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California Employment Law Blog

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Supreme Court Bars Mandatory Union Dues For Public Employees

Janus v. AFSCME, 585 U.S. ___, 2018 WL 3129785 (2018)

In a highly anticipated decision, the United States Supreme Court held that it is a violation of the First Amendment to require public sector employees who are not members of a union to pay any union dues, even when a portion of those dues is attributable to the costs of collective bargaining on behalf of all employees. Petitioner Mark Janus, an employee of the state of Illinois, refused to join the union because he opposes many of its positions, including those arguably taken on his behalf in collective bargaining activities. Janus challenged the requirement that he pay any fees to the union, including that portion of the union dues attributable to collective bargaining activities ("agency fees"), arguing that such fees represent "coerced political speech" and that "the First Amendment forbids coercing any money from the nonmembers." In a 5-4 decision, the Court overruled its prior opinion on this issue and determined that the state's "extraction of agency fees from nonconsenting public-sector employees violates the First Amendment."

Supreme Court Upholds Employee Class Action Waivers

Epic Sys. Corp. v. Lewis, 584 U.S. ___, 138 S. Ct. 1612 (2018)

The United States Supreme Court ruled that employers may require their employees to arbitrate disputes with the employer individually and waive their right to pursue or participate in a class or collective action against the employer. In a 5-4 ruling in favor of an employer's right to include class action waivers in an arbitration agreement (majority opinion by Gorsuch, J.), the Court rejected the National Labor Relations Board's position in *D.R. Horton* that such class waivers violate employees' rights to take collective steps

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for their "mutual aid and protection." The decision puts to rest the NLRA-based objection to such agreements, and so is a significant victory for employers. Four years ago, the California Supreme Court similarly ruled that such class action waivers are enforceable. *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014). However, the *Iskanian* court also held that advance waivers of claims arising under the Private Attorneys General Act ("PAGA") are unenforceable.

Court Reverses Defense Verdict In Sexual Harassment Case

Meeks v. AutoZone, Inc., 2018 WL 3062555 (Cal. Ct. App. 2018)

Natasha Meeks worked as a store manager for AutoZone and claimed that she had been sexually harassed by Juan Fajardo, another store manager. Among other things, Meeks testified that Fajardo would comment on her body and clothes; ask her to go out with him; suggest that they have sex; send her text messages with sexual content, including images and video; forcibly attempt to kiss her; and suggest he could facilitate her advancement and promotion through his position as one of the "favorites" of the district manager. Fajardo also threatened to get Meeks fired if she reported his conduct. Meeks reported Fajardo's conduct to the district manager who failed to take action, and it was not until 10 months later that the human resources department investigated the matter, which resulted in Fajardo's termination.

Meeks sued AutoZone and Fajardo for sexual harassment-hostile work environment, failure to prevent harassment, retaliation and sexual battery. The trial court granted summary adjudication against Meeks on the retaliation claim; Meeks dismissed the sexual battery claim; and the jury returned defense verdicts on the remaining claims. The Court of Appeal affirmed dismissal of the retaliation claim because there was no evidence that AutoZone retaliated against her (in fact she remained employed by AutoZone at the time of trial), but the Court reversed the judgment on the remaining claims based on the trial court's exclusion of certain evidence. Among other things, the trial court erroneously excluded: Detailed testimony from Meeks regarding sexually explicit text messages and a pornographic video that Fajardo sent to her; testimony regarding Meeks's knowledge of another employee who had reported harassment; and "me-too" evidence of Fajardo's alleged sexual harassment of other employees. (Note that in 2014, a federal court jury in San Diego awarded another AutoZone manager, Rosario Juarez, $185 million in a case involving pregnancy-related harassment, discrimination and retaliation – which may very well be the largest single-plaintiff verdict since the fall of the Roman Empire).

Employer May Be Liable For "Thwarting" Pregnant Extern From Applying For Job

Abed v. Western Dental Servs., Inc., 23 Cal. App. 5th 859 (2018)

Western Dental posted a job opening for a dental assistant in its Napa, California office while Ada Abed was working there as a student extern. Although Abed originally had been assured that the externship was a four- to six-week "working interview" and that her work was "above average," she was later told after her pregnancy became known that there were no open positions for a dental assistant in Napa (though another extern was later hired for the position). Because Abed never actually applied for a position, the trial

court dismissed her pregnancy discrimination claim, but the Court of Appeal reversed, holding that there are triable issues of fact as to whether Western Dental intentionally discriminated against Abed by falsely telling her that no job was available.

