

CALIFORNIA LABOR & EMPLOYMENT LAW

UPDATE

June 2004

Supreme Court

Disabled May Sue Tennessee under Title II of The ADA for the Fundamental Right of Access to Courts.

Paraplegics filed this action for damages and equitable relief, alleging that Tennessee and a number of its counties had denied them physical access to courthouses in violation of Title II of the Americans with Disabilities Act. The question presented was whether Title II exceeds Congress' power under Section 5 of the Fourteenth Amendment. The Supreme Court determined that as it applies to the class of cases implicating the fundamental right of access to the courts, Title II constitutes a valid exercise of Congressional authority under Section 5 of the Fourteenth Amendment to enforce that Amendment's substantive guarantees. *Tennessee v. Lane*, 2004 U.S. LEXIS 3386 (U.S. May 17, 2004).

Uniform Four-Year Limitations Period Applies to All Section 1981 Causes of Action. The Supreme Court ruled that the federal four year statute of limitations set forth in 28 U.S.C. § 1658 applies to all claims brought under Section 1981 of the Civil Rights Act. In its unanimous decision, the Court determined that the four year federal statute of limitations period, rather than the two-year Illinois limitations period applied and accordingly, the Court reinstated the discrimination claims brought by former employees of R.R. Donnelley & Sons. In so ruling, the Court reversed the Seventh Circuit's decision that the state two-year limitations period applied, making the lawsuit untimely. *Jones v. R.R. Donnelley & Sons Co.*, 2004 U.S. LEXIS 3236 (U.S. May 3, 2004).

Supreme Court Declines Review of Ninth Circuit Decision that Employees Violated Their Duty of Loyalty by Starting a Competing Business. The Supreme Court refused to hear this case involving application of Hawaii state law. Two employees filed overtime claims under the federal Fair Labor Standards Act. In response, the employer, Eckard Brandes, Inc. ("EBI"), filed a counterclaim alleging that the former employees, while still employed by EBI, formed a partnership and successfully competed against EBI on a public works project. EBI claimed this constituted a breach of the

employees' duty of loyalty in violation of Hawaii law. Both the district court and the Ninth Circuit agreed with EBI, finding that the employees' conduct constituted "a classic violation of the duty of loyalty." The Ninth Circuit also affirmed the district court's ruling that the appropriate remedy for the employees' breach of their duty of loyalty was disgorgement of the profits the employees made while competing with EBI. *Eckard Brandes, Inc. v. Riley*, 338 F.3d 1082 (9th Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 3074 (Apr. 26, 2004).

Supreme Court Declines to Review a Sixth Circuit Decision that an Employee Six Years Older than his Replacement must present Direct Evidence of Discriminatory Bias to Establish Claim for Age Discrimination.

The Supreme Court let stand a Sixth Circuit decision that, in the absence of direct evidence of age bias, a six-year age difference between an employee and his replacement is insufficient to establish a *prima facie* case of age discrimination. A 54-year-old supervisor was stripped of his duties and initially replaced by a 48-year-old employee and then permanently replaced by a 51-year-old employee. The Sixth Circuit concluded that because neither the temporary nor the permanent replacements were a "significantly younger person" than the plaintiff, additional direct evidence of discrimination must be presented. The plaintiff was unable to produce such evidence, and his case could not proceed. *Grosjean v. First Energy Corp.*, 2004 U.S. Lexis 3082 (U.S. Apr. 26, 2004).

