

Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

***FEHA, Employment discrimination, national origin harassment, summary adjudication. Rehmani v. Superior Court* (2012) __ Cal.App.4th __ (6th Dist.)**

Rehmani, a Muslim born in Pakistan, worked as a test engineer at Ericsson, Inc. He sued for workplace harassment based on national origin and religion in violation of the FEHA. The trial court granted Ericsson's motion for summary adjudication of his claim, evidently finding that the undisputed facts "demonstrate that Plaintiff was not subjected to unwelcome harassment based on religion and/or national origin, and/or the harassment did not unreasonably interfere with his work performance by creating an intimidating, hostile, or offensive work environment." The trial court denied the motion with respect to other aspects of the claim. The Court of Appeal granted Rehmani's writ petition seeking immediate relief to foreclose the prospect of duplicate trials should an appeal result in a favorable outcome. The Court held that Rehmani's evidence was that three Indian co-workers were consistently rude, dismissive, and hostile towards him because he was Pakistani and a Muslim. One told him that Pakistan needed to be "bombed and wiped out" because of all the terrorist activity there. When Rehmani asked another co-worker for assistance with a task, he replied, "You're not going to blow me up, right?" Rehmani reported this incident and was told it was a joke and not to worry about it. On September 11, 2009, Rehmani took a sick day, but his co-worker told other workers that he was "out celebrating 9/11 and planning terrorist attacks."

The appellate court held that Rehmani's showing was sufficient to create triable issues of fact on his discrimination claims. Ericsson's showing that Rehmani's showing was insufficient because it involved a few isolated comments, which were primarily about politics, and that the evidence did not show a work environment that was sufficiently severe to qualify as a hostile work environment under FEHA presented factual issues for the jury.

Arbitration; integrated agreements; parol evidence *Grey v. American Management Services* (2012) __ Cal.App.4th __ (2d Dist. Div. 4.)

American Management Services ("AMS") is a property-management company. Grey applied for employment in 2006 as an investment manager. The application packet Grey completed included an "Issue Resolution Agreement" ("IRA") that essentially required all claims arising out of the job application, employment, or termination of employment, to be resolved by binding arbitration. Grey and AMS signed the IRA. When Grey was hired, he was required to sign a written employment contract. In the "Remedies" section, this contract provided that "a dispute arising out of the alleged breach of any other provision of this Agreement . . . shall be submitted to final and binding arbitration." Grey and AMS signed. In 2009, Grey sued AMS for employment discrimination under FEHA, and asserted other ancillary tort claims. He did not plead a claim for breach of contract. AMS successfully moved to compel arbitration, and Grey's writ petition was denied. The case was arbitrated, and AMS prevailed. Grey appealed, arguing that he should not have been required to submit his claim to arbitration. The Court of Appeal agreed.

AMS conceded that the arbitration clause in the employment contract was not broad enough to cover the claims that Grey asserted, because it was limited to disputes about the breach of the contract. But AMS argued that the broader arbitration provision in the IRA should nevertheless apply. The court rejected this view, holding that the employment contract contained an integration clause, which means that the employment contract superseded all prior agreements between the parties, including the IRA.

Due process; proceedings in the absence of counsel: *Colony Bancorp of Malibu, Inc. v. Patel* (2012) __ Cal.App.4th __ (2d Dist. Div. 3.)

During a bench trial for breach of a commercial lease, the trial court took a lunch break at noon and ordered the parties back to court at 1:30 p.m. Plaintiff and its counsel were present at 1:30 p.m., as was the court. The trial court allowed the plaintiff to put its witness on the stand and to resume direct examination. The witness was asked seven questions, and then defense counsel arrived. Defense counsel made no objection, and the proceedings continued. On appeal, Patel argued, with amicus support by the Association of So. California Defense Counsel, that resumption of the trial without defense counsel present was reversible error per se. The court held that "this contention is meritless." Section 594 of the Code of Civil Procedure authorizes the trial court to proceed with trial in the absence of a party, and that was what occurred here. There was no due process

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violation. If defense counsel had objected when he arrived, the trial court would have been able to determine whether some curative action was necessary. Affirmed.

Veterinary malpractice, non-applicability of MICRA, statute of limitations: *Scharer v. San Luis Rey Equine Hospital, Inc.* (4th Dist. Div. 1.)

Horse owner brought claim for veterinary malpractice against veterinarian and equine hospital after her horse required euthanasia less than two months after surgery to remove the horse's ovaries. Sharer filed her lawsuit more than one year after the horse's death. The trial court granted the defendants' motion for judgment on the pleadings based on the one-year statute of limitations for veterinary malpractice. (Code Civ. Proc., § 340, subd. (c).) Sharer argued that the statute should be tolled because she had sent the defendants a notice of intention to sue in accordance with section 364 of the Code of Civil Procedure, which is part of MICRA. The pre-lawsuit notice provision in MICRA, if sent within 90 days of the expiration of the statute of limitation will extend the statute by 90 days. The Court held that MICRA did not apply to claims for veterinary malpractice, because such claims sought redress for damage to the plaintiff's property interests, while MICRA was limited to claims involving personal injuries.

Elder Abuse; Offers to Compromise under Code of Civil Procedure section 998; cost awards for experts. ***Bates v. Presbyterian Intercommunity Hosp., Inc.* (2012) 204 Cal.App.4th 210 (2d Dist. Div. 4.)**

Administrator of patient's estate brought action against hospital and others for wrongful death, negligence, and elder abuse. The hospital made a section 998 offer to settle the plaintiff's claim in exchange for a waiver of costs. Plaintiff declined and proceeded to trial. During jury selection, without a settlement agreement, plaintiff voluntarily dismissed the hospital. The hospital sought costs, including over $64,000 in expert-witness fees. The fees include costs incurred before the section 998 offer was made, and for an expert consultant, who had not been designated as an expert. The trial court granted the costs based on the plaintiff's failure to accept the section 998 offer. Affirmed.

The appellate court rejected the argument that the fee-shifting provisions in the Elder Abuse Act would not have allowed a fee award, and costs should be subject to the same rules. The court cited *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, which held that costs are recoverable by a defendant in situations where attorney fees would not be, due to the statutory right at issue. The court also held that the trial court did not abuse its discretion in finding that the section 998 offer to dismiss for a cost waiver was a reasonable offer. The court held that costs were properly awarded for the undesignated expert consultant because section 998 allows for an award of "fees for expert witnesses actually incurred and reasonably necessary in ... preparation for trial." The court also held that fees available under section 998 for expert witnesses are not limited to costs incurred after the offer is made.


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