Former Librarian's Discrimination Claims Were Barred On Various Legal Grounds

Wassmann v. South Orange County Cmty. Coll. Dist., 2018 WL 3063946 (Cal. Ct. App. 2018)

Carol Wassmann challenged her dismissal from employment as a tenured librarian at Irvine Valley College in a five-day administrative proceeding brought pursuant to the Education Code. The administrative law judge determined there was cause to terminate Wassmann's employment, and the trial court upheld the judge's decision. Wassmann then filed a civil lawsuit against the District and various other parties for race and age discrimination under the Fair Employment and Housing Act ("FEHA") and intentional infliction of emotional distress ("IIED"). The trial court granted defendants' motions for summary judgment on the ground that the FEHA claims were barred by res judicata, collateral estoppel and/or failure to exhaust administrative remedies and that the IIED was barred by the applicable two-year statute of limitations. The Court of Appeal affirmed the dismissal, holding that the adverse ruling of the administrative law judge barred the civil proceeding, as did Wassmann's failure to timely file a complaint with the Department of Fair Employment and Housing; the court also affirmed dismissal of the IIED claim on statute of limitations grounds.

Whistleblower Lawsuit Should Not Have Been Dismissed

Taswell v. The Regents of the Univ. of Cal., 23 Cal. App. 5th 343 (2018)

Carl Taswell, M.D., alleged he was retaliated against for his whistleblowing activities regarding patient safety at the brain imaging center during his employment with the University of California, Irvine. Prior to commencing his civil action, Taswell filed an internal complaint for whistleblower retaliation and initiated a grievance procedure pursuant to the university's academic personnel manual, but Taswell's grievance was denied. The trial court granted the Regents' motion for summary judgment on the grounds that his retaliation claims were barred by res judicata and/or collateral estoppel (based upon the adverse decision on the grievance he had filed) and because Taswell had failed to exhaust judicial remedies by challenging the administrative decision by filing a writ petition in court. The Court of Appeal reversed the dismissal, holding that neither res judicata nor collateral estoppel barred Taswell's claims, nor did his failure to challenge the adverse administrative decision by way of a writ petition.

Release Executed In Workers' Compensation Case Did Not Bar Subsequent Civil Action

Camacho v. Target Corp., 234 Cal. Rptr. 3d 223 (Cal. Ct. App. 2018)

Adrian Camacho, a former Target cashier, sued for alleged sexual orientation discrimination, harassment causing a hostile work environment, retaliation, constructive termination in violation of public policy and related claims. Prior to resigning his employment with Target, Camacho settled a workers' compensation ("WC") claim he had filed against Target based upon his assertion that he suffered workplace injuries as a result of the alleged harassment. In settling the WC claim, Camacho executed a compromise and release, which included an "Addendum A" that contained what Target contended was a general release of all claims, including civil claims that might be asserted outside the WC system. The trial court granted Target's summary judgment motion in the civil action based upon the language contained in Addendum A, but the Court of Appeal reversed, holding that "there is no language in Addendum A that demonstrates that the parties intended to settle any claims other than Camacho's workers' compensation claims."

Ninth Circuit Affirms ADA Judgment In Favor Of Employer

Snapp v. BNSF Ry., 889 F.3d 1088 (9th Cir. 2018)

Danny Snapp sued his former employer, the Burlington Northern Santa Fe Railway Co. ("BNSF"), for failure to accommodate his alleged disability in violation of the Americans with Disabilities Act ("ADA"). Snapp worked as a division trainmaster, but due to "tiredness and low energy," he went to a doctor and was diagnosed with sleep apnea; Snapp had two surgeries in unsuccessful attempts to correct the condition. After Snapp was deemed to be totally disabled, he applied for long-term disability benefits, which he received for approximately five years before those benefits were terminated due to an absence of evidence of continuing disability. Snapp was later told he had 60 days to secure another position with BNSF or his employment would be terminated. After Snapp failed to secure a position within the 60-day period, his employment was terminated. He then filed suit alleging BNSF's failure to reasonably accommodate his disability, and a jury returned a verdict in favor of BNSF. In this appeal, Snapp asserted that the district court had given erroneous jury instructions. The Ninth Circuit affirmed the judgment against Snapp on the ground that at trial, a plaintiff bears the burden of proving (not just of producing evidence) that the employer could have made a reasonable accommodation that would have enabled the plaintiff to perform the essential functions of the job and that Snapp had failed to satisfy that burden. The Court also held that the employer was not bound by the admissions made in a deposition of a corporate designee pursuant to Fed. R. Civ. P. 30(b)(6) such that the jury should not have been allowed to consider other evidence.

