's board of education voted not to renew Swanson's contract, Swanson sued for discrimination based on medical condition, denial of reasonable accommodation and refusal to engage in the interactive process. The trial court granted the school district's motion for summary judgment, but the Court of Appeal reversed, holding that triable issues of fact existed with respect to Swanson's claims. Specifically, the Court held there was evidence that once Swanson informed the school district of her breast cancer and took a medical leave of absence to receive treatment, the district began a course of conduct designed "to set her up for failure by giving her difficult assignments without the resources required to succeed so that the district later could use Swanson's performance as a pretext for its decision not to renew her contract." The Court further held that the school district failed to meet its burden to negate an essential element of Swanson's failure to accommodate claim because it did not present evidence showing the second grade position Swanson sought was not available or otherwise was not a reasonable accommodation or that the positions the school district did offer to Swanson were reasonable accommodations that would have allowed her to adequately perform the essential job functions. The Court also held that the school district failed to present any evidence to show it engaged Swanson in an interactive dialogue as required under the Fair Employment and Housing Act. *Compare Curley v. City of N. Las Vegas*, 772 F.3d 629 (9th Cir. 2014) (employee's long history of verbal altercations with coworkers, threats to supervisors and performance

deficiencies constituted legitimate, nondiscriminatory reasons for termination, notwithstanding his allegations of being disabled by a hearing impairment and being retaliated against for having filed a previous EEOC complaint).

Employee Could Proceed With Whistleblower Claim Based On Suspected Commercial Bribery

Ferrick v. Santa Clara Univ., 231 Cal. App. 4th 1337 (2014)

Linda Ferrick, a former senior administrator for Santa Clara University, claimed the termination of her employment resulted from her reporting that her supervisor had engaged in what Ferrick believed to be commercial bribery as part of a "kickback scheme." The trial court sustained the university's demurrer and dismissed the lawsuit because Ferrick had failed to allege that her discharge violated any fundamental public policy, but the Court of Appeal reversed, holding that Ferrick had a reasonable basis to suspect commercial bribery in violation of Cal. Pen. Code § 641.3. The Court further held that the supervisor's suspected engagement in commercial bribery did not affect just the university's private interest, but also the public policy embodied in Cal. Lab. Code § 1102.5. However, the Court found there to be no reasonably based suspicion on Ferrick's part that her supervisor had engaged in embezzlement; violation of an administrative regulation; violation of the California Vehicle Code; violation of workplace health and safety hazards (by driving a golf cart without a license); or violation of the California False Claims Act. *See also Johnson v. City of Shelby*, 574 U.S. ___, 135 S. Ct. 346 (2014) (*per curiam*) (police officers claiming retaliation in violation of their Fourteenth Amendment due process rights need not have expressly invoked 42 U.S.C. § 1983 to avoid dismissal); *Tamosaitis v. URS Inc.*, 771 F.3d 539 (9th Cir. 2014) (whistleblower employee who worked at a nuclear energy site failed to exhaust administrative remedies under the Energy Reorganization Act as to some defendants but could proceed with claims against another who received adequate notice; as to that defendant, there was adequate evidence to defeat summary judgment; and employee was entitled to jury trial).

Employee Could Proceed With Whistleblower Lawsuit Based On Employer's Mistaken Belief She Had Complained

Diego v. Pilgrim United Church of Christ, 231 Cal. App. 4th 913 (2014)

Cecilia Diego, the former assistant director of Pilgrim United's preschool, sued her former employer for retaliation in violation of public policy that resulted from the director's mistaken belief that Diego had lodged a complaint with the California Department of Social Services, which resulted in an unannounced inspection of the preschool. The trial court granted summary judgment in favor of Pilgrim United on the ground that Diego had not in fact made a complaint to the state. The Court of Appeal reversed, holding that although former Cal. Lab. Code § 1102.5 did not expressly protect "perceived whistleblowers" such as Diego, termination of an employee under such circumstances would nonetheless constitute a violation of public policy. The Court further held there were disputed issues of fact regarding Pilgrim United's motivation in terminating Diego that precluded summary judgment. *See also Satyadi v. West Contra Costa Healthcare Dist.*, 2014 WL 7448256 (Cal. Ct. App. 2014) (amendments to California Labor Code

involving exhaustion of administrative remedies prior to filing claim under Cal. Lab. Code § 1102.5 merely clarified existing law and therefore apply retroactively).