Federal Courts

Civil Rights Act

Corporation that Suffers Discrimination has Standing to bring an Action under Section 1981 of the Civil Rights Act. A dispute arose between a minority-owned technology services contractor, ("Thinket") and Sun Microsystems ("Sun"). Thinket filed a complaint alleging Sun deliberately refused to contract with it because of its status as an African-American owned business. A threshold issue was whether Thinket, as a corporation,

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had standing to assert a discrimination claim under Section 1981. Thinket argued that because it was certified by the Small Business Administration as a corporation owned and operated by socially and economically disadvantaged individuals, and thus eligible to receive federal contracts, the company's racial identity distinguished it from other businesses which have not established such an identity. Thinket argued this racial identity conferred standing upon it to bring the § 1981 action. The Ninth Circuit agreed, holding "if a corporation either suffers discrimination harm cognizable under Section 1981, or has acquired an imputed racial identity, it is sufficiently within the statutory zone of interest to have prudential standing to bring an action under § 1981." *Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc.*, 2004 U.S. App. LEXIS 9547 (9th Cir. May 17, 2004).

Title VII

Employee was Fired because she Violated the Company's Anti-Harassment Policy and not because of her Religious Beliefs. The Ninth Circuit ruled plaintiff's termination for violating the employer's anti-harassment policy was legitimate and was not a pretext for discriminating against the plaintiff on religious grounds. Plaintiff, an evangelical Christian, had worked for CoxCom and its predecessor for 18 years. One of the employees under the plaintiff's supervision was openly gay. The plaintiff told this employee homosexuality was against her Christian beliefs. During one of their "coaching sessions," plaintiff counseled the employee that homosexuality was wrong and against God's plan; plaintiff then closed the door and prayed with her subordinate. On another occasion, during a performance review, the plaintiff told her subordinate she would be disappointed if she engaged in another homosexual relationship. Eventually, a complaint was lodged with plaintiff's supervisors and, after an investigation, plaintiff was terminated for violating the employer's anti-harassment policy.

Plaintiff sued, challenging her termination on the basis of religious discrimination in violation of Title VII and Arizona state law. The trial court entered summary judgment for the employer. On appeal, the Ninth Circuit affirmed the judgment for the employer finding that plaintiff had failed to demonstrate that the employer's legitimate, non-discriminatory reason for the termination — her violation of the company's anti-harassment policy — was in fact a pretext for religious discrimination. *Bodett v. CoxCom, Inc.*, 2004 U.S. App. LEXIS 8154 (9th Cir. 2004).

State Courts

Arbitration

Limitation Placed on Plaintiff's Right to Discovery in Arbitration Proceeding Renders Arbitration Clause Unconscionable and Unenforceable. Finding that an arbitration clause contained in the employer's dispute resolution policy was both procedurally and substantively unconscionable, and therefore, unenforceable, the Fourth District Court of Appeal affirmed the trial court's denial of the employer's motion to compel arbitration of the plaintiff's wrongful termination action.

Plaintiff was a 20-year employee of NCR when she was terminated during a reduction in force. At the time of her termination, NCR had a three-stage dispute resolution process whereby required disputes which could not be resolved by internal mechanisms were submitted to AAA arbitration. Following her termination, plaintiff sued alleging various causes of action. NCR responded by seeking dismissal due to plaintiff's failure to exhaust her remedies under the company's dispute resolution policy. The trial court found the mandatory arbitration provision in NCR's dispute resolution policy was unenforceable because plaintiff was entitled to only limited discovery: two depositions and no written discovery.

The appellate court agreed that the arbitration agreement was unenforceable. Based upon the California Supreme Court's decision in *Armendariz v. Foundation Health*, the court found the limitation on discovery would place the employee at a distinct disadvantage in proving her claim and, therefore, the arbitration provision was substantively unconscionable. The court also found the arbitration provision was one-sided because it required arbitration of the claims more likely to be brought by an employee (e.g., wrongful termination and discrimination claims), but exempted the types of claims more likely to be brought by NCR (e.g., misappropriation of intellectual property and breach of confidentiality agreements). Finally, the court determined the offending portions were not severable and thus the entire arbitration provision was unenforceable. *Fitz v. NCR Corp.*, 2004 Cal. App. LEXIS 743 (4th Dist. Apr. 27, 2004)(publication ordered May 13, 2004).