Former High School Teacher's Race/Sex Discrimination Claims Were Properly Dismissed

Campbell v. State of Hawaii Dep't of Educ., 892 F.3d 1005 (9th Cir. 2018)

Patricia Campbell was employed by the Hawaii Department of Education ("DOE") for nine years until she resigned because she was allegedly harassed and degraded by students on the basis of her race (white) and her sex. She alleges that students called her offensive names (including "f*cking haole") and that she was physically threatened by one student who claimed to have a gun. Before she resigned, Campbell requested transfers to other schools and took a 12-month unpaid leave of absence. The district court granted summary judgment against Campbell on her claims for disparate treatment, hostile work environment and retaliation under Title VII and sex discrimination under Title IX. The Ninth Circuit affirmed dismissal of Campbell's claims, holding that there was no evidence that she suffered an adverse employment action that materially affected the terms or conditions of her employment or that any similarly situated employees of a different race or sex were treated more favorably than Campbell was. With respect to the alleged hostile environment, the Court held that once the DOE learned of the students' alleged harassment of Campbell, "the DOE did quite a lot in response" and that the alleged harassment from school officials was not sufficiently severe or pervasive enough to be actionable. Similarly, there was insufficient evidence to support either her retaliation or sex discrimination claims.

Negligent Hiring Claim May Be Covered By CGL Insurance Policy

Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co., 233 Cal. Rptr. 3d 487 (Cal. S. Ct. 2018)

Ledesma & Meyer Construction Company ("L&M") contracted with the San Bernardino Unified School District to manage a construction project at a middle school where a 13-year-old student ("Jane Doe") was allegedly sexually abused by Darold Hecht, an assistant superintendent hired by L&M. After Doe sued L&M for negligently hiring, retaining and supervising Hecht, L&M tendered the defense to its insurer (Liberty Insurance). Liberty defended L&M under a reservation of rights and simultaneously sought declaratory relief in federal court that it had no obligation to defend or indemnify L&M because the commercial general liability policy at issue provided coverage for "bodily injury" caused by an "occurrence," which was defined in the policy as an "accident." The district court granted summary judgement to Liberty; on appeal, the Ninth Circuit sought clarification of California law from the California Supreme Court, which resulted in this opinion. The Supreme Court held, contrary to the district court, that L&M's position is correct and that "Hecht's molestation of Doe may be deemed an unexpected consequence of L&M's independently tortious acts of negligence."

Employer Not Vicariously Liable For Injuries Caused By Employee During His Commute

Newland v. County of Los Angeles, 234 Cal. Rptr. 3d 374 (Cal. Ct. App. 2018)

Donald Prigo worked as a Deputy Public Defender for the County. One day on his way home from work, Prigo hit a car driven by Kevin Vargas who was forced off the road and injured a pedestrian (plaintiff, Jake Newland). Newland sued Prigo, Vargas and the County for negligence, and an eight-day trial was held to determine whether Prigo was expressly or impliedly required to use his personal vehicle for work purposes after which the jury returned a $14 million verdict in favor of Newland. The Court of Appeal reversed the judgment, holding that "Public policy does not support imposing liability on the County for the tortious conduct of an employee who was not driving in the course and scope of his employment at the time of the accident."

Successive Class Action Was Not Barred By Statute Of Limitations

Fierro v. Landry's Rest. Inc., 23 Cal. App. 5th 325 (2018)

Jorge Fierro filed this class action, claiming that he and the other members of the putative class were misclassified as exempt employees and that, in fact, they were non-exempt, non-managerial employees who are owed unpaid overtime wages and penalties. Landry's responded by filing a demurrer, claiming that the claims are barred by the applicable statutes of limitation. Although Landry's conceded that the filing of an earlier class action for these claims tolled the statute of limitations applicable to Fierro's individual claims, it maintained that the statute was not tolled for the class claims Fierro asserted. Landry's also contended that because the earlier class action was dismissed for failure to bring the action to trial within five years, the class claims could not be resurrected in the new action filed by Fierro. The trial court sustained the demurrer to the class claims due to the earlier dismissal based upon the five-year rule. The Court of Appeal reversed, holding that Landry's had not established that the earlier class action was in fact dismissed based upon the five-year rule and, in any event, that judgment was not final since an appeal is still pending. The Court further held that application of the *American Pipe* tolling doctrine saved the class claims from dismissal under California law. *Compare China Agritech, Inc. v. Resh*, 584 U.S. ___, 138 S. Ct. 1800 (2018) (successive class action may not be filed under federal law after the original statute of limitations period has expired); *see also Shine v. Williams-Sonoma, Inc.*, 23 Cal. App. 5th 1070 (2018) (successive class action was barred by settlement from previous class action asserted against same defendants and in which lead plaintiff participated).

