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By **Anthony J. Oncidi***

California Employment Law Blog

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Employer Is Entitled To Recover $4 Million In Attorney's Fees From EEOC

CRST Van Expedited, Inc. v. EEOC, 578 U.S. ___, 136 S. Ct. 1642 (2016)

The EEOC filed suit against CRST (a trucking company) alleging that over 250 female employees and prospective employees had been subjected to sexual harassment. However, the district court dismissed all of the claims on various grounds, including that the EEOC had not adequately investigated or attempted to conciliate its claims on the employees' behalf before filing suit. The district court then granted CRST more than $4 million in prevailing-party attorney's fees. On appeal the United States Court of Appeals for the Eighth Circuit reversed the dismissal of only two claims, which led it to vacate without prejudice the attorney's fees award. On remand, the EEOC settled one of the reversed claims and withdrew the other. The district court again awarded CRST more than $4 million in attorney's fees. On appeal, the Eighth Circuit reversed, holding that a Title VII defendant can be a "prevailing party" only by obtaining a ruling on the merits. In this opinion, the United States Supreme Court vacated the Eighth Circuit's judgment, holding that a favorable ruling on the merits is not a necessary predicate to finding that a defendant is a prevailing party.

Former Employee Who Accessed Employer's Computers Was Properly Imprisoned

United States v. Nosal, 2016 WL 3608752 (9th Cir. 2016)

In this criminal proceeding brought under the Computer Fraud and Abuse Act ("CFAA"), the United States government filed a criminal indictment against David Nosal (a former employee of Korn/Ferry International) as a result of his obtaining information from Korn/Ferry's computer system for the purpose of defrauding Korn/Ferry and setting up a competing executive search firm. The government succeeded in proving under the CFAA

* 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.

that an employee accesses a protected computer without authorization when he or she does so without permission; Nosal also was successfully prosecuted for trade secret theft under the Economic Espionage Act ("EEA"). The district court sentenced Nosal to one year and one day in prison; three years of supervised release; a $60,000 fine and approximately $828,000 in restitution to Korn/Ferry.

The United States Court of Appeals for the Ninth Circuit affirmed the conviction, holding that "Nosal, a former employee whose computer access credentials were revoked by Korn/Ferry acted 'without authorization' in violation of the CFAA when he or his former employee co-conspirators used the login credentials of a current employee [Nosal's former assistant] to gain access to computer data owned by the former employer and to circumvent the revocation of access." The Court also affirmed Nosal's conviction under the EEA as a result of his receiving from one of his accomplices a list of CFOs, which included candidates' names, company positions and telephone numbers. The Court vacated the judgment in part and remanded the matter for reexamination by the district court of the amount of restitution awarded to Korn/Ferry. *Cf. United States v. Christensen*, 801 F.3d 970 (9th Cir. 2015) (jury instructions defining "computer fraud" and "unauthorized computer access" were erroneous in that they allowed the jury to convict under the CFAA for unauthorized use of information rather than only for unauthorized access).

Outside Counsel's Investigation Of Sexual Harassment Was Privileged

City of Petaluma v. Superior Court, 2016 WL 3342543 (Cal. Ct. App. 2016)

Andrea Waters, who worked as a firefighter and paramedic for the City of Petaluma, alleged she was harassed and discriminated against based upon her sex. Waters also claimed she suffered retaliation after she complained about the treatment. Waters took a leave of absence from her job, filed a complaint with the EEOC in which she alleged sexual harassment and retaliation and then resigned her employment. The City retained outside counsel to investigate Waters' EEOC complaint and to assist it in preparing to defend the City in an anticipated lawsuit. The retention agreement with counsel stated that the lawyer was retained to conduct an impartial investigation and that the investigation would be subject to the attorney-client privilege. The retention agreement further stated that the lawyer would offer a "professional evaluation of the evidence based upon her experience in employment law," but it also provided that "…in this engagement [the attorney] will not render legal advice as to what action to take as a result of the findings of the investigation."

