Proskauer

newsletter

California Employment Law Notes

March 2017
Vol. 16, No. 2

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.

Routine Hugging Over 12-Year Period May Have Caused Hostile Work Environment

Zetwick v. County of Yolo, 2017 WL 710476 (9th Cir. 2017)

Victoria Zetwick, a county correctional officer, alleged that the county sheriff created a sexually hostile environment in violation of Title VII and the California Fair Employment and Housing Act by, among other things, greeting her and other female employees with unwelcome hugs on more than 100 occasions and a kiss at least once during a 12-year period of time. The district court granted defendants' motion for summary judgment based on their argument that the conduct was not objectively severe and pervasive and was, instead, merely innocuous, socially acceptable conduct. The United States Court of Appeals for the Ninth Circuit reversed, holding that the correct legal standard that the trial court should have applied is whether defendants' conduct was "severe or pervasive" and not "severe and pervasive." The Court further held that the district court erred by failing to consider whether a reasonable juror would find that hugs of the kind, number, frequency and persistence described by Zetwick created a hostile environment.

Racial Harassment Claim Based On Comments Made During "Creative Process" Was Properly Dismissed

Daniel v. Wayans, 2017 WL 526494 (Cal. Ct. App. 2017)

Pierre Daniel worked as an extra on a movie entitled "A Haunted House 2," which Marlon Wayans wrote, produced and starred in. Daniel sued Wayans and others, alleging that during his one day of work on the movie he was compared to a "Black cartoon character" and was called "nigga." Wayans moved to strike Daniel's lawsuit as a SLAPP (strategic lawsuit against public participation) pursuant to Cal. Code Civ. Proc. § 426.16, arguing that all of Daniel's claims arose from Wayans' constitutional right of free speech because

* 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.

the core injury-producing conduct occurred as part of the creation of the movie and its promotion over the Internet. The trial court granted Wayans' anti-SLAPP motion, dismissed Daniel's lawsuit and awarded Wayans his attorney's fees. The Court of Appeal affirmed the trial court's judgment, rejecting Daniel's assertion that the creative process occurs only when the cameras are rolling and holding that Daniel failed to produce evidence demonstrating a probability of prevailing on his claims. Specifically, the Court held that the word "nigga" as used by Wayans in this context "is not an unambiguous racial epithet in today's world, especially when used intra-racially, as it was here." The Court also held that Daniel's claim for intentional infliction of emotional distress was properly dismissed because the alleged misconduct "falls more in the category of insults, indignities, annoyances and petty oppressions" rather than extreme, outrageous conduct. *See also Melamed v. Cedars-Sinai Med. Ctr.*, 2017 WL 750493 (Cal. Ct. App. 2017) (Anti-SLAPP motion properly granted in connection with hospital's actions taken against physician during peer-review process); *Safari Club Int'l v. Rudolph*, 845 F.3d 1250 (9th Cir. 2017) (Anti-SLAPP motion properly denied where plaintiffs could show reasonable probability of prevailing on their claims for invasion of privacy, among other things, based upon defendant's surreptitious audio recording of a conversation).

Employer May Have Discriminated Against Female Supervisor Based On Gender

Mayes v. WinCo Holdings, Inc., 846 F.3d 1274 (9th Cir. 2017)

Katie Mayes worked at WinCo for 12 years in Idaho Falls, Idaho. During her last years at WinCo, she supervised employees on the night-shift freight crew. Mayes was fired for taking a stale cake from the store bakery to the break room to share with fellow employees and telling a loss prevention investigator that management had given her permission to do so. WinCo deemed Mayes' actions to constitute theft and dishonesty and also determined that her behavior rose to the level of "gross misconduct," thus rendering her ineligible for COBRA benefits. Mayes alleged that the reason offered by WinCo for her termination was pretext and that the real reason was that the company wanted to put a man in charge of the freight crew instead of Mayes. The district court granted summary judgment in favor of WinCo, but the United States Court of Appeals for the Ninth Circuit reversed, holding that there was "ample direct evidence of discriminatory animus" from the general manager, Dana Steen, including Steen's alleged statement that she "did not like 'a girl' running the freight crew." The Court also noted that Mayes presented evidence that WinCo replaced her with a less qualified male employee and that it was a "common, accepted practice" for supervisors to take cakes to the break room. In reversing the summary judgment, the Court further noted that if Mayes was fired for discriminatory reasons, she may be entitled to COBRA benefits (i.e., there was no "gross misconduct") and that she may be entitled to unpaid vacation benefits.

