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California Employment Law Notes: January 2018

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Trial Court Erroneously Granted Bill Cosby's Anti-SLAPP Motion

Dickinson v. Cosby, 17 Cal. App. 5th 655 (2017)

After Janice Dickinson went public with her accusations of rape against Bill Cosby, Cosby's attorney (Martin Singer) reacted with: (1) a letter demanding that media outlets not repeat Dickinson's allegedly false accusation, under threat of litigation; and (2) a press release characterizing Dickinson's rape accusation as a lie. Dickinson then brought suit against Cosby for defamation and related causes of action. When Cosby's submissions indicated that Singer might have issued the statements without first asking Cosby if the rape accusations were true, Dickinson amended her complaint to add Singer as a defendant. Cosby and Singer successfully moved to strike the amended complaint because of the pending anti-SLAPP motion. The trial court then granted in part Cosby's anti-SLAPP motion, striking Dickinson's claims arising from the demand letter, and denied it as to her claims arising from the press release.

The Court of Appeal held that the trial court erred in striking the amended complaint because it pertained only to Singer (who had not filed an anti-SLAPP motion). The trial court also erred in granting Cosby's anti-SLAPP motion with respect to the demand letter (it was sent without a good faith contemplation of litigation seriously considered and contained actionable statements of fact), but the trial court correctly denied Cosby's anti-SLAPP motion with respect to the press release (it also contained actionable statements of fact). *See also Whitehall v. County of San Bernardino*, 17 Cal. App. 5th 352 (2017) (employer's anti-SLAPP motion was properly denied in whistleblower case where governmental immunity and privilege defenses were inapplicable); *Behunin v. Superior Court*, 9 Cal. App. 5th 833 (2017) (communications between attorney and public relations consultant are not privileged unless they are confidential and reasonably necessary to accomplish the purpose for which the client consulted the attorney).

Obese Former Employee May Proceed With Disability Discrimination Claim

Cornell v. Berkeley Tennis Club, 2017 WL 6524707 (Cal. Ct. App. 2017)

Ketryn Cornell is a severely obese woman (BMI > 50) who was fired from her job as a manager and tennis court washer for the Berkeley Tennis Club. Following her termination, she sued the Club for disability discrimination, failure to accommodate her disability, disability harassment, retaliation, wrongful discharge in violation of public policy, intentional infliction of emotional distress and defamation. The trial court granted summary judgment in favor of the Club, but the Court of Appeal reversed in part, holding that Cornell's disability discrimination and harassment claims must be reinstated because her obesity may have a physiological cause. The Court further held that the legitimate nondiscriminatory business reason for the termination that the Club offered (Cornell had planted a tape recorder in an attempt to surreptitiously record a meeting of the board of directors) may have been pretext for her termination, which may in fact have been motivated by discriminatory animus against Cornell. The Court also reversed dismissal of the claims for disability harassment (based on evidence of a "negative weight-based message" by one of her supervisors); defamation (evidence of possible actual malice); and one of the three wrongful termination claims. However, the Court affirmed dismissal of the claims for failure to accommodate a disability (no evidence that the Club was aware that Cornell's obesity had an underlying physiological cause); retaliation (the 2015 amendment to FEHA making a request for an accommodation protected activity is inapplicable); and intentional infliction of emotional distress (no extreme and outrageous misbehavior).

Cal-WARN Act Applies To Temporary Layoffs

International Bhd. of Boilermakers, et al. v. NASSCO Holdings Inc., 17 Cal. App. 5th 1105 (2017)

The union and several employees sued the employer NASSCO, alleging it had violated the California WARN Act (Cal. Lab. Code § 1400, *et seq*.) by not providing at least 60 days' advance notice to approximately 90 employees who were ordered not to return to work for four or five weeks. The employer's defense was that Cal-WARN is inapplicable because this was a "temporary furlough" and not a "mass layoff" as defined in the statute. The trial court determined that Cal-WARN does apply to a temporary layoff and entered judgment in plaintiffs' favor, awarding the employees $211,405 in backpay and pension benefits. No statutory penalties were awarded because the employer had acted in good faith inasmuch as the legal issues were "unsettled." The Court of Appeal affirmed.

