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By **Anthony J. Oncidi***

Employee Who Provided False SSN and Other Information Was Barred from Suing for Disability Discrimination

Salas v. Sierra Chem. Co., 198 Cal. App. 4th 29 (2011)

Vicente Salas worked on Sierra Chemical's production line, filling containers with various chemicals. At the time of his hire, Salas provided Sierra with a resident alien card and a Social Security card and signed an Employment Eligibility Verification Form (I-9 Form). After allegedly injuring his back several times and presenting doctors' notes restricting his ability to lift, stoop and bend, Salas was laid off in December 2006 as part of Sierra's annual reduction in its production line staff. Salas received a recall-to-work letter in May 2007, but Sierra did not permit him to return to work after he told the company he was "not completely healed." Salas subsequently filed a lawsuit against Sierra, alleging disability discrimination and denial of employment in violation of public policy. After filing an in limine motion stating that he would assert his Fifth Amendment right against self-incrimination to any questions concerning his immigration status, Sierra discovered that the Social Security number ("SSN") used by Salas to secure employment belonged to a man in North Carolina named Kelley R. Tenney. Sierra then moved for summary judgment on the ground that it never would have hired or recalled Salas if it had known he was using a counterfeit SSN. After its motion was initially denied, Sierra filed a petition for writ of mandate with the Court of Appeal, which directed the trial court to grant the motion or show cause why the motion should not be granted. The trial court subsequently granted the motion, and the Court of Appeal affirmed summary judgment in this opinion based upon the after-acquired evidence and unclean hands doctrines.

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Employer Did Not Violate CFRA by Transferring Employee upon Her Return from 19-Week Stress Leave

Rogers v. County of Los Angeles, 2011 WL 3570494 (Cal. Ct. App. 2011)

After 19 weeks of medical leave, Katrina L. Rogers returned to her job as the personnel officer in the executive office responsible for rendering administrative and other support services to the Los Angeles County Board of Supervisors. During her LOA, Rogers' doctor told her that she could not perform her duties because "she could not think clearly and had headaches." Rogers' stress allegedly resulted from "an attack on [her] integrity." When Rogers returned to work, she learned that she had been transferred to the Internal Services Department, which Rogers considered to be a "demotion" and a "slap in the face." That same day, Rogers left the office early, called in sick for the rest of the week and then submitted notice of her retirement. Rogers then filed a lawsuit for violation of her rights under the California Family Rights Act ("CFRA"), which went to trial. The jury awarded Rogers $356,000 in damages for lost earnings and emotional distress. The Court of Appeal reversed the judgment, holding that Rogers was not entitled to reinstatement because she had failed to return to work at the end of the 12-week CFRA-protected leave period. The court further held there was insufficient evidence of retaliation against Rogers for having exercised her rights under CFRA because Rogers failed to establish the requisite causal connection between her protected actions in taking CFRA medical leave and the decision to transfer her to another position. *See also Walls v. Central Contra Costa Transit Authority*, 2011 WL 3319442 (9th Cir. 2011) (discharged employee could not assert FMLA claim because he had not yet been reinstated as of the time he requested the leave).

Employer's Anti-SLAPP Motion Was Properly Denied

Martin v. Inland Empire Utilities Agency, 2011 WL 3621599 (Cal. Ct. App. 2011)

Dean Martin, who worked as the executive manager of finance and administration of the municipal water district for the City of Chino, alleged retaliation, racial and age discrimination and harassment, defamation and constructive wrongful termination. In response, defendants filed a demurrer and an anti-SLAPP ("strategic lawsuit against public participation") motion. The trial court granted the anti-SLAPP motion with leave to amend but only as to the defamation claim. On appeal, defendants challenged the denial of the motion with respect to the other claims in the lawsuit and also challenged the grant of leave to amend the complaint. The Court of Appeal affirmed, holding that defendants had failed to make a prima facie showing that Martin's causes of action were based on an act in furtherance of defendants' right of petition and free speech. The court further held that the granting of the motion with leave to amend was the "functional equivalent" of an order denying the motion. *See also Fremont Reorganizing Corp. v. Faigin*, 2011 WL 3806350 (Cal. Ct. App. 2011) (former in-house counsel's anti-SLAPP motion filed in response to cross-complaint against him was properly granted in part); *Bailey v. Brewer*,

197 Cal. App. 4th 781 (2011) (statements made threatening litigation were not contemplated in good faith and thus were not protected under the anti-SLAPP statute); *U.S. ex rel. Lee v. Corinthian Colleges*, 2011 WL 3524208 (9th Cir. 2011) (former employee and independent contractor should have been permitted to amend their False Claims Act claims).

