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By **Anthony J. Oncidi***

California Employment Law Blog

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Franchisor Is Not Liable For Franchisee's Alleged Sexual Harassment Of Its Employee

Patterson v. Domino's Pizza, LLC, 2014 WL 4236175 (Cal. S. Ct. 2014)

Taylor Patterson was hired by Sui Juris (a franchisee of Domino's Pizza) to serve customers at its store. Patterson alleged that she was sexually harassed by Renee Miranda, an adult male who held the title of assistant manager of the Sui Juris store. In her complaint, Patterson alleged that she and Miranda were employed by Domino's (the franchisor). Domino's filed a motion for summary judgment on the grounds that the franchise contract stated there was no "principal and agent" relationship between it and the franchisee and Domino's disclaimed "any relationship with Sui Juris's employees" and assumed "no rights, duties, or responsibilities" as to their employment. The trial court granted summary judgment in favor of Domino's, but the court of appeal reversed. In this (4-to-3) opinion, the California Supreme Court reversed the court of appeal and reinstated summary judgment in favor of Domino's on the ground that "the imposition and enforcement of a uniform marketing and operational plan cannot *automatically* saddle the franchisor with responsibility for employees of the franchisee who injure each other on the job." *See also Carlton v. Dr. Pepper Snapple Group, Inc.*, 2014 WL 3955885 (Cal. Ct. App. 2014) (breach of contract action filed against employer by male employee who was terminated after showing sexually explicit photo to a female employee was properly dismissed).

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Employer Properly Deducted Hours From Exempt Employee's Leave Bank

Rhea v. General Atomics, 227 Cal. App. 4th 1560 (2014)

Lori Rhea is an exempt employee of General Atomics who receives a salary and accrues comprehensive annual leave ("Annual Leave") that can be used by employees to take paid time off for any reason, including vacation, sickness, medical appointments, family obligations and leisure pursuits. The amount of Annual Leave that accrues depends on the employee's length of service and ranges from 15 to 32 days per year. General Atomics' policy has been to deduct from Annual Leave for partial-day absences of any length – though an employee who is absent for a full or partial day is not required to use Annual Leave if during the same week the employee works a total of 40 hours. Rhea filed this putative class action on behalf of herself and other exempt employees who were subject to Annual Leave deductions for partial-day absences of less than four hours. The trial court granted General Atomics' summary judgment motion on the ground that California law does not prohibit requiring exempt employees to use Annual Leave for partial-day absences of any length. The Court of Appeal affirmed, holding that the policy did not create an illegal forfeiture and that prior case law does not limit such deductions to instances in which the partial-day absence is at least four hours in duration.

Police Officer's ADHD Was Not A Disability Within The Meaning Of The ADA

Weaving v. City of Hillsboro, 2014 WL 3973411 (9th Cir. 2014)

Matthew Weaving worked as a police officer for the City of Hillsboro for approximately three years before his employment was terminated due to "severe interpersonal problems" between him and other employees of the police department. Weaving contended that his interpersonal problems resulted from his attention deficit hyperactivity disorder ("ADHD") and that his termination violated the Americans with Disabilities Act ("ADA"). After the case went to a jury, which found in Weaving's favor, the City filed a motion for judgment as a matter of law based on insufficient evidence to support the verdict. The district court denied the City's motion, but the United States Court of Appeals for the Ninth Circuit reversed, holding that a jury could not reasonably have concluded that Weaving's ADHD substantially limited his ability to work or interact with others and, therefore, he was not disabled within the meaning of the ADA. *See also Chubb & Son v. Superior Court*, 2014 WL 3919614 (Cal. Ct. App. 2014) (no error in trial court's permitting parties to disclose to their respective attorneys privileged documents in connection with former in-house counsel's disability discrimination lawsuit).

Alleged Whistleblower Could Proceed With Wrongful Termination Claim

Yau v. Santa Margarita Ford, Inc., 2014 WL 4198060 (Cal. Ct. App. 2014)

