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MONTHLY SUMMARY

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March, 2007

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The "Genuine Dispute" Doctrine Is A Defense To An Action For Insurance Bad Faith Only When The Insurer Has Conducted A Complete And Unbiased Investigation

Jordan v. Allstate Insurance Company

(Cal. Ct. of App., 2d Dist.), filed March 22, 2007, published March 26, 2007

KEY FACTS

Mary Ann Jordan sued Allstate Insurance Company for breach of contract, breach of the implied covenant of good faith and fair dealing as the result of Allstate's denial of a property damage claim she made under her homeowners' policy. The trial court granted a summary judgment in favor of Allstate, finding that the policy did not cover Jordan's loss. The Court of Appeal, in *Jordan v. Allstate Ins. Co.*, 116 Cal.App.4th 1206 (2004) (*Jordan I*), reversed. It held that certain policy language was ambiguous and that it might have provided coverage for Jordan's loss.

Allstate then moved for summary judgment as to the claims for breach of the implied covenant of good faith and fair dealing. It argued that even though its original interpretation of the policy was wrong, it was not an unreasonable interpretation and as such, its denial of the claim did not amount to a breach of the implied covenant of good faith and fair dealing. The trial court granted the motion.

HOLDING & REASONING

The Court of Appeal again reversed. It held that while Allstate's interpretation of the language of its policy which led to its original denial of Jordan's claim was reasonable, it does not automatically follow that Allstate's resulting claim denial can be justified in the absence of a full, fair and thorough investigation of all of the bases of the claim that was presented. And, it held that since Jordan, had raised several triable issues of fact with respect to the adequacy of Allstate's investigation of her claim, the summary disposition of her bad faith

claim was not appropriate.

Citing the case of *Frommoethelydo v. Fire Ins. Exchange*, 42 Cal.3d 208, 214-215 (1986), the court explained the relevant principles underlying Jordan's claim of "bad faith" as follows:

> The implied promise requires each contracting party to refrain from doing anything to injure the right of the other to receive the agreement's benefits. To fulfill its implied obligation, an insurer must give at least as much consideration to the interests of the insured as it gives to its own interests. When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort. And *an insurer cannot reasonably and in good faith deny payments to its insured without fully investigating the grounds for its denial*.

The court cited *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809 (1979) for the proposition that "in order to protect the interests of its insured, it was 'essential that an insurer fully inquire into possible bases that might support the insured's claim.'"

Citing the case of *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.*, 90 Cal.App.4th 335 (2001), the court noted that "Where there is a genuine issue as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute." However, it also observed that "where an insurer denies coverage but a reasonable investigation would have disclosed facts showing the claim was covered, the insurer's failure to investigate breaches its implied covenant." And: "The insurer cannot claim a 'genuine dispute' regarding coverage in such cases because, by failing to investigate, it has deprived itself of the ability to make a fair evaluation of the claim."

The court addressed Allstate's argument that it could not be liable for breach of the implied covenant of good faith and fair dealing because its interpretation of the policy was reasonable, saying: "Thus, although Allstate's interpretation of a policy exclusion was reasonable, it also had a duty to investigate Jordan's coverage claim that was based on the 'additional coverage' provisions relating to an 'entire collapse,' which we held, in *Jordan I*, was also reasonable and consistent with Jordan's objectively reasonable expectations."

The court found that there was adequate evidence in Jordan's opposing papers to show a triable issue as to the whether Allstate conducted a "full, fair, thorough and timely investigation of Jordan's claim."

As to the evidence Jordan presented, the court noted:

> If found to be true at trial and not countered or satisfactorily explained by Allstate, such facts would constitute evidence sufficient to support the conclusion that Allstate did indeed fail to conduct a full, fair, thorough and timely investigation of Jordan's claim as it related to and relied on the "entire collapse" provisions of the Allstate policy. On the other hand, Allstate may well be able to produce evidence that all or part of Jordan's factual assertions are false, or that Allstate's acts or omission as claimed by Jordan were justified or reasonable in the circumstances. What is clear, however, is that there are disputed issues of fact that must be presented to a trier of fact for resolution. The issue of Allstate's bad faith conduct cannot be resolved on summary judgment.

