Proskauer

newsletter

July 2015
Vol. 14, No. 4

By **Anthony J. Oncidi***

California Employment Law Blog

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Employee's Inability To Work For A Particular Supervisor Does Not Constitute A "Disability"

Higgins-Williams v. Sutter Med. Found., 237 Cal. App. 4th 78 (2015)

Michaelin Higgins-Williams worked as a clinical assistant in Sutter's Shared Services Department. Higgins-Williams reported to her treating physician that she was stressed because of interactions at work with human resources and her manager. Her physician diagnosed Higgins-Williams with "adjustment disorder with anxiety," and Sutter granted her a stress-related leave of absence of slightly more than 30 days. After returning from the leave of absence, Higgins-Williams received a negative performance evaluation and had additional conflicts with her manager. Shortly thereafter, she submitted a disability accommodation request form in which she sought a transfer to a different department and an additional leave of absence. Following additional leaves of absence, which extended for more than a year, Sutter eventually terminated Higgins-Williams' employment. In her lawsuit, Higgins-Williams alleged disability discrimination, wrongful termination and related claims. The trial court granted the employer's motion for summary judgment, and the Court of Appeal affirmed on the ground that Higgins-Williams was not disabled because "an employee's inability to work under a particular supervisor because of anxiety and stress related to the supervisor's standard oversight of the employee's job performance does not constitute a mental disability under FEHA." Because Higgins-Williams had failed to indicate to the employer when or if she could return to work, her claim for violation of the CFRA/FMLA was also properly dismissed. *See also Roman v. BRE Properties, Inc.*, 2015 WL 3767790 (Cal. S. Ct. 2015) (unsuccessful plaintiffs in housing disability discrimination lawsuit may not be liable for defendant's costs under the FEHA).

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Muslim Applicant Can Proceed With Religious Discrimination Lawsuit

EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. ___, 135 S. Ct. 2028 (2015)

Samantha Elauf, a practicing Muslim, wore a headscarf when she interviewed for a job with Abercrombie & Fitch. Although the headscarf was not discussed during the interview, the store allegedly decided not to offer Elauf a position after speculating that Elauf had probably worn the headscarf for religious reasons and concluding that the headscarf would violate the store's "Look Policy," which prohibits the wearing of "caps" as too informal for Abercrombie's desired image. The EEOC, which sued Abercrombie on Elauf's behalf, obtained summary judgment from the district court based on its claim that the store had violated Title VII by refusing to hire Elauf. The appellate court reversed the district court on the ground that an employer cannot be liable under Title VII for failing to accommodate a religious practice until the applicant or employee provides the employer with actual knowledge of his or her need for an accommodation. In this opinion, the United States Supreme Court reversed the court of appeals and held that in order to prevail in a disparate treatment claim, an applicant must show only that his or her need for an accommodation was a motivating factor in the employer's decision – not that the employer had actual knowledge of the need for an accommodation.

Unpaid Interns Who Are "Primary Beneficiaries" Of The Relationship Are Not Employees Under The FLSA

Glatt et al. v. Fox Searchlight Pictures, Inc. et al., 2015 WL 4033018 (2d Cir. 2015)

Plaintiffs Eric Glatt and Alexander Footman were retained as unpaid interns on the Fox Searchlight-distributed film *Black Swan*; Plaintiff Eden Antalik interned at Fox Searchlight's corporate offices in New York City. Glatt and Footman sued for unpaid wages (minimum wage and overtime) under the federal Fair Labor Standards Act ("FLSA") and the New York Labor Law, while Antalik moved to certify a class of unpaid interns who were retained at certain Fox corporate divisions in New York and a nationwide FLSA collective of unpaid interns retained by those same divisions nationwide. The district court granted summary judgment in favor of Glatt and Footman, concluding they had been improperly classified as unpaid interns rather than employees, and granted Antalik's motions to certify the class of New York interns and to conditionally certify the nationwide FLSA collective. The United States Court of Appeals for the Second Circuit reversed the district court, holding that the proper question is whether the intern/employee in question is the "primary beneficiary" of the relationship. The Court of Appeals concluded that in the context of unpaid internships, a "non-exhaustive set of considerations" should be used, including the reasonable expectations of the parties, the training opportunities available to the intern, the connection to a formal education program, the limited duration of the relationship, etc., and that "no one factor is dispositive and every factor need not point in the same direction…" The Court also reversed the certification of the class and the FLSA collective because the district court had "misconstrued our standards for determining when common questions predominate over individual ones." *See also Wang v. The Hearst Corp.*, 2015 WL 4033091 (2d Cir. 2015) (same).

