

RECENT CASE REVIEWS FROM THE CALIFORNIA COURT OF APPEAL

[JUNE 8, 2010 – JULY 26, 2010]

Content

ADA: ATTORNEYS FEES

Mundy v. Neal
California Court of Appeal
Second District
Case No. B219711
June 30, 2010

DUTY: THIRD PARTIES

Formet v. Lloyd Termite Control Co.
California Court of Appeal
Fourth District
Case No. G042436
June 10, 2010

EMPLOYMENT LAW: EMPLOYEE TEXT MESSAGES

Ontario v. Quon
Unites States Supreme Court
Case No. 08-1332
June 18, 2010

SCHOOLS: ADMINISTERING MEDICATION

*American Nurses Association v. Jack O'Connell as
Superintendent of Public Education*
California Court of Appeal
Third District
Case No. 061150
June 8, 2010

PREMISES LIABILITY

Klein v. United States of America
Supreme Court of California
9th Cir. No. 06-55510
C.D. Cal. No. CV-05-05526-PA
July 26, 2010

DANGEROUS CONDITION OF PUBLIC PROPERTY

Avedon v. State of California
California Court of Appeal
Second District
Case No. B217827
July 26, 2010

WHISTLEBLOWER PROTECTION

Conn v. Western Placer Unified School District
California Court of Appeal
Third District
Case No. C059754
July 20, 2010

FAIR EMPLOYMENT & HOUSING ACT

Milan v. City of Holtville
California Court of Appeal
Fourth District
Case No. D054139
July 15, 2010

ADA: ATTORNEYS FEES

• Mundy v. Neal

FACTS: Thomas Mundy sued the trustee owners of an automotive service station, alleging that there was no designated van-accessible handicap parking spot at the station. Mr. Mundy did not provide Defendant Neal with notice of the accessibility issue; Ms. Neal first became aware of the issue when she was served with Mr. Mundy's Complaint. Neal researched the issue and installed the disabled parking space. Mundy

dismissed the case with prejudice after Neal installed the parking space. Mundy filed a motion requesting an award of \$3,409.50 in attorney fees pursuant to Civil Code Section 55. He argued that he was the prevailing party because his lawsuit was the “catalyst” that motivated Neal to install the parking space, in compliance with the applicable law. The trial court denied the motion.

HOLDING: Affirmed. Under Civil Code Section 55, the plaintiff must make a pre-litigation demand for corrective action before he may be considered a prevailing party entitled to attorney fees.

DUTY: THIRD PARTIES

• Formet v. Lloyd Termite Control Co.

FACTS: Sandra Caskey inherited a home from her mother and hired a licensed home inspector to evaluate the property. The inspector noted evidence of wood destroying insects, organisms, and/or rot and loose flashing at a balcony deck. The inspection report recommended further evaluation by a licensed structural pest control company. Ms. Caskey hired Defendant Lloyd Termite Control Co. to evaluate the home. Defendant reported that it found drywood termites in the main home and damage in a support post. Defendant recommended Caskey fumigate the property and hire a contractor to repair the damage. Although Caskey paid Defendant for its fumigation services, she did not hire a contractor to repair the structural damage. Four months later, the Villeneuvees purchased half the property and moved in. Plaintiff, a guest of the Villeneuvees, leaned against a balcony railing and fell ten feet to the ground when the railing failed. Defendant’s report did not note termite damage in that balcony railing. Plaintiff filed a lawsuit alleging that Defendant should have discovered and reported the dry rot in the balcony railing. Defendant filed a motion for summary judgment, which the court granted, arguing that Defendant did not owe a duty to Plaintiff because an invitee is not an intended beneficiary of the contract between Defendant and Ms. Caskey.

HOLDING: Affirmed. A pest inspection report and termite fumigation are commercial transactions, and the duty owed should be limited to the intended beneficiary of the report and fumigation, the property owner. Further, application of the *Rowland* factors determines whether there is a policy of imposing a duty on a defendant to a third party not in privity with the defendant. Here, those factors do not support that the Defendant owed a duty to the Plaintiff. For example, the Defendant could not foresee whether its recommendation to hire a contractor to repair the damage would result in the property owner actually doing so.

EMPLOYMENT LAW: EMPLOYEE TEXT MESSAGES

• Ontario v. Quon

FACTS: The City of Ontario acquired and distributed alphanumeric pagers to members of the City’s police department, including Quon. The pagers had the ability to send and receive text messages. The City’s contract with the pager service provider, Arch Wireless, provided for a limited number of text messages each pager could send and receive. Usage above those limits would result in additional fees.

