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California Employment Law Blog

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Employee Who Suffered From "Altered Mental State" Need Not Be Allowed To Rescind Her Resignation

Featherstone v. Southern Cal. Permanente Med. Grp., 2017 WL 1399709 (Cal. Ct. App. 2017)

Ruth Featherstone alleged that her former employer (SCPMG) discriminated against her based on a "temporary disability" that was caused by an adverse drug reaction, which resulted in an "altered mental state." During this alleged altered mental state, Featherstone resigned orally from her job in a telephone conversation with her supervisor so that she could "do God's work" and then, a few days later, confirmed her resignation in writing. When Featherstone emerged from the altered mental state (which caused her to take off all of her clothes and walk around naked in front of others, swear at family members and take showers for no reason), she sought to rescind her resignation, which SCPMG declined to permit her to do. Featherstone alleged that SCPMG acted with discriminatory animus by refusing to allow her to rescind her resignation. Although Featherstone was eligible for rehire, she never reapplied for her position. The trial court granted summary judgment in favor of SCPMG, and the Court of Appeal affirmed, holding that the refusal to allow a former employee to rescind a resignation is not an adverse employment action under the Fair Employment and Housing Act. The Court further held that SCPMG was not contractually obligated to permit the rescission of an at-will employee's resignation and affirmed summary adjudication of the remainder of Featherstone's related claims, including failure to prevent discrimination, failure to accommodate a disability, failure to engage in the interactive process and wrongful termination in violation of public policy.

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Garbage Truck Employee Who Failed To Provide Proof Of Right To Work Could Proceed With Age Discrimination Claim

Santillan v. USA Waste of Cal., 853 F.3d 1035 (9th Cir. 2017)

Gilberto Santillan, a 53-year-old garbage truck driver in Manhattan Beach, was employed for 32 years before his employment was terminated by a new route manager (Steve Kobzoff) after Santillan had four accidents in a 12-month period. Santillan disputed that he had four accidents and testified that he was one of five older Spanish-speaking employees who were fired or suspended after Kobzoff became the route manager. Following what the court described as a "public outcry" over Santillan's termination (the son of one of the homeowners dressed up as Santillan for Halloween because he considered Santillan to be a "hero"), USA Waste agreed to reinstate Santillan if he passed a drug test and physical examination, a criminal background check and "e-Verify" to prove his right to work in the United States. When Santillan failed to provide sufficient information for the employer to complete an e-Verify check on Santillan, he was fired again because he did not provide "proof of [his] legal right to work in the United States within three days of hire as required by the Immigration Control and Reform Act of 1986." The district court granted summary judgment in favor of the employer, but the United States Court of Appeals for the Ninth Circuit reversed, holding that Santillan had established a prima facie case of age discrimination, which USA Waste had failed to rebut because it did not offer a legitimate reason for firing Santillan. The Court held that Santillan was exempt from the IRCA requirements because he was a "continuing" and not a "new" employee. Moreover, the Court held that California public policy considers immigration status to be irrelevant in the enforcement of state labor, employment, civil rights and employee housing laws, so the agreement to satisfy the e-Verify requirements was void as against public policy. The Court also held that Santillan had engaged in protected activity by using an attorney to represent him in negotiating the original settlement agreement.

Trial Court's Decision Quashing EEOC Subpoena Should Not Be Reversed Absent Abuse Of Discretion

McLane Co. v. EEOC, 581 U.S. ___, 137 S. Ct. 1159 (2017)