Unconscionable Arbitration Agreement is Unenforceable. Finding that the arbitration agreement before it was both procedurally and substantively unconscionable and "permeated with illegality," the Second District Court of Appeal reversed the trial court's order compelling arbitration of plaintiff's discrimination claims.

Firemaster hired the plaintiff as a salesperson in the summer of 1999 and terminated him in April 2000. The plaintiff filed a complaint alleging Labor Code

violations and national origin discrimination in violation of state law. Upon Firemaster's motion, the court ordered the parties to arbitrate the dispute. The plaintiff submitted the claim to the AAA, as the agreement required. After reviewing the agreement, the AAA refused to conduct the arbitration. When the plaintiff filed a motion to reinstate the litigation, the court appointed a new arbitrator, a retired judge.

Plaintiff appealed, arguing the arbitration agreement was unenforceable and the court did not have the authority to appoint another arbitrator after the AAA refused to conduct the arbitration. The appellate court agreed and reinstated the plaintiff's litigation. The court found the arbitration agreement to be both procedurally and substantively unconscionable. It was procedurally unconscionable because it was presented to plaintiff on a "take-it-or-leave-it" basis. The court found that the agreement was substantively unconscionable in several respects. First, it lacked mutuality in that employees were required to arbitrate their claims against the employer, while claims by the employer were exempted from arbitration. Second, it required the parties to split the fees and to post fees in advance, which disadvantaged the employee and discouraged employees from bringing claims. Third, it provided a shorter limitation period than provided by applicable statutes. It also restricted discovery to one deposition, a serious disadvantage to the plaintiff. The court concluded that because the agreement was "permeated with illegality" the offending portions could not be limited or severed.

The appellate court also held that the trial court did not have the authority to appoint an arbitrator after the AAA refused to conduct the arbitration. The court explained when the selected forum declines to hear the matter, the dispute is to be tried in court. The trial court cannot choose an alternative forum as it did here. *Martinez v. Master Protection Corp.*, 2004 Cal. App. LEXIS 638 (2d Dist. Apr. 15, 2004)(publication ordered April 29, 2004).

Racial and Sexual Harassment

Assistant Writer's Sexual Harassment Claims Reinstated and Jury to Decide the Merit of the Defendants' Novel "Creative Necessity" Defense.

Reversing a trial court's grant of summary judgment, the Second District Court of Appeal held that the plaintiff deserved a jury trial on her sexual harassment claim.

After four months of working as an assistant writer on "Friends," the plaintiff quit and sued alleging racial and sexual harassment. The show maintained she was terminated for poor job performance because she could not type fast enough to take down all of the jokes discussed during the writers' meetings. The trial court granted summary judgment and awarded the employer attorneys' fees and costs.

The appellate court reversed on some, but not all, of the claims. The court found the plaintiff had presented triable issues of fact with respect to the issue of whether the writer's room was a hostile work environment. The court rejected the argument that the plaintiff had to prove the allegedly harassing conduct was directed at her personally. The court explained that "[a] woman may be the victim of sexual harassment if she is forced to work in an atmosphere of hostility or degradation to her gender." The court found it was sufficient that during the four months she worked for "Friends" the writers made crude sex-related jokes, disparaging remarks about women, and pretended to masturbate in the plaintiff's presence. The court further rejected the defendants' argument they merely treated the plaintiff as "one of the guys." FEHA is not fault-based, therefore, unlawful sexual harassment can occur even when the harassers do not realize the offensive nature of their conduct or intend to harass the victim.

The court also concluded that the plaintiff had presented triable issues of fact whether the allegedly offensive conduct was sufficiently severe and pervasive to create a hostile work environment. According to the court, the constant references to sex, sexual experiences, female body parts and the like was sufficient for a jury to conclude the writer's room was a hostile or offensive work place for a woman.