Independent Contractor Can Proceed With Sexual Harassment Claim Against City

Hirst v. City of Oceanside, 236 Cal. App. 4th 774 (2015)

Kimberli Hirst, an employee of American Forensic Nurses, Inc., sued the City of Oceanside after she was allegedly sexually harassed by an Oceanside police officer while providing phlebotomist services on behalf of the Oceanside Police Department. A jury awarded Hirst $1.5 million, which the trial court reduced to $1.25 million. In its motion for judgment notwithstanding the verdict ("JNOV"), the City asserted that Hirst was not a City employee, special employee or "person providing services pursuant to a contract." The trial court denied the City's JNOV motion, and the Court of Appeal affirmed, holding that Hirst was a "person providing services pursuant to a contract" as defined in Cal. Gov't Code § 12940(j)(1) even though she was not herself an independent contractor, but an employee of a business that had entered into a contract with the City.

Department of Corrections Did Not Discriminate Against Male Applicants By Hiring Female Guards In Women's Prisons (*Orange Really Is The New Black!*)

Teamsters Local Union No. 117 v. Washington Dep't of Corrections, 2015 WL 3634711 (9th Cir. 2015)

In the face of repeated instances of sexual abuse and misconduct by prison guards in its women's prisons, the state of Washington determined that a primary driver was the lack of female correctional officers to oversee female offenders and administer sensitive tasks such as observing inmates showering and dressing and performing pat-downs and strip searches. The state undertook a comprehensive assessment and ultimately designated a limited number of female-only correctional positions. In response, the prison guards' union, Teamsters Local No. 117, challenged the number of positions reserved for females (claiming it should be no more than 50 instead of 110) and claimed discrimination based upon sex in violation of Title VII. The district court granted summary judgment in favor of the state, and the United States Court of Appeals for the Ninth Circuit affirmed, holding that "the Department was well-justified in concluding that rampant abuse should not be an accepted part of prison life and taking steps to protect the welfare of inmates under its care."

Malicious Prosecution Action Against Employer's Law Firm Was Properly Dismissed

Parrish v. Latham & Watkins LLP, 2015 WL 3933988 (Cal. Ct. App. 2015)

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 the motion, and the Court of Appeal affirmed, but on different grounds – holding that pursuant to the interim adverse judgment rule, the denial of a dispositive motion on the merits in the underlying action (in this case, a summary judgment motion) established the existence of probable cause and precluded a subsequent malicious prosecution action. *See also Castaneda v. Superior Court*, 2015 WL 3892154 (Cal. Ct. App. 2015) (law firm of attorney who served as a settlement officer in the Los Angeles Superior Court's CRASH program is disqualified from subsequent representation of one of the parties that participated in the program with the attorney in question).

Employer Properly Withheld Taxes From Payment Of Judgment Amount

Cifuentes v. Costco Wholesale Corp., 2015 WL 3932948 (Cal. Ct. App. 2015)

Carlos Cifuentes won a judgment for lost wages against his former employer, Costco. Costco withheld federal and state payroll taxes from the award in response to which Cifuentes claimed the judgment was not satisfied, citing a 1992 appellate court opinion holding that an employer is not required to withhold payroll taxes from an award of lost wages to a former employee. The trial court determined the withholding was improper and denied Costco's motion for acknowledgement of satisfaction of the judgment, but the Court of Appeal reversed, holding that "an employer who fails to withhold payroll taxes from an award of back or front pay to a former employee exposes itself to penalties and personal liability for those taxes" and expressly declined to follow the earlier opinion of the Court of Appeal. *See also Rodriguez v. Cho*, 236 Cal. App. 4th 742 (2015) (default judgment is set aside because it exceeded the amount demanded in the complaint).

