Proskauer

newsletter

May 2016
Vol.15, No.3

By **Anthony J. Oncidi***

California Employment Law Blog

For the very latest news, insights and analysis of California employment law, please visit and subscribe to our blog at: http://calemploymentlawupdate.proskauer.com.

Employee Who Needed To Assist Disabled Son Could Proceed With "Associational Disability Discrimination" Claim

Castro-Ramirez v. Dependable Highway Express, Inc., 246 Cal. App. 4th 180 (2016)

Luis Castro-Ramirez sued his former employer, Dependable Highway Express, Inc., for "associational disability discrimination," failure to prevent discrimination and retaliation under the California Fair Employment and Housing Act ("FEHA") and wrongful termination. Castro-Ramirez's son requires daily dialysis, and Castro-Ramirez must administer the treatment to his son. Castro-Ramirez's supervisors had for several years scheduled his work so that he could be at home to administer the dialysis, but that accommodation changed when a new supervisor took over and terminated Castro-Ramirez for refusing to work a shift that did not permit him to be home in time to administer the dialysis. The trial court granted the employer's motion for summary judgment, but the Court of Appeal (over a strong dissent) reversed, holding that FEHA creates a duty on the part of the employer "to provide reasonable accommodations to an applicant or employee who is associated with a disabled person," not just to applicants and employees who themselves are disabled (citing Cal. Gov't Code § 12926(o) ("physical disability" includes a perception that a person is associated with a person who has, or is perceived to have, a disability)). *See also Wallace v. County of Stanislaus*, 245 Cal. App. 4th 109 (2016) (*Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013) does not require an alleged victim of disability discrimination to prove “animus or ill will,” only that discriminatory intent was a substantial motivating factor/reason for the employer’s actions).

* Anthony J. Oncidi is a partner in and the Chair of the Labor and Employment Department of Proskauer Rose LLP 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.

Employees Are Entitled To Suitable Seating If The Tasks Being Performed Reasonably Permit Seating

Kilby v. CVS Pharmacy, Inc., 63 Cal. 4th 1 (2016)

In this opinion, the California Supreme Court answered three questions posed to it by the United States Court of Appeals for the Ninth Circuit involving suitable seating requirements under California law. Section 14(A) of California Wage Order No. 7-2001 states that "All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." Section 14(B) states that "When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties." The federal trial court concluded that Sections 14(A) and (B) were mutually exclusive and that the former applied when an employee was actually engaged in work, while the latter applied when an employee was not actively working. The California Supreme Court answered the Ninth Circuit's questions as follows: (1) If the tasks performed at a given location reasonably permit sitting, and provision of a seat would not interfere with performance of any other tasks that may require standing, a seat is called for; (2) Whether the nature of the work reasonably permits sitting is a question to be determined objectively based on the totality of the circumstances. An employer's business judgment and the physical layout of the workplace are relevant but not dispositive factors. The inquiry focuses on the nature of the work, not an individual employee's characteristics; and (3) The nature of the work aside, if an employer argues there is no suitable seat available, the burden is on the employer to prove unavailability.

Supreme Court Affirms $2.9 Million Class Action Judgment Based On Expert's Study Of Time Spent On Donning And Doffing Activities

Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. ___, 136 S. Ct. 1036 (2016)

Following a jury trial, the employees in this class/collective action recovered $2.9 million in compensatory damages for violation of the Fair Labor Standards Act ("FLSA"). The employees alleged that they did not receive statutorily mandated overtime pay for the time they spent donning and doffing protective equipment at a pork processing plant in Storm Lake, Iowa. Tyson compensated some employees for between four and eight minutes of donning and doffing time per shift but paid others no additional wages. Tyson argued that because of the variance in protective gear that each employee wore, the employees' claims were not sufficiently similar to be resolved on a classwide or collective basis. Because Tyson did not keep records of donning and doffing time, the employees relied upon employee testimony, video recordings of donning and doffing at the plant and a study performed by an industrial relations expert, Dr. Kenneth Mericle. Dr. Mericle conducted 744 videotaped observations and analyzed the average length that various donning and doffing activities took for different departments. The Supreme Court affirmed the judgment of the United States Court of Appeals for the Eighth Circuit in favor of the employees, holding that the employees could rely upon Dr. Mericle's sample as a permissible means of establishing hours worked in a class action setting and rejecting the employer's argument that use of the study represented an improper "Trial by Formula." *See also Rodriguez v. E.M.E., Inc.,* 2016 WL 1613803 (Cal. Ct. App. 2016) (rest breaks

