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Public Policy Protects Employee From Termination For Good Faith But Mistaken Claim For Overtime Wages

In *Barbosa v. IMPCO Technologies, Inc.*, a former employee alleged his employer terminated him after mistakenly claiming extra overtime. After the Trial Court granted the employer's motion for nonsuit, the former employee appealed. The Court of Appeal reversed and remanded, holding that public policy protects an employee from termination for making a good faith but mistaken claim to overtime wages, and that whether the former employee had a reasonable good faith belief he was entitled to overtime wages and whether he was terminated based on that belief were issues for a jury.

The former employee, Manual Barbosa, worked at IMPCO Technologies as a carburetor assembler. He testified that in June 2007, two of his fellow employees told him that they were missing two hours of overtime. Because of this, Barbosa also believed he was missing two hours of overtime. He spoke with the payroll administrator, who advised Barbosa that he did not have any unpaid overtime, and told him to speak with the supervisor. The supervisor

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approved the overtime because he "just trusted [Barbosa's] call at that time." Barbosa was then paid the overtime he claimed was unpaid.

However, the payroll administrator had misgivings about Barbosa's claim, as the company had recently installed a new system which had been working correctly with no complaints. The payroll administrator spoke with the human resources manager, who ran the reports from the scans at the security gate and confirmed that Barbosa could not have worked the overtime that he claimed. When confronted with the security gate report, Barbosa apologized for the confusion and cited the other employees' claims of unpaid overtime. Barbosa offered to return the extra wages paid to both the payroll and human resources departments. However, Barbosa was terminated on June 19, 2007 for falsifying time records.

After Barbosa rested at trial, IMPCO moved for nonsuit. The Trial Court granted the motion, finding no public policy required an employer to make a determination of whether an employee's belief of unpaid wages owed was in good faith. Barbosa appealed, arguing that he presented sufficient evidence to support his claim and that the jury should be able to decide whether his claim was made in good faith and whether IMPCO terminated him for making that claim or falsifying time records.

The Court of Appeal agreed. It found that common law recognizes the right of an employee to bring an action against his employer for termination that violates a fundamental public policy. The duty to pay overtime wages is a well-established fundamental public policy. If an employer discharges an employee for exercising his/her right to overtime wages, the employee will have a viable cause of action for wrongful termination. An employee's good faith but mistaken belief is protected from employer retaliation in the whistle-blowing context, and an employee's failure to prove an actual violation of law does not defeat the wrongful termination cause of action. The court applied this rationale to an employee exercising his/her statutory right to overtime wages out of a reasonable good faith belief that he/her is entitled to it, notwithstanding the later discovery that he/she is wrong.

Injuries Suffered While Traveling To Medical Appointment For Previous Industrial Injury Are Sometimes Compensable

In *Esquivel v. Workers Compensation Appeals Board,* Tania Esquivel was receiving workers compensation benefits and was being treated by medical providers located within 8 miles of her home. For reasons unrelated to her treatment, she drove 130 miles to her mother's home. She suffered new injuries when she was in a car accident close to her mother's home while en route from her mother's home to one of the medical care providers. At issue in this case is whether the injuries sustained in the motor vehicle accident were a compensable consequence of Ms. Esquivel's existing industrial injuries. The Court of Appeal concluded that a new injury that an employee suffers while traveling a reasonable distance, within a reasonable geographic area, to or from a medical appointment for examination or treatment of an existing compensable injury **is** also compensable. However, the Court then found that Ms. Esquivel's injuries occurred outside "the employers' reasonable geographic area of her

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employer's compensability risk" and thus, Ms. Esquivel was not entitled to compensation for the additional injuries suffered near her mother's home.

In reaching its conclusion, the Court of Appeal re-stated a prior case which confirmed that an injury suffered by an employee while traveling to a medical appointment for treatment of an industrial injury is an injury arising out of and in the course of employment. The Court then found that a geographic limitation on an employer's risk could be implied from the provisions of *Labor Code* section 4600 which required employers to provide employees with reasonably necessary medical treatment. The Court noted that it would not be adopting a specific test for determining what constitutes a reasonable distance, and instead, such determinations would be made on a case by case basis considering all relevant circumstances.