In defending the lawsuit, the City asserted the "avoidable consequences doctrine" as a defense, claiming that Waters had failed to take reasonable and necessary steps to avoid the harms and/or consequences that she allegedly had suffered. The City refused to produce the outside attorney's investigative report and materials to Waters, asserting the attorney-client privilege and the work product doctrine. The trial court concluded the documents and other information sought by Waters were not privileged or subject to work-product protection and that, even if they were, the privilege had been waived because the City had put the investigation at issue by asserting the avoidable consequences doctrine. The Court of Appeal initially denied the City's petition for a writ of mandate, but after the California Supreme Court granted a writ of review and transferred

the matter back to the appellate court, the Court (in this opinion) changed its mind and held that the materials were privileged because the "dominant purpose of outside counsel's factual investigation was to provide legal services to the employer in anticipation of litigation" and that the privilege was not waived by the employer's assertion of the avoidable consequences defense.

Laid-Off Employee Could Proceed With Disability Discrimination Claims

Moore v. The Regents of the Univ. of Cal., 2016 WL 3434186 (Cal. Ct. App. 2016)

Deborah Moore was employed as the Director of Marketing for the University of California San Diego (UCSD) until her job was eliminated shortly after she got a new supervisor who believed that the job functions that Moore was performing had decreased to such a point that the supervisor could assume them herself. The job elimination also followed Moore's being diagnosed with idiopathic cardiomyopathy, which required her to wear a monitor and external defibrillator and then to have a pacemaker surgically implanted. Prior to Moore's surgery, the supervisor notified the human resources department that she wanted to eliminate Moore's job, even though another employee with the same payroll, title and classification (but with less seniority than Moore) was being retained. Prior to the layoff, the supervisor did not ask Moore if she would accept a pay reduction or any of the other positions that were filled around the time of and after her termination.

The trial court granted summary judgment in favor of the employer with respect to Moore's claims for violation of the Fair Employment and Housing Act ("FEHA") and the California Family Rights Act, but the Court of Appeal reversed (except as to the FEHA retaliation claim), finding triable issues of fact regarding pretext for the termination – based on evidence that the supervisor may not have believed Moore was healthy enough to continue in her position with the typical stressors of the job; the supervisor had told Moore that "The first thing we need to do is lighten your load to get rid of some of the stress" after Moore had informed her of her heart condition. There also was evidence that the employer had failed to follow its own policies in terminating Moore and not the other similarly-situated employee who had less seniority. *Compare Mendoza v. The Roman Catholic Archbishop of Los Angeles*, 2016 WL 3165856 (9th Cir. 2016) (*per curiam*) (summary judgment in favor of employer affirmed under Americans with Disabilities Act where employer failed to return bookkeeper to a full-time position following her medical leave of absence).

Statute Of Limitations For Constructive Discharge Claim Began To Run After Employee's Resignation Date

Green v. Brennan, 578 U.S. ___, 136 S. Ct. 1769 (2016)

Marvin Green alleged racial discrimination under Title VII of the Civil Rights Act, claiming he was denied a promotion because he is black; his supervisors had accused Green of the crime of intentionally delaying the mail. In an agreement between the parties dated December 16, 2009, the Postal Service agreed not to pursue criminal charges and Green agreed to retire. Green submitted his resignation paperwork on February 10, 2010, effective March 31. On March 22, 2010, Green reported an allegedly unlawful constructive discharge to the EEOC – 41 days after submitting his resignation and 96

days after signing the agreement to resign. A federal civil servant such as Green must contact the EEOC "within 45 days of the date of the matter alleged to be discriminatory." The United States Supreme Court held that the 45-day statute of limitations began to run on the date Green submitted his resignation (February 10) and not the earlier date on which he agreed to resign because Green did not have a "complete and present cause of action" for constructive discharge until he actually resigned.

Terminated Employee Could Proceed With Tortious Interference Claims Against Apple

Popescu v. Apple Inc., 2016 WL 3578970 (Cal. Ct. App. 2016)

Dan Popescu sued Apple Inc. for damages after he was fired by his employer, Constellium Rolled Products Ravenswood, LLC. Popescu alleged that Apple took affirmative steps to convince Constellium to fire him in retaliation for his resistance to Apple's alleged anticompetitive conduct. The trial court sustained Apple's demurrer to Popescu's first amended complaint, but the Court of Appeal reversed, holding that Popescu was not required to allege that Apple's interference with his at-will employment relationship with Constellium was independently wrongful. The Court further held that Popescu had properly alleged a claim against Apple for intentional interference with prospective economic advantage in that Popescu alleged independently wrongful conduct by Apple in persuading Constellium to terminate Popescu, which was connected to its effort to misappropriate Constellium's trade secrets and to violate the Sherman Antitrust Act and the Cartwright Act by denying Apple's smartphone competitors an aluminum alloy resource and denying consumers "a better, more durable smartphone."