in an eight-hour shift should fall on either side of the meal break and should not be combined before or after the meal break).

Employer Did Not Violate ADA When It Failed To Return Employee To Full-Time Position Following Medical Leave

Mendoza v. The Roman Catholic Archbishop of Los Angeles, 2016 WL 1459214 (9th Cir. 2016)

Alice Mendoza worked as a full-time bookkeeper for a small parish church. She took sick leave for 10 months, during which time the pastor of the church took over the bookkeeping duties himself and determined that Mendoza's job could be done by a part-time bookkeeper. When Mendoza returned from her leave of absence, there was no longer a full-time bookkeeping position available, so the pastor offered her a part-time job, which Mendoza declined before suing for violation of the Americans with Disabilities Act ("ADA"). The district court granted summary judgment in favor of the Archbishop, and the United States Court of Appeals for the Ninth Circuit affirmed, holding that Mendoza failed to establish that a full-time position was available and, therefore, that a discriminatory reason more likely than not motivated the employer.

Employee Could Proceed With Misclassification Claim, Though Wrongful Termination Claim Was Properly Rejected

Davis v. Farmers Ins. Exch., 245 Cal. App. 4th 1302 (2016)

William A. Davis brought suit against Farmers, claiming he had been wrongfully classified as an independent contractor rather than an employee and asserting that he had been wrongfully terminated on the basis of his age. The trial court directed a verdict in Farmers's favor on the wage claim, and the jury found for Farmers on the wrongful termination claim, having concluded that Farmers would have made the same termination decision for legitimate non-discriminatory reasons – even though the jury agreed with Davis that his age was a "substantial motivating factor" in his termination. The Court of Appeal affirmed the judgment in favor of Farmers on the wrongful termination claim, holding that the trial court had properly instructed the jury based upon *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013). However, the appellate court reversed the directed verdict, holding that Davis had presented sufficient evidence to allow his wage claim to go to the jury. The Court also affirmed denial of Davis's claims for recovery of attorney's fees, costs and injunctive and declaratory relief. *See also Goodrich v. Sierra Vista Reg'l Med. Ctr.*, 2016 WL 1702035 (Cal. Ct. App. 2016) (former employee who filed three motions attempting to relitigate trial court's denial of her challenge to hospital's termination decision was properly declared a vexatious litigant).

EEOC Sufficiently Conciliated Class Claims Before Bringing Suit, And Employee Stated Hostile Environment Claim

Arizona ex rel. Horne v. The Geo Group, 2016 WL 945634 (9th Cir. 2016)

Alice Hancock was employed by Geo as a correctional officer at the Arizona State Prison. Geo contracts with the Arizona Department of Corrections to maintain and operate two facilities in the state. Hancock filed a charge of discrimination and harassment based on sex and also alleging retaliation. After concluding its investigation, the Arizona Civil Rights Division and the EEOC issued a reasonable cause determination, substantiating