ANALYSIS

The precise interplay between the "genuine dispute" doctrine and whether the insurer's investigation was full, fair, thorough and timely is important, and still developing. The California Supreme Court is currently reviewing the decision in *Wilson v. 21st Century Ins. Co.*, 136 Cal.App.4th 97 (2006), where the appellate court also reversed a summary judgment in favor of an insurer because there were triable issues as to the fullness, fairness, thoroughness and timeliness of its investigation.

It is significant to note that in a footnote, the court reminded:

> We note, lest there be any confusion on the point upon remand, that the fact that this litigation had commenced did not excuse Allstate from the continuing responsibility to fully investigate Jordan's claim. As the Supreme Court cautioned in *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, an insurer's duty of good faith and fair dealing does not evaporate after litigation has commenced. To hold otherwise would effectively "encourage insurers to induce the early filing of suits, and to delay serious investigation and negotiation until after suit was filed when its conduct would be unencumbered by any duty to deal fairly and in good faith.

> …The policy of encouraging prompt investigation and payment of insurance claims would be undermined…" (*Id.*, at p. 886; see also *Old Republic Ins. Co. v. FSR Brokerage, Inc.* (2000) 80 Cal.App.4th 666, 685.) To the extent that Allstate in fact failed to fully investigate Jordan's collapse claim, particularly after our decision in Jordan I, it could be found to have violated the implied covenant of good faith (see *Frommoethelydo v. Fire Ins. Exchange, supra*, 42 Cal.3d at p. 219) and the fact that this litigation was pending would not excuse such violation.

This opinion appears in the March 26, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 3871.

A Reinsurer Cannot Sue An Insurer's Counsel For Malpractice

Zenith Insurance Company v. Cozen O'Connor

(Cal. Ct. of App., 2d Dist.), filed March 21, 2007, published March 23, 2007

KEY FACTS

Royal Insurance Company retained the law firm of Cozen O'Connor to advise it relative to a claim against one of its insureds. At the time, the policy was 100% reinsured by Zenith Insurance Company. Zenith, unhappy with certain of Royal's claims decisions and its handling of the claim, sued Royal. Zenith asserted a cause of action for professional negligence against Cozen alleging that, under the circumstances, an attorney-client relationship existed between Cozen and Zenith based on (1) an implied in fact contract and (2) the theory that Zenith was an intended beneficiary of the legal services to be performed by Cozen pursuant to its retention agreement with Royal.

Cozen successfully demurred to Zenith's claim and the cause of action against it was dismissed with prejudice. Zenith appealed.

HOLDING & REASONING

The Court of Appeal affirmed, reasoning that Cozen, who was hired by Royal, owed no duty of care to Zenith.

The court held that "[t]he fact that Zenith had reinsured 100% of Royal's potential policy liability, would thereby benefit (or suffer) from the performance of Cozen's legal services, and had multiple communications with Cozen (who was obligated as Royal's counsel to keep the reinsurer informed of the status of claim adjustment and defense) does not provide a basis for the establishment of an attorney-client relationship."

Not only was Zenith not an intended beneficiary of Royal's retention of Cozen, the court rejected Zenith's assertion that there was an implied contract between Cozen and Zenith.

ANALYSIS

This case shows that a mere alignment of interests between two entities does not mean that an attorney one of the aligned parties hires owes a duty of case to the other party.

This opinion appears in the March 23, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 3808.

MICRA Did Not Apply To A Veterinarian Who Was Sued For Advising That A Horse Was Healthy

Vasquez De Mercado v. Superior Court

(Cal. Ct. of App., 4th Dist.), filed March 15, 2007, published March 19, 2007

KEY FACTS

In June, 2004, the De Mercados hired Thomas McClung, a licensed veterinarian, to examine a horse they wanted to purchase as a jumper for their daughter. After examining the horse, on June 4 McClung reported that it had slight arthritis in one leg but met the De Mercados' requirements. The De Mercados bought the horse.