Facebook User's Criminal Conviction For Making Threats Against Wife, Co-Workers And Others Is Reversed

Elonis v. United States, 575 U.S. ___, 135 S. Ct. 2001 (2015)

Anthony Douglas Elonis (aka "Tone Dougie") posted on Facebook various self-styled rap lyrics containing graphically violent language and imagery concerning his wife (who had left him), co-workers, a kindergarten class and state and federal law enforcement. Although Elonis interspersed his posts with disclaimers about the First Amendment and statements that the lyrics were "fictitious" and not intended to depict real persons, many people who knew him saw the posts as threatening, including his wife (who had obtained a protection-from-abuse order against him) and his boss who had fired him for threatening co-workers. After Elonis's former employer informed the FBI about the posts, he was arrested and prosecuted for five counts of violating 18 U.S.C. § 875(c), which makes it a federal crime to transmit in interstate commerce "any communication containing any threat… to injure the person of another." Elonis was convicted of four of the five counts but argued on appeal that his requested (and denied) jury instruction that the government had to prove that he had intended to communicate a "true threat" should have been given. The United States Supreme Court reversed the conviction and

remanded the case for further proceedings, holding that the government has to prove the defendant transmitted a communication for the purpose of issuing a threat or with the knowledge that the communication would be viewed as a threat – and that merely proving that the defendant's posts could be viewed by a reasonable person as threatening is not enough.

False Claims Act Lawsuit Was Partially Barred By Statute Of Limitations But Not First-To-File Rule

Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter, 575 U.S. ___, 135 S. Ct. 1970 (2015)

Petitioners were employed by defense contractors that provided logistical services to the United States military during the armed conflict in Iraq. They filed a *qui tam* complaint against various defense contractors, alleging the contractors had fraudulently billed the government for water purification services that were not performed or not performed properly. Following a "remarkable sequence of dismissals and filings," the defense contractors sought dismissal of the third complaint filed against them on two grounds (statute of limitations and the first-to-file rule). The United States Supreme Court held that the Wartime Suspension of Limitations Act applies only to criminal offenses and thus did not suspend the running of the statute of limitations applicable to a civil complaint such as petitioners'. However, the Court held that the one claim that was not barred by the statute of limitations also was not barred by the first-to-file rule because a *qui tam* suit under the FCA ceases to be "pending" once it is dismissed. *See also Falk v. Children's Hosp. Los Angeles,* 2015 WL 3895464 (Cal. Ct. App. 2015) (*American Pipe* tolling doctrine precluded dismissal of claims subject to a three- or four-year limitations period); *Escobedo v. Applebees*, 2015 WL 3499902 (9th Cir. 2015) (the filing date of a complaint is the date it is delivered to the clerk, either with or without an application to proceed *in forma pauperis* ("IFP"); it is an abuse of discretion to deny an IFP application based upon a spouse's financial resources unless there is a reasonable inquiry into whether the spouse's resources are actually available to the would-be plaintiff and whether the spouse in fact has sufficient funds to assist in paying the fee).

Employee Who Was Fired For Attempting To Buy Shoes For A Friend At Company Expense Was Entitled To Unemployment Benefits

Robles v. Employment Dev. Dep't, 236 Cal. App. 4th 530 (2015)

Jose Robles had a $150 shoe allowance that he attempted to use for a friend who needed shoes. When his employer found out, Robles was fired and was subsequently denied unemployment benefits for willfully disregarding his employer's interests. In a prior appeal from the denial of benefits, the appellate court held that Robles's conduct "evinced at most a good faith error in judgment." In this opinion, the Court of Appeal affirmed the trial court's Enforcement Order granting unemployment benefits to Robles. *See also South Coast Framing, Inc. v. WCAB*, 61 Cal. 4th 291 (2015) (family of worker who died from a combination of drugs prescribed following a fall at work was entitled to workers' compensation death benefits).

