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By **Anthony J. Oncidi***

California Employment Law Blog

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Eddie Money Beats Discrimination Lawsuit Based On Free Speech Right

Symmonds v. Mahoney, 31 Cal. App. 5th 1096 (2019)

After 41 years, singer/songwriter Edward Joseph Mahoney (aka "Eddie Money") terminated the employment of Glenn Symmonds (the band's drummer) in response to which Symmonds filed a lawsuit alleging discrimination based on age, disability and medical condition in violation of the California Fair Employment and Housing Act ("FEHA"). Mahoney filed an anti-SLAPP motion to dismiss the FEHA claim on the ground that Symmonds' claim arose in connection with an issue of public interest given the media's and the public's interest in Mahoney and his music. The trial court denied Mahoney's motion to dismiss, but the Court of Appeal reversed, holding that "a singer's selection of the musicians that play with him both advances and assists the performance of the music, and therefore is an act in furtherance of his exercise of the right to free speech." *See also Rall v. Tribune 365 LLC*, 31 Cal. App. 5th 479 (2019) (*Los Angeles Times*' anti-SLAPP motion was properly granted, dismissing former blogger's defamation and wrongful termination claims based on the *Times*' "constitutionally protected editorial decision to stop publishing [the blogger's] work"); *Laker v. Board of Trustees*, 2019 WL 969567 (Cal. Ct. App. 2019) (university's anti-SLAPP motion should have been granted, dismissing professor's defamation claim arising from several internal investigations).

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Former Accountant Could Proceed With Whistleblower Lawsuit

Siri v. Sutter Home Winery, Inc., 31 Cal. App. 5th 598 (2019)

Says Siri alleged she was terminated as the general ledger staff accountant for Sutter Home Winery in retaliation for having notified the state Board of Equalization and Sutter's general counsel in writing of her belief that the winery was out of compliance with California sales and use tax law. Sutter successfully moved for summary judgment of Siri's lawsuit on the ground that Siri could not establish the elements of her claim without relying upon Sutter's tax returns, which were privileged and unavailable to her in connection with the prosecution of her lawsuit. The Court of Appeal reversed, holding that Sutter had not established that Siri could not prove her case without Sutter's tax returns – "Plaintiff's right to recover turns only on whether she was discharged for communicating her reasonable belief that [Sutter] was not properly reporting its use tax obligation." *See also Wadler v. Bio-Rad Labs., Inc.*, 2019 WL 924827 (9th Cir. 2019) (portion of $11 million whistleblower verdict in favor of former general counsel vacated based upon erroneous jury instructions regarding Sarbanes-Oxley Act violation, but punitive damages awarded under state common law theory upheld).

Employer Violated FCRA With Improper Background Check Notice

Gilberg v. California Check Cashing Stores, LLC, 913 F.3d 1169 (9th Cir. 2019)

While applying for employment with CheckSmart Financial, LLC, Desiree Gilberg signed a "Disclosure Regarding Background Investigation," which resulted in Gilberg's filing a putative class action against CheckSmart, claiming it had violated the federal Fair Credit Reporting Act ("FCRA") and the California Investigative Consumer Reporting Agencies Act ("ICRAA"). The district court granted CheckSmart's summary judgment motion, but the Ninth Circuit reversed, holding that CheckSmart's disclosure form: (1) violates FCRA's "standalone document requirement" (because it contained "surplus language" involving applicants' rights under the state law of various jurisdictions); and (2) was not "clear" (because the language was not understandable to a reasonable person) as required by the applicable statutes; the Court concluded that although the language in question was not "clear," it was sufficiently "conspicuous."

Fruit Growers May Have Been Joint Employers Of Thai Workers For Purposes Of Title VII

EEOC v. Global Horizons, Inc., 915 F.3d 631 (9th Cir. 2019)

The Washington state fruit growers in this case experienced labor shortages and as a result entered into agreements with Global Horizons (a labor contractor) to obtain temporary workers from Thailand to work in their orchards under the H-2A guest worker program. After two of the Thai workers filed discrimination charges with the EEOC, the agency initiated this litigation, claiming the growers and Global Horizons subjected the Thai workers to poor working conditions, substandard living conditions and unsafe transportation based on their race and national origin. After Global Horizons became financially insolvent, the following legal question remained: To what extent were the

growers joint employers of the Thai workers for purposes of Title VII liability? The district court dismissed all Title VII charges against the growers that did not involve "orchard-related matters." In this appeal proceeding, however, the Ninth Circuit reversed the dismissal of claims regarding "non-orchard-related matters" and held the district court should have applied the "common-law agency test" for determining joint employer status under Title VII. Further, the Court held that at least one of the growers allegedly knew or should have known about the discrimination and had "ultimate control over [even non-orchard-related matters] and thus could have taken corrective action to stop the discrimination."