Eddie Yau, a service manager for Santa Margarita Ford, alleged he was terminated after complaining to his general manager and the owner of the Ford dealership that fraudulent warranty repair claims were being submitted to Ford. Yau alleged that his termination implicated state statutes proscribing theft and fraud. The trial court sustained defendants' demurrers, but the Court of Appeal reversed in part, holding that Yau's allegations were of sufficient "public" importance to support a claim of public policy violation – even though Yau "reluctantly complied" with the allegedly illegal directions of his supervisor when he signed warranty claims he believed were "suspicious." The Court of Appeal affirmed dismissal of Yau's claim for intentional infliction of emotional distress on the ground that it was barred by the exclusivity provisions of the Workers' Compensation Act. *See also Hager v. County of Los Angeles*, 2014 WL 4078248 (Cal. Ct. App. 2014) (sheriff's deputy properly obtained verdict in whistleblower lawsuit even though his may not have been the "first report" of wrongdoing, but evidence did not support $2 million economic damages award); *Thomas v. County of Riverside*, 2014 WL 4056546 (9th Cir. 2014) (lower court improperly disregarded evidence of multiple adverse employment actions that a jury might conclude deterred protected speech); *Shaw v. Superior Court*, 2014 WL 4102480 (Cal. Ct. App. 2014) (whistleblower asserting Health & Safety Code § 1278.5 claim is entitled to a jury trial); *Van Asdale v. International Game Tech.*, 2014 WL 3973388 (9th Cir. 2014) (prevailing Sarbanes-Oxley plaintiffs are entitled to post-judgment interest at the rate set forth in 28 U.S.C. § 1961 rather than 26 U.S.C. § 6621).

LAPD Officer Properly Prevailed In FLSA Anti-Retaliation Claim

Avila v. Los Angeles Police Dep't, 2014 WL 3361123 (9th Cir. 2014)

Leonard Avila, a police officer with the Los Angeles Police Department, periodically worked through his lunch breaks and did not claim overtime. After Avila testified in a lawsuit brought by another officer who sought overtime under the Fair Labor Standards Act (FLSA), Avila was ordered to appear before the LAPD Board of Rights ("BOR"), a disciplinary review body. The BOR found Avila guilty of insubordination and recommended that he be fired, which the Chief of Police subsequently ordered as a result of his insubordination for failing to claim overtime. Avila then filed this lawsuit under the anti-retaliation provision of the FLSA, and a jury found in his favor. In this appeal, the City argued that the BOR recommendation that Avila's employment be terminated precluded his FLSA retaliation claim. The United States Court of Appeals for the Ninth Circuit rejected this argument on the ground that the BOR never addressed the issue of retaliation by the LAPD so there was no issue preclusion. The Court of Appeals also found no instructional error by the trial court. Finally, the Court affirmed an award of $547,400 in attorney's fees to Avila. *See also Kaufman v. Diskeeper Corp.*, 2014 WL 4102376 (Cal. Ct. App. 2014) (party seeking attorney's fees pursuant to Civil Code § 1717 need not, in addition to filing a noticed motion, file a memorandum of costs).

Employees Could Proceed With Malicious Prosecution Action Against Former Employer's Counsel

Parrish v. Latham & Watkins LLP, 2014 WL 4220542 (Cal. Ct. App. 2014)

In a prior litigation, FLIR Systems, Inc., and Indigo Systems Corp. (collectively, "FLIR") brought suit against their former employees, William Parrish and E. Timothy Fitzgibbons (the "Former Employees"), for, among other things, misappropriation of trade secrets. The Former Employees defeated the claims and then obtained a ruling that the misappropriation of trade secrets claim had been brought against them in bad faith, which resulted in an order that FLIR pay the Former Employees their attorney's fees and costs in an amount exceeding $1.6 million. Thereafter, the Former Employees brought this malicious prosecution claim against FLIR's attorneys (Latham & Watkins LLP), which Latham moved to strike under the anti-SLAPP statute (Cal. Civ. Proc. Code § 425.16). The trial court granted Latham's motion, but the Court of Appeal reversed, holding that the Former Employees had established a probability of prevailing on the merits because the action was not barred by the statute of limitations and because there was evidence of a lack of probable cause for prosecuting the underlying action. *See also Gotterba v. Travolta*, 228 Cal. App. 4th 35 (2014) (anti-SLAPP motion filed in response to declaratory relief action that was filed following receipt of attorney's letters threatening litigation over a contract dispute was properly denied).

Trial Court Should Not Have Denied Class Certification To Employees Seeking Reimbursement For Cell Phone Charges

Cochran v. Schwan's Home Serv., Inc., 2014 WL 3965240 (Cal. Ct. App. 2014)

Colin Cochran filed this putative class action on behalf of himself and 1,500 similarly situated customer service managers who were not reimbursed for expenses pertaining to the work-related use of their personal cell phones. The trial court denied class certification to the putative class based upon a lack of commonality because "individualized inquiries of the class members' cell phone plans and payments are necessary to determine liability." The Court of Appeal reversed on the ground that reimbursement is always required regardless of whether the employees incurred an extra expense that they would not otherwise have incurred absent the job. "Thus, to be in compliance with [Labor Code] section 2802, the employer must pay some reasonable percentage of the employee's cell phone bill." The Court conceded that "[d]amages, of course, raise issues that are more complicated." *See also Hendershot v. Ready to Roll Transport*, 2014 WL 3956777 (Cal. Ct. App. 2014) (trial court improperly considered the merits of defendant's affirmative defenses in concluding that putative class lacked numerosity).