Employee Who Took CFRA Leave May Proceed With Retaliation Lawsuit

Bareno v. San Diego Community College Dist., 7 Cal. App. 5th 546 (2017)

Leticia Bareno, who worked as an assistant at San Diego Miramar College, was terminated after she failed to return from a medical leave of absence that she took pursuant to the California Family Rights Act ("CFRA"). During the course of Bareno's employment, she received several disciplinary warnings for, among other things, excessive absences, workplace disagreements, incompetence, inefficiency and neglect of duty. On February 19, 2013, the college disciplined Bareno with a three-day unpaid suspension for additional performance issues; the suspension ran from February 20 through February 22 (a Friday). At 4:30 a.m. on Monday, February 25, Bareno called her supervisor and claimed to be "sick, depressed, stressed" and said she needed to go to the hospital. She subsequently provided a "work status report" from Kaiser indicating that she needed to take a medical leave from February 25 through March 1. Bareno emailed a second "work status report," placing her "off work" through March 8, which her supervisor denied receiving. Bareno failed to show up for work on Monday, March 4, and on Friday, March 8, the college sent her a letter indicating that her unauthorized absences constituted a voluntary resignation. Although the trial court granted summary judgment to the employer, the Court of Appeal reversed, holding that an employer is obligated to "inquire further" about an employee's need for CFRA leave before terminating employment and citing the CFRA regulations that give an employee up to 15 days to provide necessary certification of the need for a medical leave. The Court further held that Bareno had submitted sufficient medical certification to support her need for medical leave.

LAPD Failed To Reasonably Accommodate Recruits Who Were Injured While Training

Atkins v. City of Los Angeles, 2017 WL 588127 (Cal. Ct. App. 2017)

A jury found that the City of Los Angeles violated the rights of five recruit officers of the LAPD under the Fair Employment and Housing Act when the Department terminated or constructively discharged them after they sustained injuries during training at the Police Academy. Judgment was entered for plaintiffs after the jury awarded them over $12 million in damages. The Court of Appeal affirmed in part and reversed in part, holding that substantial evidence did not support the jury's verdict that the City discriminated against the plaintiffs because they could not perform the essential functions of a police recruit even with a reasonable accommodation. However, the Court held that the City failed to reasonably accommodate the recruits by reassigning them until they were healed or their disabilities became permanent. The Court further held that the jury's award of future economic damages was based upon plaintiffs' expert's testimony that "simply assumed" the plaintiffs would have completed their Academy training and probationary period and remained police officers for over 25 years without any evidence of the likelihood that they would "run the table from Academy to retirement." Accordingly, the Court directed the trial court to grant the City's motion for a new trial on future economic damages only.

Millwrights Could Proceed With Hostile Work Environment Claim

Reynaga v. Roseburg Forest Prods., 847 F.3d 678 (9th Cir. 2017)

Efrain Reynaga and his son Richard Reynaga, who worked as millwrights for Roseburg Forest Products, were the only millwrights of Mexican descent at the company. Efrain alleged that during the course of his employment he was subjected to disparate treatment and a hostile work environment based on his race or national origin. Efrain alleged that a contentious relationship had developed with lead millwright Timothy Branaugh who allegedly had harassed Efrain with racially disparaging comments. Following an investigation into Efrain's allegations, Roseburg rearranged Branaugh's work schedule so that he would not be on the same shift as Efrain. When Branaugh was subsequently scheduled to work the same shift as the Reynagas (despite the rearrangement of Branaugh's schedule), they refused to work and their employment was terminated. The district court granted summary judgment in favor of Roseburg, but the United States Court of Appeals for the Ninth Circuit reversed, holding that Branaugh's demeaning comments that directly referenced race were not "offhand comments" or "mere offensive utterances" and were sufficiently severe or pervasive to create a hostile work environment. The Court also held there was sufficient evidence of disparate treatment and retaliation to preclude entry of summary judgment for Roseburg. *See also Hamilton v. Orange County Sheriff's Dep't*, 2017 WL 591412 (Cal. Ct. App. 2017) (trial court abused its discretion by failing to accommodate counsel's joint request for a 60-day continuance prior to granting summary judgment); *Van v. Language Line Servs., Inc.*, 8 Cal. App. 5th 73 (2017) (trial court abused its discretion by sanctioning plaintiff and finding her in contempt for failing to attend her deposition where there was no court order in place compelling her attendance).