On February 7, 2006, the De Mercados sued the sellers of the horse and McClung, naming McClung in causes of action for fraud, negligent misrepresentation, and suppression of fact, seeking punitive damages. They alleged the horse had a progressive degenerative condition, making it unsuited as a jumper, but that McClung nevertheless told them it was a good horse to purchase for their daughter.

McClung demurred, asserting the causes of action were a barred by the one-year statute of limitations set out in section 340.5, which applies to health care providers.

He also filed a motion to strike the punitive damages contending that, because this was an action for professional negligence against a health care provider, under section 425.13, subdivision (a) the De Mercados were required to obtain an order before filing a complaint seeking punitive damages.

The court overruled the demurrer and denied the motion on the grounds the complaint was not for professional negligence and McClung's alleged wrongful acts had not proximately caused personal injury or wrongful death. Therefore, neither code section applied.

HOLDING & REASONING

The Court of Appeal affirmed. It held that although actions against veterinarians are subject to the Medical Injury Compensation Reform Act of 1975 ("MICRA"), the harm the De Mercados allege does not fall within MICRA's definition of professional negligence. Thus, the MICRA statute does not apply.

In concluding that the MICRA statute did not apply, the court observed that the De Mercados sought damages for the purchase price of the horse and costs of its care and that there were no allegation of a wrongful death. It also noted that "the alleged economic loss to plaintiffs is not a personal injury."

ANALYSIS

Despite the interesting argument, this case refused to expand MICRA's limitations on actions for medical malpractice.

This opinion appears in the March 19, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 3586.

A Good Samaritan Was Not Entitled To Summary Judgment Based On Health And Safety Code, Section 1799.102

Van Horn v. Watson

(Cal. Ct. of App., 2d Dist.), filed March 21, 2007, published March 23, 2007

KEY FACTS

Alexandra Van Horn was a passenger in an automobile. The driver lost control and crashed. Lisa Torti was in another car and witnessed the crash. She saw a liquid coming from under the car, and fearing that it was gasoline and would ignite, pulled Van Horn from the car. Whether as a result of the crash or being pulled from the car, Van Horn was rendered a paraplegic.

Van Horn sued, among others, Torti. Torti moved for summary judgment asserting she was entitled to immunity from liability under the "Good Samaritan" Law embodied in Health and Safety Code, section 1799.102.

The trial court granted the motion. Van Horn appealed.

HOLDING & REASONING

The Court of Appeal reversed. It held that section 1799.102 has an application only to the rendering of care at the scene of a medical emergency and that since the record demonstrated the absence of a medical emergency, Torti was not entitled to summary judgment on the basis of section 1799.102. It held that there were disputed issues of fact as to (1) whether Torti was negligent; and (2) whether that negligence increased the risk of harm to plaintiff.

ANALYSIS

Williams v. State of California, 34 Cal.3d 18 (1983), holds that (1) as a general rule, one has no duty to come to the aid of another; and (2) a person who has not created a peril is not liable in tort merely for failure to take affirmative steps to assist or protect another unless there is some special relationship between them which gives rise to a duty to act.

The court is not suggesting that good Samaritans not become involved and is not holding that they cannot get out of a case on a summary judgment if they do. Rather, it holds they cannot rely on section 1799.102.

If a good Samaritan can show he or she found someone who appeared to be in severe peril, as might be the case if gasoline were leaking from the car and appeared to be at risk of igniting, then under *Williams*, the good Samaritan might still be entitled to summary judgment.

This opinion appears in the March 23, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 3813.