Hancock's allegations, and subsequently filed a class action lawsuit. The district court granted summary judgment to the employer, but the United States Court of Appeals for the Ninth Circuit reversed, relying upon *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015) and holding that the EEOC's pre-suit conciliation efforts are subject to limited judicial review and were sufficient. The Court held that the EEOC is not required to conciliate on an individual basis prior to bringing a class action and that the proper starting date of the class action was 300 days prior to the filing of Hancock's charge (not the date of the filing of the reasonable cause determination). The Court also held that the district court had improperly dismissed another employee's (Sofia Hines) claims of a hostile environment, which allegedly included unwanted comments about her breasts, the grabbing of her breast on one occasion, an unwanted "spanking on her butt," and several unwanted sexually explicit comments directed at her. *See also Baughn v. Department of Forestry*, 2016 WL 1386040 (Cal. Ct. App. 2016) (former employer's anti-SLAPP motion to dismiss union's challenge to employer's termination of alleged sexual harasser was properly denied on the ground that the action did not arise from protected speech).

Employee Who Dismissed Claims Upon Receipt Of Settlement Can Recover Costs As Prevailing Party

DeSaulles v. Community Hosp. of the Monterey Peninsula, 62 Cal. 4th 1140 (2016)

Maureen deSaulles agreed to dismiss her causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing in exchange for a settlement payment from her former employer in the amount of $23,000. The trial court subsequently exercised its discretion and awarded $12,731.92 in costs to the employer. DeSaulles appealed, claiming that the settlement payment to her was a net monetary recovery, which entitled her – rather than the employer – to recover costs. The Court of Appeal agreed and reversed, holding that the trial court should have recognized DeSaulles was entitled to costs under the statutory definition of "prevailing party" (Cal. Code Civ. Proc. § 1032(a)(4)). The Court further concluded that because the employer was not the prevailing party, the trial court should not have exercised its discretion to determine which party prevailed based on the merits of the case. Finally, the Court cautioned that "[o]f course, parties can avoid this mechanical approach by taking care to provide for costs in their settlements." The California Supreme Court affirmed.

Employee's *Qui Tam* Fraud Claims Should Not Have Been Dismissed

United States ex rel. Mateski v. Raytheon, 816 F.3d 565 (9th Cir. 2016)

Steven Mateski worked as an engineer at Raytheon. Mateski filed a complaint in federal court alleging that Raytheon had violated the False Claims Act ("FCA") by failing to comply with numerous contractual requirements in developing a project for the government, fraudulently covering up areas of noncompliance and improperly billing the government for erroneous and incomplete work. Six years after he filed the initial complaint, the United States declined to exercise its right under the FCA to intervene in the lawsuit, and Raytheon successfully moved to dismiss for lack of subject matter jurisdiction, arguing that the suit was barred by the public disclosure bar (i.e., that the subject matter about which Mateski was complaining was already publicly known when he filed his lawsuit). The United States Court of Appeals for the Ninth Circuit reversed, holding that Mateski's allegations differ in both degree and kind from the very general

previously disclosed information about problems with the project in question. As such, "if his allegations prove to be true, Mateski will undoubtedly have been one of those 'whistle-blowing insiders with genuinely valuable information,' rather than an 'opportunistic plaintiff[] who ha[s] no significant information to contribute.'"

Proskauer's nearly 200 Labor and Employment lawyers address the most complex and challenging labor and employment law issues faced by employers.

Contacts

Harold M. Brody, Partner
+1.310.284.5625 – hbrody@proskauer.com

Anthony J. Oncidi, Partner
+1.310.284.5690 – aoncidi@proskauer.com

Mark Theodore, Partner
+1.310.284.5640 – mtheodore@proskauer.com

If you would like to subscribe to *California Employment Law Notes*, please send an email to Proskauer_Newsletters@proskauer.com. We also invite you to visit our website www.proskauer.com to view all Proskauer publications.

For the latest news, insight and analysis on **California Employment Law**, visit our blog at http://calemploymentlawupdate.proskauer.com.

To subscribe, visit our blog at http://calemploymentlawupdate.proskauer.com and enter your email address in the "Subscribe" section.

Beijing | Boca Raton | Boston | Chicago | Hong Kong | London | Los Angeles | New Orleans | New York | Newark | Paris São Paulo | Washington, D.C.

www.proskauer.com