"Me Too" Evidence Was Relevant to and Admissible in Discrimination Lawsuit

Pantoja v. Anton, 198 Cal. App. 4th 87 (2011)

Lorraine Pantoja sued attorney Thomas J. Anton and his firm for wrongful termination, violation of the Fair Employment and Housing Act ("FEHA"), battery, sexual battery and intentional infliction of emotional distress. By the time of the trial, only the FEHA claims remained. In their motions in limine, defendants sought to exclude any reference to the term "Mexicans" because Pantoja had only heard Anton use that word one time. Defendants also sought to exclude all evidence of acts of discrimination or harassment unless Pantoja had "personally witnessed such acts" and the acts "adversely affected her working environment." The trial court granted both motions. The jury found for the defense. The Court of Appeal reversed the judgment, holding that the trial court erred by excluding so called "me-too" evidence of sexual harassment by Anton of other employees that occurred outside Pantoja's presence or that did not affect her working environment. The court also concluded the trial court erred by excluding evidence of Anton's references to "Mexicans" and other evidence of Anton's alleged racial discrimination. Finally, the court found error in the trial court's jury instruction concerning a hostile work environment because it was not accompanied by additional special instructions. *See also Life Techs. Corp. v. Superior Court*, 197 Cal. App. 4th 640 (2011) (employer should not have been ordered to provide further answers to plaintiff's special interrogatories seeking identities and circumstances regarding termination of third parties in the absence of procedural and substantive safeguards designed to protect third parties' privacy interests).

Unlicensed Law Clerk Was Properly Classified as Exempt Professional

Zelasko-Barrett v. Brayton-Purcell, LLP, 2011 WL 3594015 (Cal. Ct. App. 2011)

Following his graduation from law school but before he had passed the California bar examination, Matthew Zelasko-Barrett worked for the law firm of Brayton-Purcell, LLP as a Law Clerk II. After his voluntary departure from the firm, Zelasko-Barrett filed this lawsuit claiming he was misclassified as an exempt employee while he worked for the firm as a Law Clerk II because he was not at that time "licensed or certified" to practice law by the State of California. The trial court granted the firm's summary judgment motion, and the Court of Appeal affirmed, holding that although the employee was not yet

licensed to practice law, he was nonetheless a law school graduate and performed duties that brought him within an exemption for those engaged in a learned profession. *See also Soderstedt v. CBIZ S. Cal., LLC*, 197 Cal. App. 4th 133 (2011) (trial court properly denied class certification to former accountants where common questions did not predominate and they could not satisfy numerosity requirement or establish they were adequate class representatives).

Prevailing Employer Should Have Been Permitted To Recover Its Costs from Employee

Plancich v. UPS, Inc., 2011 WL 3506066 (Cal. Ct. App. 2011)

Larry Plancich sued UPS for failure to pay overtime, meal and rest breaks; failure to keep, maintain and furnish accurate wage statements, and unfair competition, among other claims. The trial court ruled in favor of UPS on the unfair competition claim and a jury found in favor of UPS on the remaining claims. The trial court awarded costs to UPS but then granted Plancich's motion to strike costs. On appeal, the Court of Appeal reversed the judgment, holding that Code of Civil Procedure § 1032(b) permits a prevailing employer to recover its costs, notwithstanding the one-way fee-shifting provision of Labor Code § 1194, which permits a prevailing employee to recover his or her fees. *See also Securitas Sec. Servs. USA, Inc.*, 197 Cal. App. 4th 115 (2011) (employees who work consecutive overnight shifts do not work a "split shift"); *Paton v. Advanced Micro Devices, Inc.*, 197 Cal. App. 4th 1505 (2011) (genuine issue of material fact existed as to whether a paid eight-week sabbatical was subject to vacation-pay anti-forfeiture rules); *Foust v. San Jose Constr. Co.*, 198 Cal. App. 4th 181 (2011) (employee's appeal from adverse judgment in breach of contract case was frivolous and warranted entry of sanctions in employer's favor).