In Ruling On A Vexatious Litigant Motion The Trial Court May Consider Evidence And Not Only Whether The Plaintiff Makes A Prima Facia Case

Moran v. Murtaugh Miller Meyer & Nelson, LLP

(Cal. Sup. Ct.), filed March 1, 2007, published March 2, 2007

KEY FACTS

Gene Moran sued Murtaugh Miller Meyer & Nelson, LLP ("Murtaugh"). Murtaugh responded by filing a motion seeking to have Moran declared a "vexatious litigant." A "vexatious litigant" is defined as one who "[i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing."

The trial court found Moran a vexatious litigant. Then, after considering the evidence submitted in support of Murtaugh's motion, it found that there was no reasonable probability that Moran would prevail. Thus, it required that Moran post security. When Moran failed to post the security, the trial court dismissed Moran's action. Moran appealed.

The Court of Appeal affirmed. The California Supreme Court accepted the matter for review.

HOLDING & REASONING

The California Supreme Court limited its review to a single issue, namely whether "[I]n assessing whether a vexatious litigant has a reasonable probability of success on his claim… may the trial court weigh the evidence presented on the motion, or must it assume the truth of plaintiff's alleged facts and determine only whether the claim is foreclosed as a matter of law?" It concluded that "the trial court is permitted to weigh the evidence," and affirmed.

In reaching its decision, the Court noted that the vexatious litigant statute, embodied in Code of Civil Procedure, section 391.1, et seq. arguably supported more than one reasonable interpretation. Thus it had to determine which was the proper interpretation.

The Court rejected Moran's argument that the anti-SLAPP statute contained analogous language and had been interpreted as precluding weighing and to require only a prima facie showing. (See, *Wilson v. Parker, Covert & Chidester*, 28 Cal.4th 811, 821 (2002).) Instead, it focused on the language used in the security provisions applicable to shareholders' derivative suits, as interpreted by the case of *Beyerbach v. Juno Oil Co.*, 42 Cal.2d 11 (1954), which authorized weighing the evidence.

The Court also rejected Moran's argument that permitting a trial court to weigh the evidence denies a vexatious litigant his right to a jury trial. It noted that the vexatious litigant statute does not preclude a trial; it merely requires a plaintiff to post security.

The Court next rejected Moran's argument that the vexatious litigant statute unconstitutionally discriminates against vexatious litigants of "modest means." It noted that if that were the case, then any statute requiring the furnishing or security or payment of a fee would be unconstitutional.

ANALYSIS

In *Johnson v. Lewis*, 120 Cal.App.4th 443 (2004), the court observed: "Time and again, public confidence in our legal system is tested when the general public wonders, and mutters, about why courts entertain ridiculous lawsuits."

This decision is significant in that it provides trial courts with a tool for disposing of certain frivolous lawsuits brought by plaintiffs acting as their own attorneys. If a plaintiff has a good enough case to entice an attorney to take it or the court finds there is a reasonable probability the plaintiff will prevail or if the plaintiff is willing to demonstrate his or her belief in the case by posting security, the case may proceed. However, if the plaintiff has lost enough actions brought without counsel, can't find counsel, can't show a reasonable probability of success and is not willing to "put up or shut up," the case may be taken out of the system.

This opinion appears in the March 2, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 2795.

Undocumented Workers May Bring Claims For Unpaid Prevailing Wages

Reyes v. Van Elk, Ltd.

(Cal. Ct. of App., 2d Dist.), filed March 14, 2007, published March 15, 2007

KEY FACTS

Van Elk, Ltd. was a welding subcontractor that hired the plaintiffs to work on various construction projects

for public entities that were subject to California's prevailing wage law. A "prevailing wage" is an increased minimum wage that must be paid to workers who are involved in construction on government projects.

During discovery, some of the plaintiffs admitted that they were not born in the United States and had no Social Security numbers. The plaintiffs refused to answer questions in discovery regarding their immigration status. Van Elk moved for summary judgment on the grounds that the plaintiffs failed to establish that they had a right to work in the United States. Van Elk thus asserted that the plaintiffs lacked standing to assert the prevailing wage claims. The superior court granted summary judgment for Van Elk.