Damiana Ochoa filed a charge with the EEOC alleging sex discrimination (based on pregnancy) in violation of Title VII, when, after she tried to return to her job following maternity leave, her employer (McLane Co.) informed her that she could not come back to the position she had held for eight years as a cigarette selector unless she passed a physical strength test. Ochoa took the test three times but failed to pass and, as a result, her employment was terminated. McLane disclosed that it administers the test to all new applicants and to employees returning from a leave that lasts longer than 30 days. Although McLane voluntarily provided general information about the test and the individuals who had been required to take it (gender, job class, reason for taking the test and the score received), it refused to disclose "pedigree information" for each test taker (name, social security number, last known address, telephone number and the reasons why particular employees were terminated after taking the test). In this EEOC subpoena enforcement action, the district court refused to compel production of the pedigree information, but the United States Court of Appeals for the Ninth Circuit reversed that

order following a *de novo* review of the lower court's order. In this opinion, the United States Supreme Court vacated and remanded the judgment of the Ninth Circuit, holding that the district court's decision to quash or enforce an EEOC subpoena should be reviewed under the more deferential abuse of discretion standard.

Anti-Retaliation Provisions of Sarbanes-Oxley Act Apply Even If No Disclosure To SEC

Somers v. Digital Realty Trust, Inc., 850 F.3d 1045 (9th Cir. 2017)

Paul Somers, who was formerly employed as a vice president of Digital Realty, alleged that he was fired after he made several reports to senior management regarding possible securities law violations. Somers did not report his concerns to the SEC. Somers sued Digital Realty for violation of Section 21F of the Securities and Exchange Act, which includes anti-retaliation protections created by the Dodd-Frank Act. The district court followed precedent from the United States Court of Appeals for the Second Circuit and held that the applicable SEC regulation extends anti-retaliation protection to all those who make disclosure of suspected violations, regardless of whether the disclosure is made to SEC or just internally. The United States Court of Appeals for the Ninth Circuit agreed and affirmed denial of the employer's motion to dismiss. *Cf. United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325 (9th Cir. 2017) (False Claims Act lawsuit was properly dismissed on summary judgment where plaintiff failed to satisfy the applicable materiality standard); *see also Shaw v. Superior Court*, 2017 WL 1315681 (Cal. S. Ct. 2017) (former hospital employee is not entitled to jury trial in retaliatory termination action arising under Cal. Health & Safety Code § 1278.5(g) itself, though such a right exists for trial of common law claim based on statute).

Employer That Paid Females Less Than Males Based On Prior Salaries May Avoid Liability Under Equal Pay Act

Rizo v. Yovino, 2017 WL 1505068 (9th Cir. 2017)

Aileen Rizo, who is an employee of the public schools in Fresno County, sued for violation of the federal Equal Pay Act ("EPA") after she learned that her male counterparts were being paid more for performing the same work. In its summary judgment motion, the county argued that it paid males more than females based upon a factor other than sex, namely the higher salaries that male employees earned before being employed by the county. The district court rejected that argument and held that when an employer bases a pay structure "exclusively on prior wages," any resulting pay differential between men and women is not based on a factor other than sex. However, the United States Court of Appeals for the Ninth Circuit vacated and remanded the judgment, holding that if the employer is able to show that prior salary "effectuates some business policy" and the employer uses prior salary "reasonably in light of its stated purpose," prior salary can be a factor other than sex, resulting in no liability under the EPA. *Compare* Cal. Lab. Code § 1197.5(b)(3) (prohibiting reliance on prior salary by itself to justify any disparity in compensation).

Employer Failed To Show That Former Employee Violated Nondisclosure Agreement

Glassdoor, Inc. v. Superior Court, 9 Cal. App. 5th 623 (2017)

Machine Zone, Inc. ("MZ"), a software developer, brought suit against an anonymous former employee ("John Doe") who allegedly violated a nondisclosure agreement ("NDA") by posting a review on Glassdoor (a website where workers can post "reviews" of their employers) that allegedly disclosed confidential information concerning MZ and its technology. When Glassdoor refused to identify Doe, MZ moved for an order compelling it to do so. The trial court granted the motion, but in this writ proceeding, the Court of Appeal concluded that MZ had failed to make a prima facie showing that Doe's statements disclosed confidential information in violation of the NDA. The Court first concluded that Glassdoor has standing to assert Doe's interest in maintaining his anonymity. The Court further held that the information Doe had posted on the Glassdoor website regarding MZ's platform team and alleged statements from MZ's CEO did not violate the NDA: "The question thus remains: Insofar as an employee's statement about an employer's internal activities is *untrue*, can it ever violate a nondisclosure agreement? We think the answer is obviously negative."