Offer of Judgment for Full Amount of Class Rep's Claim Did Not Moot Class Action

Pitts v. Terrible Herbst, Inc., 2011 WL 3449473 (9th Cir. 2011)

Gareth Pitts filed a class action against his employer, Terrible Herbst, Inc., alleging a collective action under the Fair Labor Standards Act for failure to pay overtime and minimum wages, a class action for violations of Nevada labor laws and a class action for breach of contract. Although Pitts claimed only $88 in damages for himself, the employer made an offer of judgment to him pursuant to FRCP 68, offering to allow judgment to be taken against it in the total amount of $900, plus costs and reasonable attorney's fees. After Pitts refused the offer of judgment, Terrible filed a motion to dismiss for lack of subject matter jurisdiction on the ground that the offer of judgment rendered the entire case moot. The district court granted the motion on the ground that the offer mooted the action because Pitts had failed to timely seek class certification. The Ninth Circuit reversed, holding that the district court abused its discretion in finding that Pitts could no

longer file a timely motion for class certification. The court further held that the district court should have permitted Pitts to abandon his federal claims so that there would be no incompatibility between his FRCP 23 class action and an FLSA collective action.

Section 1981 Claim Is Subject to Four-Year Statute of Limitations

Johnson v. Lucent Techs. Inc., 2011 WL 3332368 (9th Cir. 2011)

In 2008, Russell H. Johnson, III, an African-American, sued Lucent and the administrator of his disability insurance benefits for retaliation in violation of Title VII, violation of 42 U.S.C. § 1981 and intentional infliction of emotional distress in retaliation for his filing suit against Lucent in 2005 for stopping payment of his disability benefits. In an amended pleading, Johnson added the LAPD as a defendant and added claims for medical benefits malpractice, violation of RICO, extortion, psychiatric coercion, etc. The district court dismissed Johnson's claims, but the Ninth Circuit reversed in part, holding that Johnson's Section 1981 claim (guaranteeing all persons the same right to make and enforce contracts as is enjoyed by white citizens) was subject to a four-year (not a two-year) statute of limitations. The court further held that although Johnson's claim for intentional infliction of emotional distress was subject to a two-year statute of limitations, it was possible that he "experienced severe harm when Lucent filed its petition to terminate benefits, when [another court in which Johnson was litigating against Lucent] granted the petition, or when Lucent actually stopped payment" – all of which occurred fewer than two years before Johnson filed his latest lawsuit. The Ninth Circuit affirmed dismissal of Johnson's Title VII claim (no equitable tolling was applicable) and his fraudulent concealment and abuse of process claims. *See also Withrow v. Bache Halsey Stuart Shield, Inc.*, 2011 WL 3672778 (9th Cir. 2011) (claim for unpaid ERISA benefits was not barred by statute of limitations).

Injunction Upheld Prohibiting Former Employee from Competing

NewLife Sciences, Inc. v. Weinstock, 197 Cal. App. 4th 676 (2011)

NewLife terminated the employment of Ronald Weinstock, the purported inventor of a Therapeutic Magnetic Resonance Device ("TMRD"), which NewLife had purchased approximately one year before the termination. In connection with its purchase of the TMRD, NewLife had obtained a non-compete covenant, which prohibited Weinstock from competing for five years after the termination of his employment. NewLife subsequently filed a complaint against Weinstock in which it alleged breach of contract, conversion, fraud, and misappropriation of trade secrets, and sought injunctive relief, among other things. During the course of the litigation, discovery disputes arose, and the trial court ordered Weinstock to comply with several discovery orders. After Weinstock failed to comply with the trial court's discovery orders, the court entered an order awarding issues sanctions, which included a determination that the non-compete was enforceable. The

court later entered a preliminary injunction prohibiting Weinstock from competing with NewLife. The Court of Appeal in this opinion affirmed the trial court's order granting the preliminary injunction.

Employee of Independent Contractor Cannot Sue Company That Hired Contractor for Negligence

SeaBright Ins. Co. v. US Airways, Inc., 2011 WL 3655109 (Cal. S. Ct. 2011)

US Airways uses a conveyor to move luggage at San Francisco International Airport. US Airways hired independent contractor Lloyd W. Aubry Co. to maintain and repair the conveyor and did not direct Aubry's employees in their work. The conveyor lacked certain safety guards in violation of various Cal-OSHA regulations. After one of Aubry's employees, Anthony Verdon Lujan, was injured while inspecting the conveyor, the employee and Aubry's workers' compensation carrier (SeaBright) sued US Airways. US Airways filed a summary judgment motion based on *Privette v. Superior Court*, 5 Cal. 4th 689 (1993), in which the California Supreme Court held that an employee of an independent contractor is generally precluded from suing the party that hired the contractor. The question in this case was whether the *Privette* rule applies when the party that hired the contractor failed to comply with workplace safety requirements. The Supreme Court held the *Privette* rule does apply in such circumstances and ordered that summary judgment be granted in favor of US Airways.

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