HOLDING & REASONING

The Second District reversed. The federal Immigration Reform and Control Act ("IRCA") regulates immigration. This court found no conflict between IRCA and state prevailing wage law. The goals of prevailing wage law are to protect employees from substandard wages; permit union contractors to compete with non-union contractors; benefit the public through the increased efficiency of well paid employees; and compensate private employees with higher wages to make up for the lack of job security and employment benefits enjoyed by public sector employees. Finding no conflict between these statutes, the court rejected Van Elk's argument that IRCA preempts state prevailing wage law. The court also upheld the enforceability of Labor Code section 1171.5, which declares that a person's immigration status is irrelevant to most civil litigation and not subject to discovery.

Van Elk primarily relied upon the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, in which the court refused to award back pay under the National Labor Relations Act because such an award ran counter to the policies behind IRCA. The High Court held that it was inappropriate to award pay for work not actually performed by undocumented individuals. The *Hoffman* case was deemed distinguishable because that case involved compensation for work not yet performed. Here, the employees sought to be paid for work that they had already performed. By requiring employers to pay the minimum prevailing wage, this court considered its decision to be consistent with the goal of IRCA by removing the economic incentive for employers to pay substandard wages to undocumented workers.

ANALYSIS

Employers must follow the mandates of IRCA. This includes having all new hires complete I-9 forms and retaining copies of supporting documentation. I-9 forms should be securely retained in a separate file and not in each employee's personnel file.

This opinion appears in the March 15, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 3435.

Female Attorney Failed To Prove That The County Of Los Angeles And Her Employer Violated The Equal Pay Act By Paying Male Government Attorneys More Than Female Attorneys Who Worked For A Related Private Entity

Hall v. County of Los Angeles

(Cal. Ct. of App., 4th Dist.), filed February 22, 2007, published March 7, 2007

KEY FACTS

In 1984, Los Angeles County juvenile court caseloads increased so rapidly that the county needed additional lawyers to represent the minors. As a result, the Board of Supervisors authorized "as needed" contracts with lawyers for the juvenile court. Plaintiff Danna Hall entered into one of these contracts with the county and she was designated as an independent contractor.

By June 1989, the county caseloads had stabilized. County counsel advised the board that it would be "administratively more efficient to acquire attorney services through a single employer provider" and asked the board to approve the formation of Auxiliary Legal Services, Inc. ("ALS"). The board adopted county counsel's proposals and formed ALS. The county and ALS then entered a contract under which the ALS agreed to provide contract lawyers to county counsel as requested. Under the contract, ALS was an independent contractor and the attorneys that it provided were "employees solely of [ALS] and not of [the] County." Hall became an ALS employee.

In 1999, Hall filed a class action against ALS, county counsel, and the County alleging that the three defendants were "joint employers" or a "single enterprise" and that ALS was merely a "payrolling scheme" that enabled county counsel to maintain a "two-tier [attorney] work force" notwithstanding that all lawyers did the same work under the same working conditions. Hall claimed that her lawsuit was a federal and state Equal Pay Act and sex discrimination case brought on behalf of a class of about 200 female

attorneys who worked in the ALS unit and were paid substantially less than the men who worked as county counsel.

ALS, county counsel, and the county filed a motion for summary judgment on the basis that hiring decisions were based on merit, not gender; that although there were more female lawyers at ALS than county counsel, both groups were gender-integrated; that there were no gender-based barriers to entry into either group; and that similarly situated males and females within each group were treated the same in terms of pay and benefits. The county also showed that that county counsel's lawyers were paid more than ALS lawyers "due to cost savings," not gender. The trial court granted the motion.

HOLDING & REASONING

The California Court of Appeal affirmed.