Court Properly Dismissed PAGA And Class Action Claims

Silva v. See's Candy Shops, Inc., 7 Cal. App. 5th 235 (2017)

The Court of Appeal held that the trial court properly granted summary judgment to See's Candy as to the class-certified claims for failure to properly pay wages as a result of the employer's rounding and grace-period policies, based on expert testimony that employees were paid for all of their work under See's Candy's policies. However, the trial court erred in granting summary adjudication on Pamela Silva's individual claims for meal/rest period and expense reimbursement violations because See's Candy did not move for summary adjudication on those claims – though it did request leave to amend its summary judgment notice to add the alternate summary adjudication request. The Court affirmed summary adjudication of the Private Attorney General Act ("PAGA") claims on the ground that Silva could not prevail on her rounding/grace-period claims and because she failed to provide any evidence in support of a PAGA claim based on anything other than the rounding/grace period issues.

Auto Dealership Service Advisors Are Not Exempt From Federal Overtime Requirements

Navarro v. Encino Motorcars, LLC, 845 F.3d 925 (9th Cir. 2017)

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." The U.S. Department of Labor ("DOL") subsequently 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 giving service advisors a right to overtime under the FLSA. In this opinion, the United States Court of Appeals for the Ninth Circuit held (following remand from the United States Supreme Court) that service advisors do not fall within the exemption from the FLSA's overtime-compensation requirement.

Employees Paid On Commission Are Entitled To Separate Compensation For Rest Periods

Vaquero v. Stoneledge Furniture LLC, 2017 WL 776635 (Cal. Ct. App. 2017)

Ricardo Bermudez Vaquero and Robert Schaefer, who were employed as sales associates for Stoneledge Furniture, filed a class action, alleging that Stoneledge's commission pay plan violated California law because it did not provide separate compensation to employees for any non-selling time such as time spent in meetings, attending certain types of training sessions and during rest periods. The trial court granted summary judgment in favor of Stoneledge, but the Court of Appeal reversed, holding that the applicable Wage Order requires employers to separately compensate covered employees for rest periods if the compensation plan does not already include a minimum hourly wage for such time.

Employer Violated FCRA By Including Liability Waiver In Disclosure Statement

Syed v. M-I, LLC, 846 F.3d 1034 (9th Cir. 2017)

When Sarmad Syed applied for a job with M-I, he was given a "Pre-employment Disclosure Release," which informed him that his credit history and other information could be collected and used as a basis for the employment decision; the document also stated that by signing it, Syed was waiving his right to sue M-I and its agents for any violations of the Fair Credit Reporting Act ("FCRA"). In his putative class action lawsuit against M-I, Syed alleged that M-I's inclusion of the liability waiver in the FCRA disclosure document violated the statute, which requires that the disclosure document consist "solely" of the disclosure. The district court dismissed the lawsuit, but the United States Court of Appeals for the Ninth Circuit reversed, holding that M-I violated the FCRA

by including a liability waiver in the same document as its disclosure, which must consist "solely of the disclosure." The Court further held that M-I's statutory violation was willful as a matter of law and was not barred by the two-year statute of limitations (Syed was unaware that M-I had actually procured his consumer report until he reviewed his personnel file).

Employer Not Vicariously Liable For Injuries Caused By Employee In Auto Accident

Lynn v. Tatitlek Support Servs., Inc., 2017 WL 696008 (Cal. Ct. App. 2017)

The Lynns sued TSSI in this wrongful death action arising from an automobile accident involving TSSI's temporary employee, Abdul Formoli. The Lynns contend that the "going and coming" rule, precluding employer vicarious liability, does not apply based upon the nature of Formoli's employment – namely, that the remoteness of the jobsite required Formoli to undertake a lengthy commute home after working long hours. The trial court granted summary judgment in favor of TSSI based on the "going and coming rule." The Court of Appeal affirmed, holding that none of the exceptions to the rule (incidental benefit, compensation for travel time or the special risk doctrine) applied.

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

Contact

Anthony J. Oncidi, Partner
+1.310.284.5690 – aoncidi@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