Texas Choice Of Forum and Choice Of Law Provisions Violated California Public Policy

Verdugo v. Alliantgroup, L.P., 237 Cal. App. 4th 141 (2015)

Rachel Verdugo, an associate director in the Irvine office of Alliantgroup, filed this putative class action against her employer for various violations of the California Labor Code governing overtime compensation, meal and rest breaks, vacation pay, the Private Attorneys General Act and accurate wage statements. When she was hired, Verdugo had signed an "Employment Agreement" that included a combined choice-of-law provision (invoking Texas law) and forum selection clause, requiring the sole venue for disputes to be in Harris County, Texas – the location of Alliantgroup's corporate headquarters where Verdugo had had "only minimal contact." The trial court granted the employer's motion to stay the action based on the forum selection clause. The Court of Appeal reversed, holding that Alliantgroup had failed to meet its burden to show that enforcing the forum selection clause would not significantly diminish Verdugo's unwaivable statutory rights under California law. The Court was not persuaded by Alliantgroup's argument that a Texas court "would most likely" reject the parties' choice-of-law clause and apply California law. The Court further concluded that "Alliantgroup fails to show the remedies Texas law provides are 'adequate,' let alone that enforcing the forum selection clause would not diminish Verdugo's rights."

PAGA Plaintiff Was Properly Denied Names And Contact Information Of Statewide Employees

Williams v. Superior Court, 236 Cal. App. 4th 1151 (2015)

Michael Williams was an employee of Marshalls of CA in Costa Mesa, California. After slightly more than a year of employment, Williams brought a representative action against Marshalls under the Labor Code Private Attorneys General Act of 2004 ("PAGA"), alleging Marshalls had failed to provide its employees with meal and rest breaks, accurate wage statements, reimbursements for necessary business-related expenses and to pay all earned wages during employment. During discovery, Williams served special interrogatories seeking the names and contact information of all nonexempt Marshalls employees in California who had worked for the company in the previous two years. Marshalls objected, and the trial court ordered Marshalls to produce contact information only for the employees who had worked at the Costa Mesa store, denying contact information for employees who worked at the other 128 Marshalls stores in California. Williams filed a petition for writ of mandate compelling the trial court to vacate its discovery order and to enter a new order granting Williams' motion to compel production of a list of all employees statewide. The Court of Appeal denied the petition, holding that discovery of Marshalls's employees' contact information statewide is premature and that the employees' privacy interests outweigh Williams' need for immediate disclosure of such information – "The courts will not lightly bestow statewide discovery power to a litigant who has only a parochial claim." *See also Munoz v. Chipotle Mexican Grill, Inc.*, 2015 WL 3958999 (Cal. Ct. App. 2015) (trial court's order denying plaintiffs' motion for class certification and granting Chipotle's motion to deny class certification is a nonappealable order because the PAGA claims remain pending in the trial court); *Allen v. Bedolla*, 2015 WL 3461537 (9th Cir. 2015) (district court properly

denied objectors' untimely motion to intervene, but failed to satisfy the criteria for determining substantive fairness of settlement of class action).

There Is No Private Right Of Action For Misclassification Of Individual As An Independent Contractor

Noe v. Superior Court, 237 Cal. App. 4th 316 (2015)

Several vendors who sold food and beverages at various entertainment venues in southern California sued for failure to pay minimum wage and willfully misclassifying them as independent contractors in violation of Cal. Lab. Code § 226.8. In this opinion, the Court of Appeal held that Section 226.8 applies not only to employers who make a misclassification decision but extends to any employer who is aware that a co-employer has willfully misclassified their joint employees and fails to remedy the misclassification. However, the Court further held that Section 226.8 cannot be enforced through a direct private action and may be enforced only by the California Labor Commissioner. On that basis, the Court denied plaintiffs' petition for writ of mandate.

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