Former CEO's Defamation Action Was Properly Dismissed With Anti-SLAPP Motion

Charney v. Standard General, LP, 10 Cal. App. 5th 149 (2017)

Dov Charney, the former president and CEO of American Apparel, Inc., was terminated following an investigation into allegations that he had engaged in various types of misconduct. Following Charney's departure, Standard General effectively took over American Apparel through its control of company stock and the Board. After Charney's employment was terminated, Standard General issued a press release that stated:

> As we have stated previously, our objective is to help American Apparel grow and succeed. We supported the independent, third-party and very thorough investigation into the allegations against Mr. Charney, and respect the Board of Directors' decision to terminate him based on the results of that investigation.

Charney sued, asserting that the press release contained false and defamatory information about him. In response to the complaint, Standard General filed an Anti-SLAPP motion, which the trial court granted and the Court of Appeal affirmed, holding that Charney had failed to satisfy his burden of showing minimal merit to his claim that the press release was defamatory: "The statement cannot be proven false as it does not state that Charney engaged in criminal conduct or that his conduct violated certain standards, or even that there existed any particular conduct that caused his termination."

Employee May Have Been On “Business Errand” At Time Of Traffic Collision

Sumrall v. Modern Alloys, Inc., 2017 WL 1365089 (Cal. Ct. App. 2017)

Juan Campos was employed as a cement/mason finisher for Modern Alloys, Inc. when he was involved in a collision that injured Michael Sumrall, who was riding a motorcycle. Before his shift, Campos was required to drive from his home to Modern Alloys’ “yard” where he would pick up coworkers and drive a company truck to the jobsite. In response to Sumrall’s complaint against Modern Alloys alleging respondeat superior liability for Campos’s negligence, Modern Alloys asserted that Campos was not acting with the scope of his employment under the “going and coming”’ rule because he was on his way to the yard at the time of the collision. The trial court granted Modern Alloys’ motion for summary judgment, but the Court of Appeal reversed, holding that there is a triable issue of fact as to whether Campos was on a business errand for Modern Alloys’ benefit while commuting from his home to the yard – and a “business errand” is an exception to the “going and coming” rule.

Safeway/Vons Assistant Managers Were Properly Classified As Exempt From Overtime

Batze v. Safeway, Inc., 10 Cal. App. 5th 440 (2017)

Gary Batze, et al., brought this lawsuit against their employer Safeway/Vons for failure to pay overtime wages. The employees alleged that they worked non-managerial tasks that rendered them non-exempt employees. After weeks of trial testimony, the trial court determined that the employees were engaged for more than 50 percent of their work week in managerial tasks and that they met all the other qualifications to be exempt from overtime. The Court of Appeal affirmed, holding that the employer had a realistic expectation that its store managers would be involved primarily in exempt work and that the work performed by the employees during a strike did not transform them into non-exempt employees. The Court further held that the statute of limitations was not tolled until the trial court’s order denying class certification was entered.

Employee Was Properly Awarded $31,000 In Attorney’s Fees On $300 Unpaid Wage Claim

Beck v. Stratton, 9 Cal. App. 5th 483 (2017)

Anthony Stratton filed a claim against Thomas Beck with the labor commissioner for unpaid wages in the amount of $303.55. After conducting an administrative hearing, the labor commissioner awarded Stratton $303.50 plus an additional $5,757.46 in liquidated damages, interest and statutory penalties for a total award of $6,060.96. Beck then filed an appeal in the Los Angeles Superior Court, which resulted in an award to Stratton in the amount of $6,778.85, exclusive of attorney’s fees and costs. The trial court subsequently awarded Stratton $31,365 in attorney’s fees. In this appeal, Beck asserted that the attorney’s fees motion, which was filed 58 days after the judgment was entered, was untimely and that the fees sought were unreasonably high. The Court of Appeal rejected both arguments and affirmed the judgment in favor of Stratton. *See also Quiles*

v. Parent, 10 Cal. App. 5th 130 (2017) (award of attorney's fees and costs need not be bonded pending appeal of same).