Quon and other officers exceeded their text message character limits several months running. The City undertook an audit to determine whether the overages were caused because the message limit numbers were too low, or whether the officers were improperly using their pagers to send and receive personal messages. Lieutenant Duke was provided transcripts of the messages. He reviewed the transcripts and found that many of Quon’s messages were not work-related, and some were sexually explicit. Duke reported this finding to the Chief, who read the transcripts and referred the issue to the internal affairs

division for review. The internal affairs division used Quon's work schedule to redact from the transcript any message sent while Quon was off- duty. The content of the messages Quon sent during work hours was then reviewed again. The internal affairs division's investigation concluded that Quon was sending and receiving non-work related messages while on duty.

Quon filed a lawsuit alleging that the City and Police Department violated the Stored Communications Act and the Fourth Amendment of the US Constitution. Quon alleged he had a reasonable expectation of privacy in the context of his text messages when Defendants obtained and reviewed, or "searched" the transcripts. The City and Police Department filed a motion for summary judgment on the Fourth Amendment Claim. The District Court determined that Quon had a reasonable expectation in the privacy of his text messages. However, the Court found that whether the audit of the text messages was reasonable turned on the intent of the search. That issue was sent to trial, where the jury concluded that the purpose of the audit was to determine the sufficiency of the plan's character limits, rather than whether Quon was using his pager to send improper messages. Based on that finding, the District Court held that the City and Police Department did not violate the Fourth Amendment and entered judgment in their favor.

On appeal, the 9th Circuit agreed with the District Court that Quon had a reasonable expectation of privacy in his text messages, but did not agree that the audit was reasonable. The 9th Circuit reversed the District Court's ruling, holding that the search was not reasonable in scope because the City could have performed a less-intrusive version of the search, such as asking Quon to redact the messages himself. The Supreme Court granted the petition for certiorari filed by the City and Police Department, challenging the Court of Appeals' holding that the scope of the search violated the Fourth Amendment.

HOLDING: Reversed. Reviewing the transcripts was reasonable because it was motivated by a legitimate work-related purpose, and was an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use.

SCHOOLS: ADMINISTERING MEDICATION

• American Nurses Association v. Jack O'Connell as Superintendent of Public Education

FACTS: In 2007, the parties to *K.C. v. O'Connell* reached a settlement in an unrelated case. That settlement required the California Department of Education to issue a specific legal advisory regarding the rights of students with diabetes in California. The legal advisory stated that, in order to comply with federal law, California law should be interpreted to allow a trained but unlicensed school employee to administer insulin to a student – pursuant to the student's Section 504 Plan or IEP – if a licensed person is not available to do so. Subsequent to the release of the CDE's advisory, the American Nurses Association filed the current action, alleging that the advisory is inconsistent with the Nursing Practice Act and is an illegal regulation. The ANA argued that Business and Professions Code § 2275 prohibits unlicensed persons from performing the function of a nurse, including administering medications; however, the CDE's legal advisory allowed just that to occur. The trial court ruled that, as a matter of policy, unlicensed trained school personnel should be authorized to administer insulin, but were not authorized to do so under current law.

HOLDING: Affirmed. Current law does not authorize unlicensed school personnel to administer injections of insulin to diabetic students. However, the Court did not decide whether unlicensed school personnel could safely administer prescribed insulin and whether it was sensible to allow them to do so.

PREMISES LIABILITY

• Klein v. United States of America

FACTS: Plaintiff was riding his bicycle on a paved road in a National Forest when he was struck by a vehicle driven by a part-time volunteer working for the United States Fish and Wildlife Service. Plaintiff filed suit in federal district court, where summary judgment was granted in favor of the government based upon California's "recreational use immunity" statute, Civil Code Section 846. In its summary judgment, the government relied on *Shipman v. Boething Treeland Farms, Inc.* (2000) 77 Cal.App.4th 1424, in which recreational use immunity barred a claim by a recreational user that was injured by the landowner's negligent operation of a motor vehicle on the property. On appeal, the Ninth Circuit certified to the California Supreme Court the question of whether Section 846 immunizes a landowner from negligent activities on the premises, or only from claims arising from the nature and condition of the property itself.

RULING: The Supreme Court expressly disapproved of the *Shipman* ruling that Section 846 does not bar claims based on the landowner's negligent activities on the premises. The Court found that the statutory phrase "keep the premises safe," contained within Section 846, aptly describes property-based duties underlying premises liability, not negligent acts causing injury.

