Labor & Employment Law Newsletter

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Employees to Exhaust All Administrative Remedies Before Filing Suit

By Jonathan P. Geen, Esq.

On August 27, 2013, the Court of Appeal for the Third District issued a very favorable decision for employers with regard to exhaustion of administrative remedies. In *MacDonald v. State of California* (2013) 219 Cal. App. 4th 67, the Third District affirmed the trial court's sustaining of a demurrer without leave to amend on the employee's claim for retaliatory and discriminatory discharge in purported violation of California Labor Code sections 1102.5 and 6310. The basis for the trial court and Court of Appeal's decision was the employee's failure to have taken advantage of the administrative remedy provided to employees by California Labor Code section 98.7. This statutory section provides in pertinent part:

> Any person who believes that he or she has been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner may file a complaint with the division within six months after the occurrence of the violation.

The plaintiff employee worked for the State of California, specifically the California State Assembly at one of its offices in San Joaquin County. After being hired, plaintiff complained to supervisors that one of his supervisors was illegally and/or inappropriately smoking at defendant's office, in violation of the California Labor Code. One of the supervisors told plaintiff that the smoking issues were a serious problem and would "be addressed." Nonetheless, less than two weeks later, plaintiff was fired. Plaintiff filed a complaint, setting forth causes of action for retaliatory discharge, in violation of section 1102.5, and retaliatory and discriminatory discharge, in violation of Labor Code section 6310. The plaintiff had not taken advantage of the administrative remedies set out in Labor Code section 98.7, whereby he could have filed a claim with the labor commissioner.

Plaintiff asked the Third District to review the decision of the trial court sustaining a demurrer to plaintiff's complaint without leave to amend his claims because the plaintiff argued that the administrative remedy set out in section 98.7 was permissive and not mandatory, and was meant to

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merely add to the potential remedies available to an aggrieved employee. In rejecting plaintiff's position and in reaching its decision, the Third District focused significantly on the California Supreme Court's decision in *Campbell v. Regents of the University of California* (2005) 35 Cal.4th 311. The *MacDonald* court reiterated the rule of exhaustion of administrative remedies referenced in the *Campbell* case and which it stated was well-established in California jurisprudence. This rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. The *MacDonald* court, most significantly, said that **this rule of administrative remedy exhaustion applies even where the administrative remedy is couched in permissive, as opposed to mandatory, language**. The Third District rejected plaintiff's arguments that other appellate decisions controlled, stating that there is no requirement that a plaintiff pursue the Labor Code administrative procedure prior to pursuing a statutory cause of action. The Third District noted that these other cases did not reference *Campbell* and the Third District believed *Campbell* was dispositive on the issue, even though the *Campbell* court never addressed California Labor Code section 98.7. The Third District explained that because the administrative remedy at issue in the case before it was provided by statute, the *Campbell* case controlled and plaintiff was required to exhaust that remedy before filing suit.

This is a very favorable decision to employers. Many employees may not exhaust their administrative remedies before filing suit, and then will have their claims barred. However, it is unclear whether this decision will be followed by other districts and/or whether this is a legal issue the California Supreme Court may see fit to review.

Recent Appellate Decisions

By Jonathan P. Geen, Esq.

Federal

In the case of ***Lawler v. Montblanc North America, LLC*** (9th Cir. 2013) 704 F. 3d 1235, the Ninth Circuit affirmed summary judgment in favor of the luxury writing instrument defendant on the plaintiff's claims for disability discrimination and intentional infliction of emotional distress. The Lawler court determined that the plaintiff was unable to set out a prima facie case because she could not establish that she was competently able to perform her job duties as store manager since, after having broken her toes, she was unable to work more than 20 hours per week, which did not allow her to perform all of the obligations of her job. In fact, the plaintiff had admitted that her disability made it impossible for her to fulfill all the duties of her position, and that she had been unemployed and not applied for any positions for a period of months due to her medical issues. The Ninth Circuit also rejected plaintiff's assertion that her supervisor's gruff, abrupt, and intimidating conduct constituted outrageous conduct required for an intentional infliction of emotional distress claim.

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In the case of ***Wang v. Chinese Daily News, Inc.*** (9th Cir. 2013), ___ F.3d ___, 2013 W.L. 4712728, the Ninth Circuit reversed the district court's granting of class certification under Federal Rule 23(b)(2) on claims by a purported class of former and future CDN employees who claimed they were made to work overtime, denied overtime compensation and meal and rest breaks, and assorted related claims. Though this case proceeded to trial with a judgment for the purported class, the Ninth Circuit reversed the trial court's granting of certification, finding that the trial court had abused its discretion. The trial court had, in the view of the Ninth Circuit, unduly focused on the fact that the plaintiffs were challenging a uniform employer policy with regard to classification of reporters and account executives as exempt. The Ninth Circuit said that the district court had essentially created a presumption that class certification is proper when an employer's internal exemption policies are applied uniformly to the employees. The Ninth Circuit said that a district court abused its discretion in relying on that uniform policy to the exclusion of other factors relevant to the predominance inquiry inherent in the class certification process.