Employer Had Good Cause To Terminate Employee Following Proper Investigation

Jameson v. Pacific Gas & Elec. Co., 16 Cal. App. 5th 901 (2017)

Steve Jameson worked for PG&E for more than 26 years before his employment as a regional construction manager was terminated. Prior to the termination, PG&E retained an outside investigator who was a former PG&E staff lawyer who had investigated (personally or through another member of her law firm) approximately 100 alleged violations of PG&E's code of conduct during the previous year. The investigator (Jennie Lee) spent approximately 50 hours on this case over the course of two months, during which time she interviewed 10 individuals. Lee concluded that Jameson had retaliated against another employee who had made a safety-related complaint, and, based upon Lee's investigation, PG&E terminated Jameson's employment. Jameson then sued for breach of contract and breach of the implied covenant of good faith and fair dealing. The trial court granted summary judgment in favor of PG&E, and the Court of Appeal affirmed, holding that PG&E had good cause as a matter of law to terminate Jameson because it had relied upon Lee's investigation. The Court further held that "the issue is not whether Lee's conclusions were correct or whether her investigation could have been better or more comprehensive. The question, rather, is whether PG&E's determination … was reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual." *See also ITV Gurney Holding Inc. v. Gurney*, 2017 WL 6016111 (Cal. Ct. App. 2017) ("Duck Dynasty" producers have no contractual right to be reinstated to their positions managing the day-to-day operations of the company, but could continue as members of the board of managers).

Ninth Circuit Adopts "Primary Beneficiary" Test To Determine If Students Were Employees

Benjamin v. B&H Educ., Inc., 2017 WL 6460087 (9th Cir. 2017)

Plaintiffs in this case are students of cosmetology and hair design at the Marinello Schools of Beauty ("B&H") in California and Nevada. Plaintiffs claim that they are employees within the meaning of the Fair Labor Standards Act ("FLSA") and under California and Nevada state law on the ground that much of their time is spent doing menial and unsupervised work. The district court granted summary judgment in favor of B&H, holding that plaintiffs, not the schools, are the primary beneficiaries of plaintiffs' labors because at the end of their training they qualify to practice cosmetology. The Ninth Circuit affirmed, adopting the "primary beneficiary" test under the FLSA that originated in *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2016) (unpaid interns on the set of a film production who claimed to be employees under the FLSA).

As for the California state law claims, the Court held that none of the cases cited by plaintiffs arose in the educational context and, therefore, the California Supreme Court would have no reason to look to the wage order definition of employer to determine whether these plaintiffs are students or employees. The Court further predicted that the California Supreme Court would apply something like the "primary beneficiary" test instead of the more "rigid" factors adopted by the United States Department of Labor in an informal guidance on the topic issued in 2010. Finally, the Court affirmed the district court's order striking the declarations of plaintiffs' witnesses who had not been identified pursuant to FRCP 26. *See also Douglas v. Xerox Bus. Services*, 875 F.3d 884 (9th Cir. 2017) (the relevant time period for determining minimum-wage compliance under the FLSA is the workweek as a whole, rather than each individual hour within the workweek).

Veteran Established Violation Of USERRA Based Upon Lower Signing Bonus

Huhmann v. Federal Express Corp., 874 F.3d 1102 (9th Cir. 2017)

Dale Huhmann alleged that when he returned from serving in the United States Air Force, he was paid a signing bonus of $7,400 instead of the $17,700 bonus that he would have received had he not served. In a bench trial, the district court ruled in Huhmann's favor, and the Ninth Circuit affirmed. The appellate court held that: (1) the case was properly decided in court and not before an arbitrator under the Railway Labor Act; (2) the district court properly applied the reasonable certainty test to determine that Huhmann would have received the higher bonus had he not served; (3) the district court properly determined that Huhmann was reasonably certain to have achieved the status necessary to receive the bonus had he not left for his military service; and (4) the district court correctly concluded that the bonus was, in part, a seniority-based benefit.