The circumstances to be taken into consideration include: The location of the employee's residence; the location of the employee's workplace; the location of the office of the employee's attorney; the location of the medical provider's office; the place where the new travel related injury occurred; the distance between the employee's point of departure and the medical provider's office along a reasonably direct route; the additional distance the employee travels if he/she deviates from the medical provider's office; the reason for the employee's travel beyond a reasonable geographic area within which the employer ordinarily should bear the risk of incurring compensability liability; and, the availability of medical providers in the area of practice and facilities offering treatment, reasonably required to cure or relieve the employee from the effects of the existing industrial injury.

Employer's Successful Disability Accommodation For Over A Year May Not Preclude Liability For Single Incident Failure

In *A.M. v. Albertsons, LLC*, the Court considered the scope of an employer's duty to accommodate disabled employees. Employee A.M. started working for Albertsons in 1987. In January of 2003, she took a medical leave following a diagnosis of cancer of the tonsils and larynx. She underwent chemotherapy and radiation which affected her salivary glands and left her mouth dry. To counter this, she constantly drank water. Due to the large volume of water she drank, she had to use the bathroom frequently.

A.M. returned to work in January of 2004. From January of 2004 to February of 2005, whenever A.M. worked at a check stand and needed to use the restroom she asked a coworker to take her place. In February of 2005, employee Sampson began to work at the store and was in charge when more senior managers were not present. On February 11, 2005 Sampson was working with A.M. along with another employee. There is no evidence that Sampson had any knowledge of A.M.'s disability or restroom accommodation that had previously been granted. During her shift, A.M. told Sampson she needed a break but did not mention that she needed to use the restroom. Sampson asked her if she could wait and A.M. agreed to do so. A while later, A.M. told Sampson she needed to go to the bathroom.

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Sampson told A.M. that she could not relieve her because she was busy. Unable to control herself, A.M. urinated at the check stand. After the incident, A.M. became depressed and sought psychiatric treatment.

A.M. sued Albertsons for failure to provide a reasonable accommodation for her disability and failure to engage in the interactive process. At trial, Albertsons argued in a motion for nonsuit that the single incident that occurred in February of 2005 could not constitute a failure to accommodate. The Trial Court denied the motion and the jury found in favor of A.M. on the cause of action that Albertsons failed to accommodate her in February of 2005.

Albertsons appealed the Trial Court's denial of the motion for nonsuit and argued that the single February, 2005 incident must be viewed in context of the many months during which Albertsons did accommodate A.M.'s disability. In addition, Albertsons claimed that it fulfilled its duty to accommodate A.M. and on the day of the incident, A.M. never left her check stand to use the restroom nor did she ever mention to Sampson that she had been granted an accommodation. Albertsons claims that as part of the interactive process, A.M. had a continuing duty to communicate and act reasonably with respect to her accommodation.

The Court of Appeal rejected Albertsons' interactive process argument, stating that the interactive process was meant to apply to the initial process by which a reasonable accommodation is granted. No authority existed to support Albertsons' claim that the interactive process was intended to apply in a situation where an employer failed to provide a reasonable, agreed-upon accommodation.

Next, Albertsons claimed that the February, 2005 failure to accommodate was trivial, because it constituted a single incident in the context of a longer period of successful accommodation. The Court of Appeal refused to adopt Albertsons' argument finding that no authority supported the position. Rather, the Court noted that a single failure to make a reasonable accommodation could have tragic consequences for an employee such as A.M. The Court of Appeal further reasoned that to the extent a single failure to accommodate could be trivial within the context of a larger pattern of accommodation, Albertsons had the opportunity to argue that possibility to a jury. By its award of damages, the jury must have determined that the failure to accommodate in this instance was substantial and not trivial. As a result, the Court of Appeal held that the Trial Court properly denied Albertsons' motion for nonsuit.