The Equal Pay Act ("EPA") ensures that employees performing equal work be paid equal wages without regard to gender. In order to establish a violation of the EPA, a plaintiff must to show that her employer pays different wages to employees doing substantially similar work under substantially similar conditions on the basis of gender. The burden then shifts to the employer to prove that the disparity is permitted by one of the EPA's statutory exceptions, such as that the disparity is based on a factor other than sex. The burden then shifts back to the plaintiff to prove pretext.

The court found that Hall failed to establish her prima facie case. In order to do so, she had to show that she was paid lower wages than a male comparator for equal work *and* that she selected the proper comparator. Hall chose male county counsel lawyers who earned more that she did as her comparator. The court found that male ALS lawyers were the proper comparator. Since women within ALS were paid the same as men within ALS, Hall's claim failed.

Even if Hall had established a prima facie case, summary judgment was still proper because the wage disparity between ALS and county counsel was based on "cost savings," a legitimate and nondiscriminatory reason.

The court further held that Hall could not state a claim for either disparate treatment or disparate impact. To prove disparate treatment, Hall was required to show membership in a protected class, qualification for a position at issue, adverse employment action, and an inference of intentional discrimination. To prove disparate impact, Hall was required to show that, regardless of the County's motive, a facially neutral practice or policy bearing no relationship to job requirements had a disproportionate adverse effect on members of a protected class. Hall did not establish a prima facie case of disparate treatment or disparate impact because she did not present any evidence showing that the County created ALS because of its effect on female lawyers or to show that creation of ALS had a disproportionate adverse effect on women. Even if she had, her claims still would have failed because of the County's legitimate, non-discriminatory reason for creating ALS, was to save costs.

ANALYSIS

An employer analyzing a claim brought by an employee based on the EPA should make sure that the employee has selected the proper comparator before proceeding further. If the employee selected the wrong comparator, his or her claim will most likely fail.

This opinion appears in the March 7, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 3062.

High School Teacher Failed To Establish That He Was Unlawfully Terminated In Violation Of Public Policy

Carter v. Escondido Union High School District

(2007 Cal.App. LEXIS 401), filed March 21, 2007, published March 22, 2007

KEY FACTS

James T. Carter was a teacher and basketball coach at Monte Vista High School in the Grossmont Union High School District during the 1999-2000 school year. During the spring semester, Carter noticed that Harlan Edison, a football and basketball player, was gaining weight. Edison told Carter that he had been drinking a protein shake to gain weight at the recommendation of his football coach, Coach Carberry. About a week after drinking the shake, Edison experienced kidneys problems and was temporarily hospitalized. When Carter heard that Edison was in the hospital, he went to the school's athletic director and repeated that Edison was taking "weight gainer" at the recommendation of his Coach Carberry. Carter said that if the school did not take any action, he would leave Monte Vista and look for a job elsewhere.

Carter then applied to teach at Orange Glen High School in the Escondido Union High School District ("EUHSD") and received a probationary appointment

as a teacher. After he accepted the position, Carter learned that Coach Carberry's wife was going to be the interim principal at the school. Carter taught at Orange Glen from 2000 through 2002. In 2002, the EUHSD informed him that his employment would terminate at the end of the second probationary year.

Carter sued EUHSD, alleging that he was unlawfully terminated in violation of public policy. A jury found that EUHSD had wrongfully terminated Carter in violation of public policy.

HOLDING & REASONING

The Court of Appeal reversed because EUHSD's liability was not grounded on a well-established fundamental public policy derived from a constitutional or statutory provision.

An employer may discharge an at-will employee for no reason, or for an arbitrary or irrational reason, but is precluded from doing so for an unlawful reason or for a purpose that contravenes fundamental public policy. A discharge is actionable as against public policy if it violates a policy that is: (1) delineated in either constitutional or statutory provisions; (2) inures to the benefit of the public rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental.

The requirement that the policy underlying employer liability be delineated in a constitutional or statutory provision ensures that employers have adequate notice of conduct that will subject them to liability to the employees they discharge.