The defendants raised a novel defense to the charges: "creative necessity." They argued given the context of the writer's room, the writers were only doing their jobs so their actions could not support a harassment claim. Engaging in the allegedly offensive banter got their creative juices flowing, so they should not be held accountable for it. The court concluded the context or nature of the work is a factor the jury may consider. Although the court did not decide where to draw the line between acceptable and unacceptable conduct even in the context of the writer's work, it did say the argument could only go so far and some conduct, such as touching or fondling, would never be acceptable. *Lyle v. Warner Bros. Television Productions*, 117 Cal. App. 4th 1164 (2d Dist. 2004).

Torts

Employer's Payment for Defense of Employee Accuses of Sexual Assault and Battery does not Constitute Ratification of the Conduct.

The First District Court of Appeal entered judgment on behalf of an employer whose employee was accused of sexually assaulting and battering a non-employee third-party. The court found the acts of the employee accused of the assault and battery were not committed within the course and scope of employment so as to render the employer liable. Furthermore, the court found that there was no evidence of negligent hiring or supervision so as to render the company liable.

The plaintiff, who is a Mexican immigrant with very limited English, worked as a janitor at an office build-

ing in which Guardsmark provided security personnel. Guardsmark assigned Kadah, who had been an exemplary employee for three years, to work security in the building. The plaintiff claimed that Kadah trapped her in a men's restroom she was cleaning and sexually assaulted her.

The plaintiff sued both Kadah and Guardsmark. Guardsmark moved for summary judgment arguing the alleged assault was not related to Kadah's employment and there was no evidence of negligent hiring or supervision. The trial court granted Guardsmark's motion and entered judgment in its favor. Plaintiff proceeded to trial against Kadah and obtained a judgment against him. The plaintiff moved for a new trial against Guardsmark on the grounds that newly discovered evidence demonstrated Guardsmark ratified Kadah's wrongful acts by paying for his defense.

The appellate court rejected the plaintiff's argument. Not only was the evidence the plaintiff presented — deposition testimony and a representation letter — inadmissible hearsay, but payment of Kadah's legal fees was easily characterized as a sound business decision following a risk/benefit analysis. Guardsmark could be held responsible for a judgment entered and required to indemnify the employee for attorney fees and costs if the defendant's conduct was found to have occurred within the scope of his employment. Thus, providing good representation of its employee made sense and did not ratify any allegedly improper conduct. *Plancarte v. Guardsmark, LLC.*, 2004 Cal. App. LEXIS 721 (1st Dist. Apr. 14, 2004) (publication ordered May 12, 2004).

Wage & Hour

\$90 Million Overtime Verdict Upheld. The California Supreme Court has declined to review an appellate court decision affirming a \$90 million dollar verdict in favor of approximately 2,400 current and former Farmers Exchange Insurance claims representative for alleged overtime violations. Daily Lab. Rpt. No. 93 (May 14, 2004), A-10.

Worker's Compensation

Employer Entitled to Bargained-For Credits in Settlement Decree. A workers' compensation applicant and her employer settled her case by giving her a lump-sum payment "less credit for further PDAs [permanent disability advances] subject to proof." The parties disputed what the "less credit" phrase meant. The employee's argument, which was adopted by the WCAB, was that the employer was not entitled to a credit for PDAs paid after the date the compromise and release was signed. The employer appealed and the Third District Court of Appeal annulled the decision of the WCAB. The court ruled the WCAB's decision deprived the employer of a lawful, bargained-for provision of the settlement agreement. The employer was entitled to credit for all payments of PDAs up to the time of the final lump sum payment to the employee. *County of San Joaquin v. WCAB*, 117 Cal. App. 4th 1180 (3rd Dist. 2004)(publication ordered Apr. 21, 2004).

Legislative Updates

Federal Development

H-2B Visas may be filed June 1, 2004. Employers who want to hire temporary foreign workers under the H-2B program in FY 2005 can start filing their applications June 1, 2004. Daily Lab. Rpt. No. 92 (May 13, 2004), A-2.

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