Workplace Violence Injunction Was Improperly Entered Against Out-Of-State Resident

ViaView, Inc. v. Retzlaff, 2016 WL 3626708 (Cal. Ct. App. 2016)

ViaView filed a petition for a workplace violence restraining order against Thomas Retzlaff, a resident of Texas, who had filed a motion to quash the petition for lack of personal jurisdiction. The trial court denied the motion to quash and granted a permanent injunction against Retzlaff. The Court of Appeal issued a peremptory writ of mandate directing the trial court to vacate its order denying Retzlaff's motion to quash and to enter a new order granting the motion, holding that Retzlaff did not make a general appearance in the action (and thereby waive his jurisdictional challenge) because he properly filed a motion to quash. As for Retzlaff's jurisdictional challenge, the Court determined that ViaView failed to prove the factual bases justifying the exercise of jurisdiction over Retzlaff since its principal (James McGibney) filed a declaration in opposition to the motion to quash that was not signed under penalty of perjury under the laws of the State of California as required by Cal. Code Civ. Proc. § 2015.5. In so ruling the Court held that ViaView failed to prove that the allegedly defamatory threats that Retzlaff made on the Internet were aimed at a California audience, that a significant number of California residents saw them or that the social media platforms were targeted to California.

Auto Dealership Service Advisors May Be Exempt From Federal Overtime Requirements

Encino Motorcars, LLC v. Navarro, 579 U.S. ___, 2016 WL 3369424 (2016)

An amendment to the Fair Labor Standards Act ("FLSA") exempts from its overtime requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." Later, the U.S. Department of Labor ("DOL") issued an opinion letter and amended its Field Operations Handbook to state that service advisors also are exempt from overtime under the statute. However, in 2011, the DOL issued a new rule that limited the exemption only to employees who sell automobiles, trucks, or farm implements, thus presumably giving service advisors a right to overtime under the FLSA. In this case, the United States Supreme Court vacated the judgment of the United States Court of Appeals for the Ninth Circuit, which had upheld the rule change, and determined that the 2011 regulation was issued by the DOL without the reasoned explanation that was required in light of the Department's change in position and the significant reliance interests involved. The Court remanded the case for further consideration by the Ninth Circuit. *See also Flores v. City of San Gabriel*, 2016 WL 3090782 (9th Cir. 2016) (City's payment of unused benefits must be included in the regular rate of pay and thus in the calculation of FLSA overtime for police officers).

Call Center Employees' Unpaid Wage Claims Were Properly Dismissed

Corbin v. Time Warner Entm't-Advance/Newhouse P'ship, 821 F.3d 1069 (9th Cir. 2016)

Call center employees of Time Warner Entertainment-Advance/Newhouse Partnership ("TWEAN") alleged that their employer's compensation policy of rounding all employee time stamps to the nearest quarter hour deprived them of earned overtime. The lead plaintiff also claimed he was not compensated for one minute of time when he mistakenly opened an auxiliary computer program before logging into the employer's timekeeping software. The United States Court of Appeals for the Ninth Circuit affirmed summary judgment in favor of the employer on the grounds that TWEAN's rounding policy comported with federal law and because the policy was neutral on its face; the Court also affirmed summary judgment for TWEAN on the "logging-in" claim on the ground that one minute of uncompensated time is de minimis and thus not compensable. *See also Vaquero v. Ashley Furniture Indus., Inc.*, 2016 WL 3190862 (9th Cir. 2016) (district court properly certified class action for commission-compensated employees despite employer's assertion of no commonality and no predominance of class claims).

Former Employee's Manager Is Not Entitled To Prevailing-Party Attorney's Fees

Ramos v. Garcia, 2016 WL 3537366 (Cal. Ct. App. 2016)

Rogelio Ramos sued his former employers for unpaid overtime, minimum wages and other compensation and obtained some of the monetary recovery he requested. Ramos also sued Manuel Garcia (Ramos's former manager) under the same theories and lost on the ground that Garcia was a co-employee and not the owner/employer; the trial court awarded Garcia $29,295 in prevailing-party attorney's fees pursuant to Labor Code

§ 218.5. The Court of Appeal reversed the judgment, holding that Section 218.5 is inapplicable to Garcia because the statute was not intended to authorize an attorney's fee award against an employee who unsuccessfully sues a fellow employee for alleged nonpayment of wages.

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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

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