PAGA Wage Statement Claim Does Not Require Proof of Injury

Raines v. Coastal Pac. Food Distrib., Inc., 23 Cal. App. 5th 667 (2018)

Terri Raines sued Coastal Pacific individually and under the Private Attorneys General Act ("PAGA") for failure to furnish her and other employees accurate itemized wage statements showing the applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate as required by Cal. Lab. Code § 226(a). The trial court determined that Raines had suffered no injury because the hourly overtime rate could be determined from the wage statement by simple math and dismissed both her individual and representative PAGA claims. The Court of Appeal reversed the judgment as to the PAGA claim (but not as to Raines's individual claim), holding that "the trial court incorrectly found an employee must suffer an injury in order to bring a PAGA claim." *See also Huff v. Securitas Sec. Servs. USA, Inc.*, 23 Cal. App. 5th 745 (2018) (an "aggrieved employee" may pursue penalties under PAGA for all Labor Code violations committed by an employer even if s/he is not personally affected by all of the violations); *AHMC Healthcare, Inc. v. Superior Court*, 2018 WL 3101350 (Cal. Ct. App. 2018) (employer not liable under PAGA if payroll system automatically and in a neutral manner rounds employee time up or down to the nearest quarter hour and overcompensates employees overall by a significant amount to the detriment of the employer).

Employer Need Not Provide Wage Statement Concurrently With Payment of Employee's Final Wages

Canales v. Wells Fargo Bank, N.A., 23 Cal. App. 5th 1262 (2018)

Fabio Canales and Andy Cortes sued Wells Fargo under PAGA for an alleged violation of Cal. Lab. Code § 226 for failure to provide an itemized wage statement concurrently with a terminated employee's final wages paid in-store. The trial court granted summary judgment to Wells Fargo on the ground that it had complied with the statute by furnishing the wage statements by mail. The Court of Appeal affirmed the judgment in favor of Wells Fargo on the ground that mailing the final wage statement is a "viable means to 'furnish'" it because the statute requires that the wage statement be furnished "semimonthly or at the time of each payment of wages." In so holding the Court rejected the Labor Commissioner's more restrictive interpretation of the statute as a "void underground regulation."

Employer Improperly Adopted Alternative Workweek Schedule But Wage Statement Penalties Are Reversed

Maldonado v. Epsilon Plastics, Inc., 22 Cal. App. 5th 1308 (2018)

Olvin Maldonado filed this class action against his employer based upon an improperly adopted Alternative Workweek Schedule ("AWS"). The Court of Appeal affirmed the judgment of the trial court, finding that Epsilon failed to prove that there had been a preadoption vote of the employees adopting a 10/2 AWS (a 12-hour/day schedule in which the employees were paid for 10 hours at the regular rate of pay and 2 hours of overtime), but the Court agreed with Epsilon that the damages had been miscalculated.

The Court upheld the award of waiting time penalties pursuant to Cal. Lab. Code § 203 based on the evidence of a lack of good faith on the part of the employer ("Epsilon made no inquiry whatsoever when it took over the plant, and simply assumed the 10/2 AWS had been properly adopted"). The Court reversed the trial court's award of wage statement penalties because "when there is a wage and hour violation, the hours worked will differ from what was truly earned. But only the absence of the *hours worked* will give rise to an inference of injury; the absence of accurate *wages earned* will be remedied by the violated wage and hour law itself, as is the case here." Finally, the Court vacated the order awarding $900,000 in attorney's fees to permit the trial court to reconsider the amount of those fees following remand, but did determine the attorney's fees motion was timely filed. *See also Diaz v. Grill Concepts Servs., Inc.*, 23 Cal. App. 5th 859 (2018) (employer that suspected but did not confirm it was underpaying its employees the "living wage" amount mandated by city ordinance is liable for waiting time penalties under Cal. Lab. Code § 203, and trial court has no discretion to waive same).

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