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By **Anthony J. Oncidi***

Employers Need Only Provide (Not Ensure) Meal And Rest Breaks

Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004 (2012)

In this long-awaited opinion, the California Supreme Court determined several important issues of law regarding meal and rest breaks. First and foremost, the Supreme Court determined that "an employer's obligation is to relieve its employee of all duty, with the employee thereafter at liberty to use the meal period for whatever purpose he or she desires, but the employer need not ensure that no work is done." The Court also issued rulings concerning the certification of three subclasses of employees, holding that the trial court had properly certified a subclass for rest break violations (because of the employer's uniform policy denying same) and had properly denied certification of a subclass involving "off-the-clock" violations (because of a lack of evidence of common policies or means of proof). Finally, the Court remanded the case to the trial court to reconsider whether the subclass involving meal break violations should have been certified. *See also Kirby v. Immoos Fire Prot., Inc.*, 2012 WL 1470313 (Cal. S. Ct. 2012) (prevailing party on claim for violation of Labor Code § 226.7 involving meal and rest break requirements may not recover its attorney's fees).

Employees Did Not Violate Federal Statute By Misappropriating Employer's Computer Data

United States v. Nosal, 2012 WL 1176119 (9th Cir. 2012) (*en banc*)

In this criminal proceeding brought under the Computer Fraud and Abuse Act ("CFAA"), the United States government filed a 20-count indictment against David Nosal (a former employee of Korn/Ferry International) and his accomplices (also from Korn/Ferry) as a result of their obtaining information from their employer's computer system for the purpose of defrauding Korn/Ferry and helping Nosal set up a competing business. The government contended that under the CFAA, an employee exceeds authorized access when he or she

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obtains information from a computer and uses it for a purpose that violates the employer's restrictions on the use of such information. A three-judge panel of the Ninth Circuit Court of Appeals agreed with the government's interpretation of the CFAA, but a broader *en banc* panel of the Court affirmed the district court's dismissal of the CFAA counts, holding that the CFAA was intended by Congress to criminalize hacking by outsiders and not to reach the activities of employees who had exceeded their authorized access. In so holding, the Ninth Circuit parted company with the Fifth, Seventh and Eleventh Circuits, all of which have interpreted the CFAA to encompass employee misconduct such as that alleged in this case.

Nurse's ADA Disability Discrimination Claim Was Properly Dismissed

Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233 (9th Cir. 2012)

Monika Samper, a neo-natal intensive care unit nurse, sought an accommodation from the hospital where she was employed that would have allowed her an unspecified number of unplanned absences from work. She wanted to opt out of Providence's attendance policy, which permitted five unplanned absences of unlimited duration and other absences during a rolling 12-month period. Samper, who alleged she suffered from fibromyalgia, regularly exceeded the number of unplanned absences permitted by the hospital's policy. In an effort to accommodate Samper, Providence permitted her to call in when she was having a "bad day" and move her shift to another day in the week. Samper was given another accommodation in which her two shifts per week would not be scheduled on consecutive days. Despite these and other accommodations, Samper's attendance problems persisted. After further accommodations, Samper was finally discharged for, among other reasons, seven absences in a 12-month period and "general problems with absences." In response, Samper filed a lawsuit, alleging violation of the Americans with Disabilities Act due to the hospital's alleged failure to accommodate her disability. The district court granted summary judgment in favor of the hospital, and the Ninth Circuit Court of Appeals affirmed based on the "common-sense notion that on-site regular attendance is an essential job function…of a neo-natal nurse." The Court further held that Samper's requested accommodation (a waiver from the hospital's five-absence limit) was unreasonable, noting that "an employer need not provide accommodations that compromise performance quality."

Employee From Pakistan Could Proceed With Religion And National Origin Harassment Claims

Rehmani v. Superior Court, 204 Cal. App. 4th 945 (2012)

Mustafa Rehmani, a Muslim born in Pakistan, worked as a system test engineer for Ericsson Inc. before his employment was terminated in 2009. Among other things, Rehmani alleged that three of his coworkers (Amit Patel, Aneel Choppa and Ashit Ghevaria) and Ericsson harassed him based on his Pakistani nationality and his Muslim faith. The trial court granted defendants' motion for summary adjudication of those claims on the ground that the undisputed facts demonstrated that Rehmani was not subjected to unwelcome harassment based on religion and/or national origin. The Court of Appeal granted Rehmani's petition for a writ of mandate and directed the trial court to vacate its order granting summary adjudication to defendants after reviewing the evidence. The Court noted that Rehmani had "offered evidence of a larger picture than just a few interpersonal squabbles. His declaration, together with testimony from coworkers, suggests rudeness, taunting, and intimidation from Indian engineers toward non-Indian colleagues." The Court further observed, "considering the current international climate of tension between Muslims and non-Muslims and that factor's interaction with relations between various countries (including Pakistan and India), we cannot regard the [claim of harassment based on religion] as independent of the evidence related to national origin."

Physician's Wrongful Termination And Discrimination Claims Were Properly Dismissed

Nesson v. Northern Inyo County Hosp., 204 Cal. App. 4th 65 (2012)

John Nesson sued the hospital where he had been employed as a radiologist after the medical executive committee terminated his contract. Nesson alleged breach of contract, retaliation and discrimination based upon a perceived mental disability or medical condition. The hospital successfully obtained dismissal of Nesson's lawsuit under the anti-SLAPP statute on the grounds that the complaint targeted a protected activity (the suspension of Nesson's medical privileges following a medical peer review) and that Nesson had failed to establish that there was a probability that he would prevail on his claims. The Court of Appeal affirmed the dismissal. *Compare Donovan v. Dan Murphy Found.*, 204 Cal. App. 4th 1500 (2012) (foundation director's "wrongful removal" claim was improperly dismissed under anti-SLAPP statute).