Time Spent By Warehouse Workers In Security Screening Is Not Compensable Under Fair Labor Standards Act

Integrity Staffing Solutions, Inc. v. Busk, 574 U.S. ___, 2014 WL 6885951 (2014)

The employer in this case, Integrity Staffing Solutions, Inc., provides staffing to Amazon.com throughout the United States. Plaintiffs Jesse Busk and Laurie Castro worked as hourly employees retrieving and packaging products at Integrity Staffing warehouses in Nevada. Integrity Staffing required its employees to undergo a screening before leaving the warehouse at the end of each day. Busk and Castro filed a putative class action against Integrity Staffing on behalf of similarly situated employees for violations of Nevada state law and the federal Fair Labor Standards Act ("FLSA"), alleging they were entitled to compensation for time spent waiting to undergo and actually undergoing security screenings to prevent employee thefts at the end of their shifts – they alleged the screenings amounted to roughly 25 minutes per day. In a unanimous opinion, the United States Supreme Court held that the security screenings at issue here are "noncompensable postliminary activities" because the screenings were not the principal activity that the employees were employed to perform nor were they "integral and indispensable" to the employees' duties as warehouse workers. *See also Landers v. Quality Communications, Inc.*, 771 F.3d 638 (9th Cir. 2014) (putative FLSA class action was properly dismissed on the pleadings where plaintiff failed to allege facts showing there was a specific week in which he was entitled to but denied minimum or overtime wages).

Employee Recovers $131,000 For Unpaid Wages Against Former Employer

Tabarrejo v. Superior Court, 2014 WL 7335417 (Cal. Ct. App. 2014)

Manuel Tabarrejo was employed as a caregiver by Princess Retirement Homes, Inc. ("PRH"). After Tabarrejo left his employment with PRH, he filed a claim with the Labor Commissioner for unpaid wages and other wage-related claims and was awarded $131,096.77. PRH appealed the Labor Commissioner's order and posted an undertaking as required by Cal. Lab. Code § 98.2. Tabarrejo moved to dismiss the appeal on the ground that PRH was a suspended corporation that lacked the capacity to sue. The trial court granted Tabarrejo's motion to dismiss. When PRH failed to pay the amount due to Tabarrejo within 10 days, he asked the court to release the undertaking to him. The trial court concluded that PRH did not have standing to file the appeal and ordered the release of the undertaking to PRH's owners. The Court of Appeal issued a preemptory writ of mandate directing the trial court to vacate its order granting PRH's request for return of the cash deposit and to enter a new order denying PRH's request for return of the cash deposit and granting Tabarrejo's request to disburse the undertaking to him. Tabarrejo also is to be awarded the costs and attorney's fees he incurred in connection with this writ proceeding.

Trial Court Should Have Certified Class Claims Of Managerial Employees

Martinez v. Joe's Crab Shack Holdings, 231 Cal. App. 4th 362 (2014)