Carter claimed that EUHSD's liability arose from Education Code section 49423. This section stated that any pupil who was required to take medication prescribed by a physician or surgeon, could be assisted by a school nurse or other designated school personnel if the school received a written statement from the student's physician and from the parent. The court held that Section 49423 did not support EUHSD liability. This section did not *prohibit* any conduct. Rather, it *permitted* conduct. Specifically, it permitted authorized school personnel to assist students in taking their medication. The statute did not establish a fundamental public policy against teachers recommending weight-gaining substances to students. Therefore, the statute could not support a wrongful termination claim.

Assuming the statute was meant to prohibit students from taking medication without parental permission, the statute still did not apply because the protein shake was not "medication" prescribed by a physician or surgeon and Edison was not "assisted" in taking it "by the school nurse or designated school personnel." Although California Code of Regulations, title 5, section 601(b) includes nutritional supplements in its definition of medication, the court found that this regulation did not apply.

The Court also held that Carter's claim could not be tethered to California's whistle-blower statute, Labor Code section 1102.5. Section 1102.5 prohibits termination of an employee "for disclosing information to a government or law enforcement agency, where the employee has a reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." First, Carter did not disclose a violation of a state or federal statute or noncompliance with a state or federal rule or regulation. Second, Carter's conversation with the athletic director was not motivated by his belief that a law had been broken. Third, even if Carter subjectively believed that Coach Carberry violated a statue or regulation, his belief was not reasonable as protein shakes are not unlawful under either state or federal law.

ANALYSIS

Employers may discharge at-will employees at any time for no reason. Employers may also discharge at-will employees for arbitrary or irrational reasons. However, employers may not discharge employees for unlawful reasons or for purposes that are against public policy.

This opinion appears in the March 22, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 3753.

OTHER CASES OF INTEREST

An Excess Insurer Was Obligated To Pay Defense Costs

Transcontinental Insurance Company v. Insurance Company of the State of Pennsylvania

(Cal. Ct. of App., 4th Dist.), filed February 28, 2007, published March 29, 2007

In an insurance coverage dispute between an excess insurer and a primary insurer over the obligation to defend a housing developer in a construction defect case, the trial court determined the excess insurer,

Insurance Company of the State of Pennsylvania (ICSOP), had an obligation to pay the developer's defense costs.

ICSOP appealed, asserting that other carriers providing coverage for several subcontractors, whose policies named the developer as an additional insured, had the duty to pay for the defense. It asserted the California rule of "horizontal exhaustion" required the payment from these primary policies before any excess or umbrella policies could be triggered.

The Court of Appeal affirmed, concluding that the trial court's analysis was correct.

This opinion appears in the March 29, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 4107.

When There Is No Duty To Defend There Is No Duty To Pay Under The Supplementary Payments Provision

Golden Eagle Insurance Corp. v. Cen-Fed Ltd.

(Cal. Ct. of App., 2d Dist.), filed March 21, 2007, published March 23, 2007

Washington Mutual Bank sued Cen-Fed Ltd. for breach of a commercial lease. Golden Eagle Insurance Corporation, which had issued a commercial general liability policy to Cen-Fed Ltd., provided Cen-Fed with a defense under a reservation of rights.

In the insurance coverage litigation that ensued, the trial court held that Golden Eagle Insurance Corporation had no duty to defend or indemnify to Cen-Fed. However, it also held that Golden Eagle was obligated to pay, pursuant to the supplementary payments provisions of its policy, the costs, including attorney's fees, awarded against CenFed in the underlying action.

Cen-Fed appealed the determination of no coverage. Golden Eagle appealed the determination that it was obligated to pay the costs awarded against Cen-Fed.

The Court of Appeal held that the trial court correctly determined that Golden Eagle was not liable to indemnify Cened for the damages awarded against it in the underlying action.