Unfair Competition Claim Against Franchisor Was Properly Dismissed

Aleksick v. 7-Eleven, Inc., 2012 WL 1589017 (Cal. Ct. App. 2012)

Kimberly Aleksick, who worked as a clerk at a 7-Eleven store, sued 7-Eleven (the franchisor of the store where Aleksick was employed) for violation of the Unfair Competition Law ("UCL"). Aleksick alleged that 7-Eleven, which provides payroll services to its franchisees, violated the UCL by converting any partial hour worked in a pay period from minutes to hundredths of an hour, which sometimes shorted employees a few seconds of time. The trial court granted 7-Eleven's motion for summary judgment on the ground that Aleksick had failed to allege any statutory predicate for her UCL claim and, in any event, the Labor Code wage statutes govern the employer-employee relationship, and the undisputed evidence showed that 7-Eleven was not the employer of Aleksick or the other class members. The Court of Appeal affirmed summary judgment against Aleksick.

Union Employee's Claims Were Not Preempted By Federal Law

Sciborski v. Pacific Bell Directory, 2012 WL 1592546 (Cal. Ct. App. 2012)

Annie Sciborski sued her former employer, Pacific Bell Directory, after it deducted approximately $19,000 from her wages to recover a $36,000 sales commission that had been paid to her. After a three-day trial, the jury found Pacific Bell's wage deductions violated the Labor Code and resulted in Sciborski's constructive discharge in violation of public policy. On appeal, Pacific Bell asserted that Sciborski's claims were preempted by federal law under section 301 of the Labor Management Relations Act. The Court of Appeal rejected Pacific Bell's argument after concluding the claims were not preempted because they arose from independent state law and did not require the interpretation of a collective bargaining agreement.

Personal Attendant Who Cared For Elderly Person Was Exempt From Overtime

Cash v. Winn, 2012 WL 1662629 (Cal. Ct. App. 2012)

Joy Cash, who is not a licensed or trained nurse, cared for Iola Winn, who is in her 90's, in Winn's home. After she left her employment, Cash sued Winn for failure to pay her overtime wages. Winn claimed that Cash was a personal attendant within the meaning of Wage Order No. 15 and thus exempt from overtime. At trial, the court instructed the jury that a personal attendant is a person who is employed to "supervise, feed or dress" an elderly person and explained that "supervision" includes assisting the elderly person with various daily living tasks. The trial court also instructed the jury that the personal care exemption (from overtime) does not apply when the employee's duties require the regular administration of health care services "such as the taking of temperatures or pulse or respiratory rate, regardless of the amount of time such duties take." Following the jury trial, the court entered judgment in Cash's favor for over $123,000, consisting of $33,700 in overtime wages, $14,000 in prejudgment interest, $73,000 in attorney's fees and $3,000 in litigation costs. The Court of Appeal reversed the judgment on the ground that the trial court had erred in instructing the jury about the existence of a health care exception to the personal attendant exemption.

Attorney Fee Award Should Be Made Payable To Attorney And Not Client

Henry M. Lee Law Corp. v. Superior Court, 204 Cal. App. 4th 1375 (2012)

Henry M. Lee represented Ok Song Chang in employment litigation resulting in a $62,000 judgment in Chang's favor following a jury trial. The trial court also awarded Chang $300,000 in attorney fees as a prevailing party under the applicable Labor Code provisions. After Chang substituted herself in propria persona for her former attorney, Lee moved to intervene in the action and to amend the post-judgment order awarding attorney fees to make the fee award payable to Henry M. Lee Law Corporation. Although the trial court denied the motion, the Court of Appeal granted Lee's petition for a writ of mandate, holding that "absent a contract determining a different disposition of an attorney fee award, attorney fees awarded under [the] Labor Code…in excess of fees already paid to the attorneys by the client, should be made payable directly to the attorney who provided the legal services."

School District Could Be Vicariously Liable For Negligent Supervision Of School Personnel

C.A. v. William S. Hart Union High Sch., 53 Cal. 4th 861 (2012)

Through a guardian ad litem, C.A. alleged that while he was a student at Golden Valley High School, he was subjected to sexual harassment and abuse by Roselyn Hubbell, the head guidance counselor at his school. C.A. sued the school district for negligent supervision of Hubbell because the district knew or should have known of her "dangerous and exploitive propensities." The district demurred to the complaint on the ground that there is no statutory authority for holding a public entity liable for negligent supervision, hiring or retention of its employees. The trial court sustained the demurrer and the court of appeal affirmed, but in this opinion, the California Supreme Court reversed the lower court, holding that a public school district may be vicariously liable for the negligence of administrators or supervisors in hiring and retaining a school employee who sexually harasses and abuses a student. *Compare Sharrock v. United States*, 673 F.3d 1117 (9th Cir. 2012) (government not liable for injuries sustained by plaintiffs from auto accident with off-duty sailor who was on his way to basketball practice).

Ninth Circuit Rejects "Selective Waiver" Theory Of Preserving Attorney-Client Privilege

In re Pac. Pictures Corp., 2012 WL 1640627 (9th Cir. 2012)

Although this case did not arise in the employment context, it has implications in labor and employment litigation matters in which a government agency is involved. The question the Ninth Circuit decided is whether a party waives the attorney-client privilege forever by voluntarily disclosing privileged documents to the federal government. The Court answered this question in the affirmative.

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