Roberto Martinez and three other current or former employees of Joe's Crab Shack ("JCS") filed this putative class action asserting that they and similarly situated salaried managerial employees had been misclassified as exempt employees and were entitled to unpaid overtime and related wages. Plaintiffs alleged they worked more than 55 hours per week and that JCS's hiring and training practices, operations manuals, managerial evaluations, policies and procedures, etc., were all uniform and that when nonexempt employees were absent, plaintiffs were required to fill in for them. Plaintiffs claimed they spent from 50 to 95 percent of their time performing nonexempt duties. Defendants submitted declarations (more than half of which came from general managers) showing variation in the ways the putative class members were treated and stating that only a third or less of their time was spent on nonexempt duties. The trial court denied certification based on plaintiffs' inability to estimate the number of hours spent on individual exempt and nonexempt tasks and their admission that the amount of time spent on particular tasks varied from day to day. The Court of Appeal reversed, holding that the class is adequately represented by plaintiffs and that the trial court's "analysis suffers from an overly focused examination of the facts that concentrated on individual differences rather than commonality." Further, the Court held that "the crux of the matter, therefore, lies in whether a typically nonexempt task becomes exempt when performed by a managerial employee" based on the employer's realistic expectations and classification of tasks rather than an employee's recollection in retrospect of whether he or she was engaged in an exempt or nonexempt task.

Trial Court Properly Denied Class Certification For Unpaid Meal Break Claims

In re Walgreen Co. Overtime Cases, 231 Cal. App. 4th 437 (2014)

The putative class members in this case moved for class certification on the theory that although Walgreens's stated policy on meal breaks was proper, its actual practice departed from its stated policy in an illegal and class wide way. The trial court denied class certification, and the Court of Appeal affirmed, holding that the evidence was too weak to support certification, including a declaration from plaintiffs' expert statistician (he incorrectly assumed a Labor Code violation every time a worker did not take a break) and declarations from the putative class members themselves that were "unreliable" and largely recanted during the witnesses' depositions: "There is nothing attractive about submitting form declarations contrary to the witnesses' actual testimony. This practice corrupts the pursuit of truth." *See also Koval v. Pacific Bell Tel. Co.*, 2014 WL 7447715 (Cal. Ct. App. 2014) (uniform policies governing meal and rest breaks that were disseminated orally by line supervisors varied so widely – creating a "shifting kaleidoscope of liability determinations" – that class certification was properly denied).

Employer Properly Challenged CUIAB's Determination That Worker Was Not An Independent Contractor

West Hollywood Cmty. Health & Fitness Ctr. v. CUIAB, 2014 WL 6852700 (Cal. Ct. App. 2014)

After leaving his job as a massage therapist at West Hollywood Community Health & Fitness Center (d/b/a "Voda Spa"), Mario Serban applied for unemployment benefits. The Employment Development Department sent Voda Spa a letter indicating that Serban had been an employee (and not an independent contractor) and that he had good cause to leave work, thus rendering him eligible for unemployment benefits. The California Unemployment Insurance Appeals Board ("CUIAB") affirmed the administrative law judge's ruling in favor of Serban, and Voda Spa sought administrative mandamus in court to challenge the decision. The trial court heard Voda Spa's challenge to the conclusion that Serban had good cause to leave his work, but granted the CUIAB's motion to strike all allegations challenging its determination concerning Serban's employment status (based on the argument that a court cannot hear an action whose purpose is to prevent the collection of state taxes). The Court of Appeal reversed the trial court's striking of the challenge to the CUIAB's determination of Serban's employment status and held that "in contrast to a challenge to a tax decision, a party may challenge a benefit decision."

Immigrant Who Used Someone Else's SSN To Obtain Employment Was Properly Deported To Mexico

Ibarra-Hernandez v. Holder, 770 F.3d 1280 (9th Cir. 2014)

Gloria Ibarra-Hernandez, a native and citizen of Mexico, sought review of a final order of removal from the United States after the Board of Immigration Appeals (the "Board") held that she was ineligible for cancellation of removal following her conviction for taking the identity of another in violation of Arizona state law. Ibarra-Hernandez admitted at a change of plea hearing that she had used a real person's identity without that person's knowledge or consent to obtain employment. The United States Court of Appeals for the Ninth Circuit concluded that the "Board reasonably held that stealing a real person's identity for the purpose of obtaining employment is inherently fraudulent and therefore it involves moral turpitude," rendering her ineligible for cancellation of removal.

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