$300 Unpaid Wage Claim Results In Additional $57,000 Award To Employee

Stratton v. Beck, 30 Cal. App. 5th 901 (2018)

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. 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 and concluded "the parties are to bear their own costs on appeal." Beck interpreted this language to mean that he had not been ordered to pay Stratton's attorney's fees on appeal; Stratton disagreed and requested an additional $57,420 (which he sought to have doubled in light of the complexity of the matter) in appellate attorney's fees from Beck. In this latest opinion, the Court of Appeal once again sided with Stratton and ordered Beck to pay Stratton's appellate attorney's fees in the amount of $57,420.

Payroll Company Not Liable To Employee For Negligence Or Breach Of Contract

Goonewardene v. ADP, LLC, 6 Cal. 5th 817 (2019)

Sharmalene Goonewardene alleged claims against ADP (the payroll company used by her employer, Altour International Inc.) for wrongful termination, violation of the Labor Code, breach of contract, negligent misrepresentation and negligence. The trial court sustained ADP's demurrer to the complaint without further leave to amend, and the Court of Appeal affirmed in part and reversed in part, holding that only the wrongful termination and Labor Code claims were properly dismissed. The Court of Appeal held that there were not sufficient facts alleged establishing an employment relationship between Goonewardene and on that basis affirmed dismissal of the Labor Code and FLSA violation claims. Similarly, ADP was not liable as a matter of law for either discrimination or wrongful termination in violation of public policy because of the absence of an employment relationship. As for the breach of contract claim, the Court of Appeal held

that Goonewardene and other Altour employees were third-party beneficiaries of an agreement between Altour and ADP. The Court of Appeal also held that the negligent misrepresentation and professional negligence claims survived demurrer based on ADP's alleged failure to properly calculate wages owed to Goonewardene.

In this opinion, the California Supreme Court reversed the Court of Appeal insofar as the lower Court held that the trial court erred in dismissing the causes of action for breach of contract, negligence and negligent misrepresentation. The Supreme Court unanimously determined that ADP was not a creditor beneficiary of the employment relationship between Altour and its employees or that ADP agreed to pay the wages that Altour owes to its employees out of ADP's own funds. The Supreme Court further held that ADP owed no common law duty of care to Altour's employees and thus could not be liable for alleged negligence.

PAGA Penalties Must Be Shared With All Aggrieved Employees

Moorer v. Noble L.A. Events, Inc., 2019 WL 949419 (Cal. Ct. App. 2019)

David Moorer, who worked as a full-time security guard and "lobby ambassador" for Noble, filed a complaint as an individual and on behalf of all aggrieved employees against Noble and others under the Private Attorneys General Act ("PAGA"). After Noble failed to respond to outstanding discovery requests and its lawyer withdrew, Moorer submitted a request for entry of a default judgment against Noble in the amount of $679,374.52, including $594,550 in PAGA penalties. The civil penalties under PAGA were calculated based on wage violations for 23 aggrieved employees. However, the trial court denied a request by Moorer to enter the default judgment because the proposed judgment failed to account for the distribution requirements for PAGA penalties – specifically, Moorer's proposed judgment sought to allocate all penalties to Moorer himself and made no reference to the 75 percent of PAGA penalties owed to the state or the share of penalties to be distributed to other aggrieved employees. Although Moorer subsequently conceded the state was entitled to 75 percent of the PAGA penalties, he continued to seek to allocate the remaining 25 percent to himself alone rather than distribute it among the aggrieved employees. The trial court dismissed the case, and the Court of Appeal affirmed, holding that allocation of 25 percent of the penalties to all aggrieved employees is consistent with the statutory scheme under which the judgment binds all aggrieved employees, including nonparties. *See also Correia v. NB Baker Elec., Inc.*, 2019 WL 910979 (Cal. Ct. App. 2019) (PAGA representative-action waiver remains unenforceable under California law; PAGA representative action may not be compelled to arbitration without the state's consent).

Court Should Not Have Denied Certification Of Class Of Drivers Seeking Wage & Hour Remedies

Jimenez-Sanchez v. Dark Horse Exp., Inc., 2019 WL 626349 (Cal. Ct. App. 2019)

The trial court denied plaintiffs' motion for class certification of a putative class consisting of employees who worked as drivers transporting milk within California. Plaintiffs allege failure to compensate for all hours worked; failure to schedule meal periods; failure to provide uninterrupted duty-free meal periods of at least 30 minutes; failure to pay premiums when rest or meal breaks were not provided, recordkeeping violations, etc. Dark Horse, the employer, independently secured settlement agreements and releases from 54 of the 76 putative class members and argued there was insufficient numerosity for the case to proceed as a class action and atypicality of the class representatives since they had not signed the releases. The Court of Appeal reversed the trial court's order denying certification on the ground that the trial court used improper criteria or erroneous legal assumptions of whether plaintiffs' claims and one of defendant's defenses presented predominantly common issues suitable for determination on a class basis. Specifically, the Court held the trial court based its decision on the certification motion in part on an erroneous legal assumption that the law applicable to compensation for rest periods is the same as that applicable to compensation for nonproductive time. The Court further held the claimed unconscionability issues (related to the releases) are predominantly individual and not subject to class treatment. *See also Nisei Farmers League v. California Labor & Workforce Dev. Agency*, 30 Cal. App. 5th 901 (2019) (Labor Code section 226.2 governing piece-rate compensation is not unconstitutionally vague).

