Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Pantoja v. Anton

(2011) __ Cal.App.4th __ (5th Dist.)

Who needs to know about this case: Lawyers bringing sexual-harassment and employment discrimination cases

Why it's important: Holds that it was reversible error for the trial judge to exclude "me too" evidence of sexual harassment by the employer – that is, evidence of harassment or discrimination experienced by employees other than the plaintiff, and of which the plaintiff was not aware.

Synopsis: Pantoja was hired by Anton, an attorney, as a receptionist and secretary. She claimed that he often berated her using profanities and insulting language. She would tend to sweat during his tirades, which would prompt him to ridicule her for that, and ask whether she was going through menopause. She testified that Anton treated other female employees similarly. She also testified that on several occasions he touched her buttocks or thigh in a way she considered inappropriate. He ultimately fired her, and she sued.

The trial court ruled that plaintiff could not introduce evidence at trial of harassing or discriminatory conduct by Anton toward other women when Pantoja was not present. Plaintiff made an offer of proof concerning the testimony of several former employees who would testify about Anton's harassing or discriminatory behavior directed toward them. The defense witnesses testified that Anton did use profanity, but did not direct it toward any particular person. The jury returned a defense verdict, finding that Pantoja was not subjected to unwanted harassing conduct because she was a woman, and that gender was not a motivating basis for her discharge. The appellate court reversed.

It held that it was error for the trial court to exclude Pantoja's "me too" evidence. The ruling erroneously disregarded the possibility that the evidence was relevant to prove Anton's intent when he used profanity and touched employees. And by the time the defense had presented its case it was clear that Anton's intent was in dispute. His defense was premised on the claim that his frequent use of profanity was directed at situations; not people. Evidence that he had harassed other women outside of Pantoja's presence could have assisted the jury by showing that he harbored a discriminatory intent or bias based on gender. It would also have assisted the jury in evaluating Anton's credibility and that of other witnesses who claimed that he did not use the type of language that Pantoja claimed was directed at her. The court concluded that the evidence was admissible to show intent under Evidence Code section 1101, subdivision (b), to impeach Anton's credibility as a witness, and to rebut factual claims made by defense witnesses. To the extent that the trial court excluded the evidence as unduly prejudicial under Evidence Code section 352, it was an abuse of discretion. The jury's task was not simply to decide whether to believe Pantoja and her witnesses – it also had to decide whether to believe Anton and his witnesses. Given the nature of the defense, which was that Anton had a policy of not tolerating harassment and of not directing verbal abuse at individuals, evidence of his harassment of women outside of Pantoja's presence and outside the period of her employment was relevant to his credibility and that of his witnesses.

The court went on to find that the expression "bitch" is not a neutral word in general, and when directed as a derogatory epithet against women its primary function is to express contempt for a woman or women in general. Used in this context, the word can be compared to a racial slur. In conjunction with the other evidence Pantoja presented, its reported use was probative of the user's discriminatory intent.

The court also rejected Anton's argument that any error was harmless. It found that there is a reasonable probability that the evidence of Anton's gender bias, which corroborated Pantoja's other evidence of Anton's gender bias, would have tipped the balance in a credibility contest like this case.

Hughes v. Progressive Direct Ins. Co.

(2011) __ Cal.App.4th __ (2d Dist., Div. 7.)

Who needs to know about this case: Lawyers handing UCL claims (Bus. & Prof. Code, § 17200) against insurers

Why it's important: Insurers frequently argue that *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, bars virtually any UCL claim based on a violation of any provision of the Insurance Code. This case holds that a UCL claim can be predicated on an insurer's violation of Insurance Code section 758.5, which prohibits an insurer from either requiring an insured's auto to be repaired by a specific repair shop or suggesting that a specific repair shop be used unless the insured is also informed of the right to select another repair shop. In

particular, it rejects the insurers's contention that the claim is barred by *Moradi-Shalal*.

Synopsis: *Moradi-Shalal* held that the prohibitory provisions in Insurance Code section 790.03 did not create a private right of action. Its holding has been extended to prohibit UCL claims based on a violation of Insurance Code section 790.03. Plaintiff filed a lawsuit against his insurer, Progressive, for violating Insurance Code section 758.5. That section is not part of the Unfair Insurance Practices Act ("UIPA") which contains section 790.03, but like the UIPA, it provides powers to the insurance commissioner to enforce the statute.