DANGEROUS CONDITION OF PUBLIC PROPERTY

• Avedon v. State of California

FACTS: In November 2007, some individuals built a bonfire inside a cave in Malibu Creek State Park. The bonfire ignited chaparral and a fire ensued that destroyed more than 50 homes. Plaintiff homeowners filed suit against the State of California charging that an uncontrolled entrance into the state owned park created a dangerous condition of public property and a nuisance. According to the Plaintiffs, the cave and the surrounding area had been popular for late-night parties and bonfires for decades. Residents of the surrounding area allegedly notified the State on multiple occasions, in the years preceding the fire, of the danger created by the bonfires and parties. The trial court sustained the State's demurrer without leave to amend and subsequently entered judgment dismissing the action with prejudice. Plaintiffs appealed.

HOLDING: Affirmed. Plaintiffs made no claim that either the cave or fire road were unsafe; the allegations involved the wrongful conduct of third parties and suggested no *inherent defect* in the property itself. The alleged dangerous condition was lack of barriers preventing vehicular access and parking near the cave. Without an alleged defect in the property, Plaintiffs cannot allege facts establishing a causal connection between the defect and the injuries sustained. Thus, no dangerous condition of public property exists. Having decided that the dangerous condition claims failed, the Court held that the nuisance claim also failed.

WHISTLEBLOWER PROTECTION

• Conn v. Western Placer Unified School District

FACTS: Plaintiff was hired by Defendant District in 2003 to teach first grade. Early in the 2003-2004 school year, Plaintiff complained about a child in her class who had severe behavioral issues. That child was eventually removed from her classroom. In November 2003, she questioned the findings of a speech and language pathologist in regard to another one of her students who passed an initial screening test. A full assessment was completed, and it was later determined that the child qualified for speech and language services. In 2004, Plaintiff's son, who had been receiving special education services from the District, was

determined to be no longer eligible. At Plaintiff's request another assessment was provided and it was determined that he was eligible for services. During the 2004-2005 school year, the principal advised the Plaintiff that her colleagues were complaining about her cell phone usage and admonished her for leaving school grounds during the day without his permission. On February 24, 2005, Plaintiff was informed that she would not be reelected for the following school year. Plaintiff sued the District and school officials under Education Code § 44113, alleging that she was not reelected because she advised school personnel that certain students were not properly evaluated and provided with special education services. The trial court granted a directed verdict for the Defendants concluding that the individual defendants were management employees and thus, exempt from liability under Section 44113. The school district was likewise not subject to liability because it was not an employee. Plaintiff appealed.

HOLDING: Reversed in part and affirmed in part. Education Code section 44113 states, "[A]n employee may not directly or indirectly use or attempt to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the right of that person to disclose to an official agent matters within the scope of this article." The statute is intended to encourage school employees to disclose improper governmental activity. The Court of Appeal found that the principal, director of personnel and the superintendent were not exempt from liability under section 44113 because they exercised "official authority" when they recommended that the Plaintiff not be reelected. Thus, they acted as supervisory employees, not management employees, who could be liable under 44113. Because the school district is not an employee it is, therefore, not liable under the statute. However, Plaintiff cannot state her claim because her complaints to the District were in an attempt to secure special education services for students, not to report legal violations. Thus, her complaints did not constitute "whistle-blowing."

FAIR EMPLOYMENT & HOUSING ACT

• Milan v. City of Holtville

FACTS: In 1998, Plaintiff began working as a water treatment operator for the City of Holtville. By September 2002, Plaintiff has been promoted to a Grade III operator. On September 10, 2002, while Plaintiff was moving a large L-shaped piece of metal from one room to another, the metal hit a wall and severely injured the Plaintiff's neck. Plaintiff suffered two herniated discs that required immediate surgery. Plaintiff applied for workers' compensation benefits and was examined by a physician on behalf of the Defendant who concluded, unbeknownst to the Plaintiff, that she would not be able to return to work at the water treatment plant. In March 2004, Plaintiff received a letter from Defendant City terminating her employment. The letter stated that based on the physician's evaluation, Plaintiff could not return to her customary position because there was no job within the City which she could reasonably perform. Plaintiff sued alleging that Defendant had violated FEHA by failing provide effective accommodations for her disability. At trial, Defendant contended it had met its obligations under the FEHA because Plaintiff had never sought an accommodation for her disability and, in any event, no accommodation was possible because she could not perform the essential functions of her job. The trial court determined that Defendant had failed to provide a reasonable accommodation for her disability. Defendant appealed.

HOLDING: Reversed. Section 12940(n) requires that an employer, "engage in a timely, good faith, interactive process with the employee...to determine effective reasonable accommodations, if any, *in response to a request for reasonable accommodation by an employee...*" By its terms, section 12940(n) requires that the *employee* initiate the process. The Plaintiff did not meet her obligation under the statute and no obligation to engage with her with respect to possible accommodation arose.