Successive Class Action May Be Barred By Statute Of Limitations

Fierro v. Landry's Rest. Inc., 2019 WL 658710 (Cal. Ct. App. 2019)

Jorge Fierro filed this class action, claiming that he and the other members of the putative class were misclassified as exempt employees and that, in fact, they were non-exempt, non-managerial employees who are owed unpaid overtime wages and penalties. Landry's responded by filing a demurrer, asserting that the claims are barred by the applicable statutes of limitation. Although Landry's conceded that the filing of an earlier class action for these claims tolled the statute of limitations applicable to Fierro's individual claims, it maintained that the statute was not tolled for the class claims Fierro asserted. Landry's also contended that because the earlier class action was dismissed for failure to bring the action to trial within five years, the class claims could not be resurrected in the new action filed by Fierro. The trial court sustained the demurrer to the class claims due to the earlier dismissal based upon the five-year rule. The Court of Appeal reversed and remanded the action to the trial court, holding that on the present record the Court could not determine whether all of the class' claims are untimely. The Court further determined that upon denial of class certification in an action, a putative class member may not commence the same class claim in a new action beyond the time allowed by the limitation period applicable to the class claim, citing *China Agritech, Inc. v. Resh*, 584 U.S. ___, 138 S. Ct. 1800 (2018) (successive class action may not be filed under federal law after the original statute of limitations period has expired).

Caregiver May Not Have Been Independent Contractor Under DWBR

Duffey v. Tender Heart Home Care Agency, LLC, 31 Cal. App. 5th 232 (2019)

Nichelle Duffey sued Tender Heart Home Care Agency for employment-related wage and hour claims such as unpaid overtime under the California Domestic Worker Bill of Rights ("DWBR," Cal. Labor Code §§ 1450, *et seq*.). The trial court granted Tender Heart's motion for summary judgment after determining that Duffey was an independent contractor and not an employee under the "common law" test. The Court of Appeal reversed, holding that the trial court should have applied the legal standard set forth in the DWBR itself rather than California Supreme Court precedent from 1989 and that the statute creates a dispute of fact as to whether Duffey was an independent contractor or employee. The Court further held that there is a disputed issue of fact as to whether Tender Heart is a non-employer employment agency within the meaning of the statute.

On-Call Employees Who Must Call In Should Receive Reporting-Time Pay

Ward v. Tilly's, Inc., 31 Cal. App. 5th 1167 (2019)

Skylar Ward challenged by way of this putative class action the on-call scheduling practices of her former employer, Tilly's, Inc., as violating the reporting time pay requirements of California law. Tilly's required on-call employees to contact Tilly's two hours before their on-call shifts. If they are told to come in, they are paid for the shifts they work; if they are not told to come in, they receive no compensation for having been "on call." Ward alleged that when the employees contacted Tilly's two hours before their on-call shifts, they were "reporting for work"; Tilly's asserted that employees "report for work" only by physically appearing at the work site at the start of a scheduled shift. The trial court sustained Tilly's' demurrer and dismissed the action. The Court of Appeal reversed, holding that "the call-in requirement is inconsistent with being off-duty, and thus triggers the reporting time pay requirement."

Damages May Not Be Denied To Employee Based Upon His "Imprecise Testimony"

Furry v. East Bay Pub'g, LLC, 30 Cal. App. 5th 1072 (2019)

Terry Furry worked as a sales and marketing director for the East Bay Express (a weekly newspaper based in Oakland) and alleged that East Bay failed to pay minimum and overtime wages, meal and rest breaks, provide properly itemized wage statements, etc. Following a bench trial, the court determined that East Bay failed to meet its burden of proving that Furry was exempt from overtime and related wage and hour requirements. However, because Furry "failed to present sufficient evidence regarding the amount and extent of his [overtime] work" and because his testimony was "uncertain, speculative, vague and unclear," the court declined to award recovery for uncompensated overtime hours because "even a rough approximation of said hours would be pure guess work and unreasonable speculation on the court's part." As for meal and rest breaks, the trial court determined that East Bay provided Furry with uninterrupted meal and rest breaks.

The Court of Appeal reversed the judgment as to the overtime claims because East Bay failed to keep proper records and so “the imprecise nature of Furry’s testimony was not a bar to relief.” The Court affirmed the judgment as to the meal and rest breaks because Furry failed to prove that East Bay knew or should have known he was working through authorized meal breaks.

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