Employer Can Seek Clarification Of Employee's Work Restriction Without Violating Labor Code § 132a

In *Gelson's Markets, Inc. v. W.C.A.B.*, Gelson's Markets ("Gelson's") filed a petition for review of a decision by the Workers' Compensation Appeals Board, which had found Gelson's liable for discrimination under *Labor Code* section 132(a) against its employee, Paul Fowler ("Fowler"). *Labor Code* section 132a prohibits an employer from discriminating "in any manner" against an employee who has filed a workers' compensation claim or received a rating, award, or settlement.

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Specifically, Fowler sustained an injury to his neck and was taken off of work. Approximately six months later Fowler received a return to work release from his neurosurgeon stating that he could return to work but his ability to use of a forklift and reach-fork truck would be limited to one hour per day. Gelson's risk manager, Kelli Garcia ("Garcia") thought the release did not provide Gelson's with enough information about Fowler's restrictions. Garcia believed that she needed to make sure Fowler was capable of performing all functions of his job, and the release specified only a small and insignificant aspect of Fowler's job. Garcia felt that she needed to make sure that the physician had Fowler's physical job description and knew what Fowler's work for Gelson's involved. She therefore telephoned Fowler's physician and was informed by him that Fowler should remain Temporarily Totally Disabled.

Following this conversation, Garcia advised Fowler that Gelson's was not able to accommodate these restrictions. A few days later, Garcia received a second release for activity indicating that Fowler could return to work with "no restrictions." Garcia believed something was wrong, given the first release and the statement that Fowler should be Temporarily Totally Disabled. Garcia wrote a letter to Fowler's doctor stating that Gelson's could not return Fowler to work, and stating that the two release for activity forms Fowler had submitted were confusing and inconsistent. Garcia believed that Gelson's needed to know Fowler's restrictions if he was not ready to return to full duty, and needed to be certain Fowler had no further injury.

In response, Fowler's doctor wrote a letter stating that Mr. Fowler was of the impression that he could carry out his job duties and was released to return to his job with no restrictions. Garcia did not return Fowler to work after receiving this letter because the letter indicated that Fowler, and not his doctor, felt he was able to return to work. Garcia then requested the physician's opinion about whether Fowler could return to work and with what restrictions. Garcia never received that opinion and did not return Garcia's phone calls.

Thereafter, Fowler and Gelson's agreed to have Fowler seen by an agreed medical examiner. After Fowler's examination, Gelson's received a report stating that Fowler should be given the option of returning to his usual and customary job activities. However, Garcia concluded that the report was inconclusive and that Gelson's needed clarification since the medical examiner gave no restrictions, yet also said Fowler had lost 25 percent of his pre-injury capacity. This issue was later resolved at deposition when the medical examiner testified that he thought Fowler could probably perform his usual and customary job. Based on this, Gelson's returned Fowler to work.

Fowler then filed a petition for benefits and increased compensation under section *Labor Code* § 132a, claiming back pay and a $10,000 statutory penalty. The Workers' Compensation Administrative Law Judge found that the medical examiner's report was not ambiguous as to Fowler's ability to return to work, and that Gelson's failure to reinstate Fowler violated section 132a. Moreover, it found Fowler was entitled to increased compensation of $10,000 and reimbursement for lost wages.

Gelson's sought review of the Administrative Law Judge's decision, and the Court of Appeal held that Fowler made no showing that Gelson's treated him differently from non-industrially injured employees. That is, Fowler made no showing that Gelson's would have returned a non-industrially injured employee to work whose physician provided the same releases, but discriminated against Fowler

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by not returning him to work. Further, the Court of Appeal found Fowler made no showing that Gelson's treated him disadvantageously because of the industrial nature of his injury, as compared to how Gelson's treated a non-industrially injured employee. Thus the Court of Appeal opined he did not make a prima facie case of discrimination in violation of *Labor Code* § 132a and did not shift the burden to Gelson's to establish an affirmative defense.

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