The court held that *Moradi-Shalal* barred UCL claims against insurers based solely on their violation of various parts of the UIPA. But it does not bar all private actions against insurers based on unfair or anticompetitive behavior. The Supreme Court has held that a UCL claim is barred when it is based on conduct that is absolutely privileged, or involves conduct that is effectively immunized by another statute (such as the UIPA under *Moradi-Shalal* and its progeny.) But the UCL provides that its remedies are intended to be cumulative to each other, and to all other remedies provided under all other laws of the State. Here, plaintiff is not suing Progressive for violating the UIPA, but another express statutory provision. Nor does the conduct at issue approximate the bad-faith refusal to settle insurance claims that is at the heart of *Moradi-Shalal's* analysis. "In sum, if a plaintiff relies on conduct that violates the UIPA but is not otherwise prohibited, the principles of *Moradi-Shalal* require that a civil action under the UCL be considered barred. An alleged violation of other statutes applicable to insurer, however, whether part of the Insurance Code . . . or the Business and Professions Code, may serve as a predicate for a UCL claim absent an express legislative direction to the contrary."

Short(er) takes

Employment discrimination; FEHA; after-acquired evidence; immigration status; unclean hands: *Salas v. Sierra Chemical Co.* (2011) __ Cal.App.4th __ (3d Dist.)

Salas provided Sierra Chemical with a resident alien card, and was hired as a seasonal worker. He injured his back and filed a worker's compensation claim. The following season, Sierra Chemical recalled its seasonal workers, but refused to hire Salas when he told it that his back had not yet fully healed. He sued for violations of the FEHA – discriminating on the basis of disability; failure to reasonably accommodate; and failure to engage in an interactive process. Sierra Chemical obtained evidence that the Social Security number used by Salas was actually issued to another person, who lived in North Carolina. Salas did not state in his opposition to the motion that the number he used to gain employment was actually issued to him. The trial court granted summary judgment on behalf of Sierra Chemical. Affirmed. The after-acquired evidence doctrine operates as a complete or partial defense to an allegedly discriminatory termination or refusal to hire, where the employer discovers evidence of wrongdoing by the applicant or employee that would have resulted in the challenged termination or refusal to hire. The doctrine has been held to apply in cases where the applicant or employee violated or caused the employer to violate federal requirements. Here, the employer submitted evidence that Salas misrespresented a job qualification imposed by the federal government, i.e., possessing a valid Social Security number. He also placed his employer in the position of submitting a false I-9 form to the federal government. The doctrine therefore operates to bar Salas's claim. The court also held that the doctrine of unclean hands bars Salas's claims.

Appellate procedure and jurisdiction; motions for reconsideration; dismissals under Code of Civil Procedure section 581d; need for written order; appealable (or non-appealable) orders: *Powell v. County of Orange* (2011) __ Cal.App.4th __ (4th Dist. Div. 3.)

Powell sued Orange County and two Orange County Sheriff's deputies in 2007 alleging civil-rights violations. In September 2009 the trial court set an OSC re: dismissal for failure to prosecute. When Powell's counsel did not appear at the OSC, the trial court issued a minute order dismissing the case without prejudice for failure to prosecute. The minute order was not signed and there was no signed order made under Code of Civil Procedure section 581d. In April 2010 Powell filed a motion to set aside the dismissal under Code of Civil Procedure section 473, subd. (b) (attorney fault). The trial court denied the motion. On June 4, 2010, Powell, through new counsel, filed a motion to reconsider denial of motion to set aside dismissal and entry of judgment. The reconsideration motion was made under Code of Civil Procedure section 1008 and section 473, subd. (b). The trial court denied the motion. A notice of ruling was served on July 2, 2010, and Powell appealed from the order denying the motion for reconsideration on August 31, 2010. Appeal dismissed for lack of appellate jurisdiction.

An order denying a motion for reconsideration is not an appealable order. The appellate court therefore has no jurisdiction over an appeal from the denial of a motion for reconsideration. In addition, section 581d states that, "All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes, and the clerk shall note those judgments in the register of actions in the case." An order that is not signed by the trial court does not

qualify as a judgment of dismissal under section 581d. The dismissal for lack of prosecution was subject to the requirements of section 581d. Accordingly, the dismissal by minute order, which was not signed, did not comply with section 581d. The lack of a written order of dismissal signed by the trial court has two consequences. First, the set aside motion was premature as there is no judgment yet to set aside. Second, in this matter, there is no final judgment that might serve as a basis for appellate jurisdiction.

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