Health Care Employees Can Waive Their Second Meal Period

Gerard v. Orange Coast Mem. Med. Ctr., 9 Cal. App. 5th 1204 (2017)

In this putative class/Private Attorney General Act ("PAGA") action, Jazmina Gerard (and others) challenged a hospital policy that allowed health care employees who worked shifts longer than 10 hours to voluntarily waive one of their two meal periods, even if their shifts lasted longer than 12 hours. Plaintiffs alleged that they all signed second meal period waivers and occasionally worked longer than 12 hours without being provided a second meal period. The trial court granted summary judgment against Gerard and denied class certification to the other plaintiffs. In an earlier opinion, the Court of Appeal reversed, holding that Wage Order No. 5, Section 11(D), is partially invalid to the extent it permits employees in the health care industry to waive their second meal periods for shifts longer than 12 hours. After the California Supreme Court granted the hospital's petition for review, the Supreme Court transferred the case back to the Court of Appeal and ordered the lower court to vacate its earlier decision and to reconsider the case in light of the enactment in 2015 of SB 327 (amending Cal. Labor Code § 516). In this opinion, the Court of Appeal concluded that the Wage Order is valid after all.

Piece-Work-Based Pay Plan Violates FLSA

Brunozzi v. Cable Commc'ns, Inc., 851 F.3d 990 (9th Cir. 2017)

Matteo Brunozzi and Casey McCormick worked as technicians for CCI installing cable television and internet services. They alleged that CCI's compensation plan violates the overtime provisions of the Fair Labor Standards Act ("FLSA") because the "production bonus" paid by CCI is designed to decrease in proportion to an increase in the number of overtime hours the employees work. The United States Court of Appeals for the Ninth Circuit agreed with the employees and held that "the diminishing 'bonus' device in CCI's pay plan causes it to miscalculate the technicians' regular hourly rate during weeks when they work overtime and allows CCI to pay the technicians less during those weeks."

Chapter 11 Automatic Stay Applies To PAGA Claims

Porter v. Nabors Drilling USA, LP, 2017 WL 1404392 (9th Cir. 2017)

Jeremy Porter, a former employee of Nabors Drilling, filed a complaint alleging various claims against Nabors, including a claim arising under the Private Attorney General Act ("PAGA"). After removing the action to federal court, Nabors moved to compel arbitration of all of Porter's claims pursuant to an arbitration agreement. Porter agreed to arbitrate all of his claims except the PAGA claim. Over Porter's objection, the district court granted Nabors' motion to compel arbitration of the PAGA claim, and Porter filed the current appeal. After the appeal was filed, Nabors filed a "Notice of Suggestion of Bankruptcy," which stated that Nabors and its parent companies had filed voluntary petitions seeking bankruptcy protection under Chapter 11. Porter filed a motion for summary disposition, arguing that the automatic bankruptcy stay does not apply to a pending PAGA claim

based on an exception to the automatic stay for proceedings brought "by a governmental unit … to enforce such governmental unit's … police and regulatory power." The United States Court of Appeals for the Ninth Circuit granted Nabors' motion to stay the appellate proceedings, rejecting Porter's contention that a PAGA claim falls within the governmental unit exception to the automatic stay. *Cf. Gateway Community Charters v. Spiess*, 9 Cal. App. 5th 499 (2017) (nonprofit public benefit corporation that operates charter schools is not an "other municipal corporation" exempt from liability for waiting time penalties pursuant to Cal. Lab. Code § 220(b)).

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