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California Employment Law Blog

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Delivery Drivers Were Improperly Classified As Independent Contractors

Dynamex Operations West, Inc. v. Superior Court, 2018 WL 1999120 (Cal. S. Ct. 2018)

Two delivery drivers for Dynamex filed this putative class action on behalf of similarly situated drivers, alleging that they were misclassified as independent contractors rather than employees for purposes of Industrial Wage Commission Order No. 9 (governing the transportation industry). At issue in the case is whether the relatively broad definition of "employee" that is found in the California Wage Orders (one who is "suffered or permitted to work") may be relied upon to determine whether a worker is an employee or an independent contractor. In this opinion, the California Supreme Court ruled that the broad definition of "employee" that is found in the Wage Orders does govern the issue and set forth the following "ABC" test for determining independent contractor status. The hiring entity must prove:

> (A) The worker is free from the control and direction of the hirer in connection with the performance of the work;
>
> (B) The worker performs work that is outside the usual course of the hiring entity's business; and
>
> (C) The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity.

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Employer May Not Avoid Title VII Liability Based Upon Employees' Salary History

Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018) (*en banc*)

Aileen Rizo, who is an employee of the public schools in Fresno County, sued for violation of the federal Equal Pay Act ("EPA") after she learned that her male counterparts were being paid more for performing the same work. In its summary judgment motion, the county argued that it paid males more than females based upon a factor other than sex, namely the higher salaries that male employees earned before being employed by the county. The district court rejected that argument and held that when an employer bases a pay structure "exclusively on prior wages," any resulting pay differential between men and women is not based on a factor other than sex. A panel of the Ninth Circuit previously vacated and remanded the judgment, holding that if the employer is able to show that prior salary "effectuates some business policy" and the employer uses prior salary "reasonably in light of its stated purpose," prior salary can be a factor other than sex, resulting in no liability under the EPA. However, in this *en banc* opinion, the Ninth Circuit vacated the panel decision and affirmed the district court's judgment, holding that prior salary "is not a legitimate measure of work experience, ability, performance, or any other job-related quality" and that it had an attenuated relationship with "legitimate factors other than sex such as training, education, ability, or experience."

Community College District Failed To Reasonably Accommodate Disabled Employee

Hernandez v. Rancho Santiago Cmty. Coll. Dist., 2018 WL 2057468 (Cal. Ct. App. 2018)

Marisa Hernandez worked on and off as an assistant for the District for a number of years without any complaints about her performance. Eight months into her 12-month probationary period (after which point she would become a "permanent employee"), Hernandez took a temporary disability leave of absence to have surgery to replace a knuckle on a finger that she injured while working for the district prior to her most recent hiring. Because her performance had not been reviewed, the District terminated her employment while she was on the leave to prevent her from becoming "permanent." Hernandez sued the District for failure to reasonably accommodate her disability and for failure to engage in the interactive process. Following a court trial, the judge found in Hernandez's favor and awarded her $723,746 in damages. The Court of Appeal affirmed the judgment, holding that "when a probationary employee suffers a temporary total disability requiring absence from work for an extended period of time, that period may be deducted from the employee's probationary period." The Court further held there was evidence that the District did not conduct the interactive process in good faith.

Auto Dealership Service Advisors Are Exempt From Federal Overtime Requirements

Encino Motorcars, LLC v. Navarro, 584 U.S. ___, 138 S. Ct. 1134 (2018)

An amendment to the Fair Labor Standards Act ("FLSA") exempts from its overtime requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." The U.S. Department of Labor ("DOL") subsequently issued an opinion letter and amended its Field Operations Handbook to state that service advisors also are exempt from overtime under the statute. However, in 2011, the DOL issued a new rule that limited the exemption only to employees who sell automobiles, trucks, or farm implements, thus giving service advisors a right to overtime under the FLSA. In this opinion, the United States Supreme Court ruled for the second time in as many years that service advisors are exempt from the FLSA's overtime-compensation requirements. (Following the Supreme Court's 2016 ruling, the case was remanded to the Ninth Circuit where that court decided for the second time in as many years that the exemption does not include service advisors.)

Gas Station Owner Was Not Joint Employer Of Managers

Curry v. Equilon Enterprises, LLC, 2018 WL 1959472 (Cal. Ct. App. 2018)

Sadie Curry worked as a gas station manager at a station owned by Shell Oil, but operated by another company (ARS). Curry was hired, trained and supervised by ARS employees, and ARS alone determined that Curry was an exempt employee. In this putative class action, Curry alleged that she and the other managers were misclassified as exempt employees and that Shell was their joint employer along with ARS. The trial court granted Shell's motion for summary judgment on the ground that although Shell may have exercised some control over the way in which ARS managed the gas stations, there was no evidence that Shell exercised any direct control over Curry's wages, hours or working conditions. The Court of Appeal affirmed dismissal.