Alzheimer's Patients Are Not Liable For Injuries They May Inflict On Home Health Care Workers

Gregory v. Cott, 2014 WL 3805478 (Cal. S. Ct. 2014)

Carolyn Gregory was injured while providing in-home care for Lorraine Cott, an Alzheimer's disease patient. Gregory received workers' compensation benefits but sued the Cotts for negligence and premises liability and asserted a claim against Lorraine for battery. The trial court granted a defense motion for summary judgment based on the primary assumption of risk doctrine. The California Court of Appeal and California Supreme Court affirmed, holding that "it is [Gregory's] occupation to care for Alzheimer's patients. We do not hold that *anyone* who helps with such patients assumes the risk of injury. The rule we adopt is limited to professional home health care workers who are trained and employed by an agency." *See also LeFiell Mfg. Co. v. Superior Court*, 2014 WL 3855046 (Cal. Ct. App. 2014) (Labor Code § 4558, which provides an exception to workers' compensation exclusivity where there has been a knowing removal by the employer of a point of operation guard on a power press, did not apply in this case).

Unfair Competition Claim Against Trucking Company Is Not Preempted By Federal Law

People v. Pac Anchor Transp., Inc., 2014 WL 3702674 (Cal. S. Ct. 2014)

The People on behalf of the State of California filed this unfair competition law ("UCL") action against Pac Anchor Transportation, Inc., for misclassifying drivers as independent contractors and for other alleged violations of California labor and unemployment insurance laws. In response, Pac Anchor filed a motion for judgment on the pleadings on the ground that the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") preempted the People's claims. The California Supreme Court held that the FAAAA does not preempt the UCL action, noting that the "People's sole premise for invoking the UCL is to ensure that employers properly classify their employees or independent contractors in order to conform to state law." *See also Dilts v. Penske Logistics, LLC*, 2014 WL 3291749 (9th Cir. 2014) (claims by drivers suing for violations of California meal and rest break laws were not preempted by the FAAAA because the state laws at issue are not related to "prices, routes, or services").

FedEx Drivers Are Employees Not Independent Contractors

Alexander v. FedEx Ground Package Sys., Inc., 2014 WL 4211107 (9th Cir. 2014)

In this class action, the named plaintiffs represent approximately 2,300 individuals who were full-time delivery drivers for FedEx in California between 2000 and 2007. FedEx characterizes its drivers as independent contractors in its Operating Agreement. Similar cases to this one were filed in approximately 40 states, and the Judicial Panel on Multidistrict Litigation consolidated these cases for multidistrict litigation ("MDL") in the District Court for the Northern District of Indiana. The MDL Court certified a class for plaintiffs' claims under California law and subsequently granted FedEx's motions for summary judgment, holding that plaintiffs were independent contractors as a matter of law in each state (including California) where employment status is governed by common-law agency principles. In this opinion, the United States Court of Appeals for the

Ninth Circuit reversed the summary judgment that was granted to FedEx and ordered, instead, that summary judgment be entered in favor of plaintiffs. The Court based its decision on the ground that the "Operating Agreement grants FedEx a broad right to control the manner in which its drivers perform their work. The most important factor of the right-to-control test thus strongly favors employee status."

Employees Of Electrical/Gas Company Are Not Entitled To Off-Duty Meal Periods

Araquistain v. Pacific Gas & Elec. Co., 2014 WL 4227872 (Cal. Ct. App. 2014)

Plaintiffs Ignacio Araquistain, David Page and Douglas Girouard are non-exempt, unionized employees of PG&E, which is an "electrical corporation" and a "gas corporation" within the meaning of Labor Code § 512(f)(4). The operative collective bargaining agreement states that "shift employees and other employees whose workday consists of eight consecutive hours shall be permitted to eat their meals during work hours and shall not be allowed additional time therefore [sic] at Company expense." In this action, plaintiffs alleged that PG&E is required to provide off-duty meal breaks to its employees, notwithstanding the contrary provision contained in the collective bargaining agreement. The Court of Appeal affirmed summary judgment in favor of PG&E, holding that a collective bargaining agreement providing that employees shall be permitted to eat their meals during work hours "expressly provides for meal periods for those employees" as required by Labor Code § 512(e)(2).

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