It also held that since there was no coverage under the Golden Eagle policy for Washington Mutual's claims, as a matter of law, there was never a duty to defend. As a result, Golden Eagle had no obligation to pay or reimburse CenFed for the costs of suit and attorney's fees awarded to Washington Mutual. The court reasoned that Golden Eagle's burden under the supplementary payments clause was an integral part of the duty to defend and could be no broader than, its duty to defend.

The law is designed to encourage insurers to defend their insureds. An insurer that wrongfully, even if reasonably, fails to defend an insured is subject to a host of negative ramifications. It may be unable to assert exclusions that would preclude indemnity. It may also be liable for sums in excess of its policy limits. In contrast, an insurer that defends when it is not obligated to may seek reimbursement of sums paid in defending the insured. Thus, to hold that an insurer that defends when it is not obligated to do so must pay under the supplementary payments provision of the policy simply because it has defended would be contrary to sound public policy.

This opinion appears in the March 23, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 3817.

A Pro Per Plaintiff Was Not Entitled To Relief Under Code Of Civil Procedure, Section 473

Burnete v. La Casa Dana Apartments

(Cal. Ct. of App., 4th Dist.), filed March 26, 2007, published March 28, 2007

Ilie Burnete brought a personal injury action against La Casa Dana Apartments, L'Abri Management, Inc. and Sera Trust, arising from the purportedly dangerous condition of an apartment complex staircase. Burnete represented himself at trial. The trial court entered a judgment of nonsuit against Burnete. Burnete moved to set aside the judgment, arguing that that he was entitled to relief because he was "mistaken as to the legal [consequences] of his actions" and because of excusable neglect, given his emotional strain, financial duress and medical condition.

The trial court denied the motion. Burnete appealed.

The Court of Appeal affirmed. It explained: "Were we to agree, no judgment against a self-represented party

would ever be final. Every defendant who paid for legal counsel at trial would have to pay for a second trial after the self-represented plaintiff lost."

This opinion appears in the March 28, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 4009.

An Attorney's Fee Lien Takes Priority Over A Hospital's Lien

County of San Bernardino v. Calderon

(Cal. Ct. of App., 4th Dist.), filed March 22, 2007, published March 26, 2007

On July 14, 2003, Martin Zavala Calderon was injured in a car accident in which the other driver was at fault. He received medical treatment from the County of San Bernardino. The reasonable value of that care was $113,104.

On July 18, 2003, Calderon retained counsel and entered into a contingency fee agreement under which his counsel had a lien against any settlement or judgment. The reasonable value of the legal services was $50,020, plus costs advanced by counsel in the amount of $999.14.

On November 13, 2003, the County gave notice of its lien under The Hospital Lien Act (HLA), which appears at Civil Code, sections 3045.1 through 3045.6.

On June 29, 2005, Calderon received a settlement in the amount of $150,060 from the other driver's insurance company.

The County filed an action for declaratory relief seeking an adjudication as to whether its lien had priority over Calderons' counsel's lien. The trial court ruled that because the lien for attorney fees was created before the hospital's lien, the attorney's lien has priority over the hospital lien.

The Court of Appeal affirmed, finding that under the HLA, the critical thing is the giving of notice of the lien and that the first lien created takes priority.

This opinion appears in the March 26, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 3887.

The Prevailing Plaintiff Was Not Entitled To The Benefits Of Code Of Civil Procedure, Section 998 Because She Unilaterally Withdrew Her Offer

Marcey v. Romero

(Cal. Ct. of App., 4th Dist.), filed March 26, 2007, published March 27, 2007

Felecia Marcey brought a personal injury action against Brenda Romero. Marcey made a statutory offer to compromise under Code of Civil Procedure, section 998, but withdrew it before Romero accepted. Marcey prevailed at trial and then filed a cost bill. The trial court, on Romero's motion, taxed the expert witness fees claimed by Marcey. Marcey appealed.

The Court of Appeal affirmed. It held that although Marcey could withdraw the offer before it was accepted, unless the offer remained open for the statutory period, the cost-shifting provisions of section 998 were not available.

This opinion appears in the March 27, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 3982.

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