Staffing Company Was Not Liable For Failure To Provide Meal Periods

Serrano v. Aerotek, Inc., 21 Cal. App. 5th 773 (2018)

Norma Serrano brought this putative class action against her employer (Aerotek), which placed her as a temporary employee with its client (Bay Bread). Serrano alleged violations of the Labor Code and of the Private Attorneys General Act (PAGA) based upon, among other things, Aerotek's alleged failure to provide required meal periods. The trial court granted summary judgment to Aerotek based upon the undisputed facts that the temporary services contract required Bay Bread to comply with all applicable laws; Aerotek provided its meal period policy to temporary employees such as Serrano and trained them on it during their orientation; and the policy required employees to notify Aerotek if they believed they were being prevented from taking meal breaks. The Court of Appeal affirmed dismissal of the claims after concluding that "Serrano fails to convince us that anything more is required of staffing agencies when they provide temporary employees to other companies." The Court further held that Aerotek was not vicariously

liable for any meal period violations committed by Bay Bread. *See also Castillo v. Glenair, Inc.*, 2018 WL 1790683 (Cal. Ct. App. 2018) (employees who settled class action claims against staffing company may not assert same claims against company where they had been placed to work).

Title VII Claim Must Be Filed Within 90 Days Of Receipt Of Right-To-Sue Letter

Scott v. Gino Morena Enterprises, LLC, 2018 WL 1977123 (9th Cir. 2018)

Taylor Scott sued GME in state court for sexual harassment and retaliation. Because Scott worked at a barbershop located on the United States Marine Corps Base Camp Pendleton, her state court action was removed to federal court under the federal enclave doctrine. After removal, GME filed a motion for judgment on the pleadings, seeking dismissal of the state law claims as preempted by the federal enclave doctrine. Before Scott filed an opposition to the motion, the parties filed a joint motion to allow Scott to file an amended complaint asserting only federal claims under Title VII. GME subsequently moved to dismiss Scott's Title VII claims on the ground that they were time barred because she had failed to file them within 90 days of receipt of the EEOC's right-to-sue letter. The district court granted GME's motion for summary judgment, and the Ninth Circuit affirmed in part, holding that the 90-day clock for Scott to file suit began when she received the right-to-sue letter from the EEOC. The Court further held that Scott's Title VII claims may be based on alleged acts that occurred after she filed her first complaint with the DFEH, but only to the extent such acts were part of a single unlawful employment practice (i.e., a "continuing violation"). *Cf. Tanguilig v. Neiman Marcus Grp.*, 2018 WL 1790681 (Cal. Ct. App. 2018) (employment action was properly dismissed for failure to bring case to trial within 5 years; no tolling for period during which a contested order to arbitrate was in effect).

Employee Was Permitted To Voluntarily Dismiss Breach Of Contract Action

Shapira v. Lifetech Resources, LLC, 2018 WL 1804993 (Cal. Ct. App. 2018)

Achikam Shapira sued his former employer for breach of an employment contract. The case proceeded to a bench trial. After the parties rested but before submitting their closing arguments in brief form, Shapira requested that the trial court dismiss his action pursuant to Cal. Code Civ. Proc. § 581(e). The trial court denied Shapira's request to dismiss, ruled in favor of Lifetech and awarded it costs and prevailing party attorneys' fees in the amount of $137,000. The Court of Appeal reversed the judgment and held that Shapira had the right to dismiss the action before completion of the trial (which includes closing arguments), so Lifetech was not the "prevailing party" nor was it entitled to recover its attorneys' fees.

Employer's Action Against Opposing Attorney Was Properly Dismissed On Anti-SLAPP Grounds

MMM Holdings, Inc. v. Reich, 21 Cal. App. 5th 167 (2018)

MMM sued Marc Reich, an attorney who had represented a former employee of MMM/MSO of Puerto Rico (Jose Valdez) in a whistleblower *qui tam* action against the company, for conversion, civil theft, etc., after Reich refused to turn over 26,000 electronically stored documents that Valdez took with him when his employment was terminated. In response to the complaint, Reich filed an anti-SLAPP motion to dismiss, arguing that the claims he had filed against MMM involved Reich's petitioning activity protected by the statute and that MMM could not show a probability that it would prevail in the action against Reich. The trial court granted Reich's anti-SLAPP motion, and the Court of Appeal affirmed, holding that Reich was involved in petitioning activity on behalf of his client and the litigation privilege made it improbable that MMM would prevail in its action against Reich.

Lower Court Should Have Certified Registered Nurses' Class Action

Sali v. Corona Reg'l Med. Ctr., 2018 WL 2049680 (9th Cir. 2018)

Marilyn Sali and Deborah Spriggs sued Corona Regional Medical Center on behalf of seven putative classes of registered nurses who were allegedly underpaid their wages; not paid for all overtime hours worked; and not provided accurate wage statements, among other things. The district court denied class certification on the grounds that plaintiffs could not satisfy the predominance requirement of FRCP 23(b)(3); the typicality requirement of Rule 23(a) because plaintiffs failed to submit admissible evidence of their injuries; Spriggs was not an adequate class representative; and plaintiffs' counsel could not adequately serve as class counsel. The Ninth Circuit reversed the district court and held that "at this preliminary stage," plaintiffs were not required to submit admissible evidence in support of their motion to certify the class: "By relying on formalistic evidentiary objections, the district court unnecessarily excluded proof that tended to support class certification." The Court further held that despite what the district court characterized as plaintiffs' attorneys' "lax approach" in gathering and preparing declarations, they could adequately serve as class counsel. Finally, the Court held that the district court's determination that individual questions predominated was based on multiple errors of law.

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