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By **Anthony J. Oncidi***

California Employment Law Blog

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Nuclear Plant Maintenance Manager's Whistleblower Claim Was Properly Dismissed

Sanders v. Energy Northwest, 2016 WL 560809 (9th Cir. 2016)

David W. Sanders, a maintenance manager for Energy Northwest (a nuclear power plant), claimed his employment was terminated in retaliation for his objection to the severity level designation of an internal "condition report" that was generated by other employees at the plant. Sanders filed a whistleblower complaint with the Department of Labor (the "DOL"), and when the DOL failed to issue a final decision within one year, Sanders filed a complaint in federal court, alleging he was retaliated against for objecting about a "nuclear safety issue." The district court granted summary judgment in favor of Energy Northwest on the ground that Sanders failed to establish a case of retaliation because his activity did not "rise to the level of protected activity" under the Energy Reorganization Act. The United States Court of Appeals for the Ninth Circuit affirmed dismissal on the ground that "Sanders' single expression of a difference of opinion [concerning] one existing internal condition reports lacks a sufficient nexus to a concrete, ongoing safety concern." *See also Austin v. Los Angeles Unified School Dist.*, 2016 WL 527175 (Cal. Ct. App. 2016) (denial of alleged whistleblower's motion for relief after the trial court granted former employer's unopposed motion for summary judgment is reversed, remanded for consideration on the merits).

Employer Was Entitled To Obtain Reimbursement Of Short-Term Employee's Training Costs

USS-POSCO Indus. v. Case, 197 Cal. Rptr. 3d 791 (Cal. Ct. App. 2016)

Floyd Case voluntarily enrolled in a three-year, employer-sponsored educational program. Case agreed in writing that if he quit his job within 30 months of completing the

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program, he would reimburse his employer (UPI) a prorated portion of the program costs. Two months after completing the program, Case went to work for another employer. When Case refused to reimburse UPI, the company sued him for breach of contract and unjust enrichment. In response, Case cross-complained against UPI, asserting a putative class action in which he claimed the reimbursement agreement was unenforceable and that it violated the Labor Code. The trial court granted UPI's motion for summary judgment on its own claims and on Case's cross-complaint, holding that the reimbursement agreement was valid and not unlawful under any theory Case had raised. The trial court also granted UPI $80,000 in prevailing party attorney's fees pursuant to Labor Code § 218.5. The Court of Appeal affirmed summary judgment in favor of UPI, rejecting Case's claims that the agreement violated the California Labor Code, California Business & Professions Code § 16600 (invalidating contracts that restrain someone from engaging in a lawful profession, trade or business), the National Labor Relations Act (prohibiting direct bargaining with an employee) and contractual consideration and adhesion principles. However, the Court of Appeal reversed the award to UPI of reimbursement of its attorney's fees based upon a 2014 amendment to Section 218.5.

Department Of Labor's Rule Extending Tip Pool Restrictions Is Valid

Oregon Restaurant & Lodging Ass'n v. Perez, 2016 WL 706678 (9th Cir. 2016)

Pursuant to 29 U.S.C. § 203(m) of the Fair Labor Standards Act ("FLSA"), an employer may fulfill part of its hourly minimum wage obligation to a tipped employee with the employee's tips. This practice is known as taking a "tip credit." The employers in this case did not take a tip credit against their minimum wage obligation; however, the employers did require their employees to participate in tip pools that were comprised of both customarily tipped employees (e.g., servers and casino dealers) and non-customarily tipped employees (e.g., kitchen staff and casino floor supervisors). In 2011, the United States Department of Labor ("DOL") promulgated a formal rule that prohibits tip pools that violate Section 203(m) regardless of whether the employer takes a tip credit. The lower courts in this case held that prior Ninth Circuit authority foreclosed the DOL's ability to promulgate the 2011 rule and that the 2011 rule was invalid because it was contrary to Congress's clear intent. In this opinion, the United States Court of Appeals for the Ninth Circuit reversed, holding that the DOL may regulate the tip pooling practices even of employers (including those involved in this case) who do not take a tip credit.

Employer Properly Computed Overtime On Flat-Sum Attendance Bonuses

Alvarado v. Dart Container Corp. of Cal., 243 Cal. App. 4th 1200 (2016)

According to Dart's written policy, a $15 attendance bonus would be paid to any employee who was scheduled to work a weekend shift and completed the full shift. Hector Alvarado challenged Dart's calculation of overtime payments and sued for violations of the Labor Code and the Private Attorneys' General Act (PAGA). The trial court granted summary judgment in favor of Dart on the ground that there is no California law applicable to calculating overtime on attendance bonuses paid in the same period in which they were earned while distinguishing a prior appellate court opinion and rejecting

as "void" and without the force of law two sections of the DLSE Manual (Sections 49.2.4.2 and 42.2.4.3). The Court of Appeal affirmed, holding that Dart's use of the federal formula for computing overtime on flat-sum bonuses is lawful.

Class Action Was Properly Dismissed For Failure To Prosecute

Castillo v. DHL Express (USA), Inc., 243 Cal. App. 4th 1186 (2015)

Henry Castillo filed this putative class action based on alleged violations of the wage and hour laws. The trial court granted defendants' motion to dismiss based on plaintiff's failure to bring the case to trial within five years. In opposition, Castillo contended that the running of the five-year period was tolled by operation of law while the parties pursued private mediation. The trial court rejected Castillo's tolling argument, and the Court of Appeal affirmed, holding that because the trial court did not order and the parties did not stipulate to submit the case to mediation pursuant to Cal. Rule of Court 3.891, it was properly dismissed under the five-year rule.

Unaccepted Settlement Offer Does Not Moot Putative Class Action

Campbell-Ewald Co. v. Gomez, 577 U.S. ___, 136 S. Ct. 663 (2016)

In this putative class action involving an alleged violation of the Telephone Consumer Protection Act (prohibiting using an automatic dialing system to send a text message to a cellular telephone, absent the recipient's express consent), Campbell-Ewald proposed to settle Jose Gomez's individual claim and filed an offer of judgment pursuant to FRCP 68. Gomez did not accept the offer and allowed it to expire. Campbell-Ewald then moved to dismiss the case on the ground that the unaccepted offer mooted Gomez's claim by offering him complete relief. The district court granted the motion to dismiss, but the United States Court of Appeals for the Ninth Circuit reversed. In this opinion, the United States Supreme Court affirmed the Ninth Circuit, holding that Gomez's complaint was not effaced by Campbell-Ewald's unaccepted offer because under basic contract principles, a settlement bid, once rejected, has no continuing efficacy.

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