State

In the case of ***McCoy v. Pacific Maritime Association*** (2013) 216 Cal. App. 4th 283, the Second District affirmed the trial court's granting of summary adjudication to defendant on all claims except retaliation under FEHA and, in particular, on plaintiff's sexual harassment claim. Plaintiff McCoy had been working as a marine clerk at the ports. Thereafter, after receiving training, she became a vessel planner. She alleged that one vessel planner who trained her harassed her. Specifically, she alleged that on between five to nine occasions he would comment on the buttocks of other female employees, use racial slurs, and also make crude gestures toward a woman when the woman's back was turned, but in front of plaintiff. The Second District affirmed the trial court's decision that this conduct, in light of the totality of the circumstances, did not constitute severe and pervasive conduct sufficient for a hostile work environment. The *McCoy* court noted that when sexual conduct involves or is aimed at persons other than the plaintiff, that conduct is considered less offensive and severe than conduct that is directed at the plaintiff directly. The *McCoy* court stated that although crude and offensive, the alleged comments over the four-month period the plaintiff worked in the vessel planner's office were not so severe and pervasive as to alter the conditions of her employment.

In ***Faulkinbury v. Boyd & Associates*** (2013) 216 Cal.App.4th 220, the Fourth District reversed the trial court's order denying class certification after having been asked by the California Supreme Court to review its prior affirmance of that decision under the California Supreme Court's decision in *Brinker Restaurant Corp. v. Superior Court*. The plaintiffs in that case sought to represent and certify a class of about 4,000 current and former employees of Boyd & Associates that provide security guard services throughout Southern California. The claims included claims for unpaid overtime and meal and rest breaks. The Fourth District found in

reconsidering the case that the class was ascertainable and that common questions predominated, and that any differences in damages and individual questions as to whether the nature of employees' work prevented employees from being relieved of all duty in order to take a meal or rest break, did not preclude certification.

In the case of ***Heyen v. Safeway, Inc.*** (2013) 216 Cal.App.4th 795, the Second District affirmed the trial court's judgment in the employee's favor on a claim for unpaid overtime based on her alleged misclassification as an exempt employee. In that case, the plaintiff, who was a former assistant manager for Safeway, alleged that Safeway had misclassified her as exempt. She claimed that the demands of her job required that she work much more than 40 hours a week and that she was required to do considerable nonexempt work, including bagging groceries. Safeway argued that the trial court should have recognized that a managerial employee can simultaneously do exempt and nonexempt work. The Second District rejected that assertion, finding that the Labor Code does not recognize hybrid activities; i.e., activities that have both exempt and nonexempt aspects. The *Heyen* court further rejected Safeway's assertion that the "realistic expectations" rule supported its assertion that Heyen was an exempt employee. The Court of Appeal found considerable evidence that the employer had a practice of requiring Heyen to do bookkeeping work and she was forced to work at checkout due to the store's operating ratios. Therefore, plaintiff's practice of doing significant amounts of nonexempt work did not deviate from Safeway's reasonable expectations.

In ***Carter v. Entercom Sacramento, LLC*** (2013) 219 Cal. App. 4th 337, the Third District rejected the plaintiff's claims for indemnity under California Labor Code section 2802. Plaintiff sought indemnity for attorneys' fees and costs he incurred in defending a lawsuit brought by a woman who died from drinking too much water in an ill-conceived radio contest the plaintiff conducted as part of his duties as an employee of the company that owned the radio station. In *Carter*, the plaintiff had rejected an offer by the employer's insurer to retain counsel on his behalf. He, instead, insisted that he be allowed to keep, at the insurer's cost, the attorney he personally selected. The Third District rejected the plaintiff's assertions that he was entitled to whatever counsel he wanted, as section 2802 only requires indemnity for "necessary" expenditures. Plaintiff failed to produce sufficient evidence to establish that he was entitled to indemnity for an attorney he demanded, in view of the insurer's unconditional offer to defend him with counsel it selected.

In ***Alamo v. Practice Management Information Corp.*** (2013) 219 Cal. App. 4th 466, the Second District reversed a judgment in plaintiff's favor on claims for pregnancy discrimination and retaliation, in violation of FEHA. The trial court had authorized a jury instruction that provided that Alamo only had to prove her pregnancy-related leave was a "motivating reason" for her discharge. The Second District stated that in view of the California Supreme Court's decision in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, the trial court should have used a jury instruction

providing that the standard of causation in a FEHA discrimination or retaliation claim is not a motivating reason, but rather "a substantial motivating reason." For that reason, the Court of Appeal reversed and remanded the case to the trial court.

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