Employer Was Properly Sanctioned $4,000 Per Day For Noncompliance With Discovery Order

Padron v. Watchtower Bible & Tract Soc'y of NY, Inc., 16 Cal. App. 5th 1246 (2017)

Oswaldo Padron sued Watchtower for negligence; negligent supervision/failure to warn; negligent hiring/retention; sexual battery and sexual harassment, etc., associated with his allegedly being molested by one of Watchtower's agents (Gonzalo Campos) when Padron was a child. Following multiple hearings and motions, the trial court imposed a $2,000 per day sanction for every day Watchtower did not search for responsive documents and another $2,000 per day sanction for every day Watchtower did not produce responsive documents sought by Padron. Watchtower appealed the sanctions order, challenging the trial court's authority to enter such an order and asserting that it had acted with substantial justification in refusing to comply with the order. The appellate court affirmed the trial court's order, noting that "the superior court has shown great patience and flexibility in dealing with a recalcitrant litigant who refuses to follow valid orders and merely reiterates losing arguments." *See also Diaz v. Professional Cmty. Mgmt., Inc.*, 16 Cal. App. 5th 1190 (2017) (employer and its counsel acted in bad faith by voluntarily seeking an order from the trial court denying their own motion to compel arbitration with the goal of generating pretrial appellate jurisdiction).

District Court Has Discretion To "Gross Up" Backpay Award To Compensate For Tax Liability

Clemens v. Qwest Corp., 874 F.3d 1113 (9th Cir. 2017)

Arthur Clemens, Jr., sued his employer Qwest Corporation for race discrimination and retaliation in violation of Title VII. A jury awarded Clemens $157,000 for lost wages and benefits, more than $275,000 for emotional distress and $100,000 in punitive damages. The district court reduced the emotional distress and punitive damages awards to a total of $300,000 (based on Title VII's cap on compensatory and punitive damages). The district court denied Clemens's request for a "tax consequence adjustment" or "gross up" to compensate him for his increased income-tax liability, resulting from his receipt of the backpay award in one lump sum. The Ninth Circuit reversed the district court's order denying a tax consequence adjustment and joined the Third, Seventh and Tenth Circuits in permitting it. *See also Hamer v. Neighborhood Housing Servs. of Chicago*, 138 S. Ct. 13 (2017) (Federal Rule of Appellate Procedure's limitation on extension of time to file a notice of appeal is not jurisdictional).

Instructional Error In ADA Case Was Harmless

Dunlap v. Liberty Natural Products, 2017 WL 6614570 (9th Cir. 2017)

Tracy Dunlap sued her employer Liberty Natural Products for violation of the Americans with Disabilities Act ("ADA") and Oregon state law when Liberty terminated her employment after she was diagnosed with bilateral lateral epicondylitis in both elbows. The jury awarded Dunlap $70,000 in noneconomic damages, and the district court awarded her $13,200 in backpay damages. The district court granted Dunlap half of the prevailing-party attorneys' fees that she sought. The Ninth Circuit held that the district court had conflated the elements of Dunlap's disparate treatment claim with the elements of her failure-to-accommodate claim, but that the error was harmless because it is more probable than not that the jury's verdict was not affected by the instructional error. The Court further affirmed the reduced attorneys' fee award to Dunlap based upon the fact that she had succeeded on only one of her five claims against Liberty. *See also Lopez v. Routt*, 17 Cal. App. 5th 1006 (2017) (individual defendant who prevailed in a FEHA harassment claim may not recover prevailing-party attorney's fees against the plaintiff unless the claim was "frivolous").

Employees' Alter Ego/Joint Employer Claims Should Not Have Been Dismissed

Turman v. Superior Court, 17 Cal. App. 5th 969 (2017)

Former employees of the restaurant Koji's Japan, Inc. sued Koji's along with Koji's president, sole shareholder and director Arthur J. Parent, Jr. ("Parent") and A.J. Parent Company, Inc. (aka "America's Printer"). Following a bench trial, the trial court determined that Parent and America's Printer were not alter egos of Koji's. However, because the trial court applied the wrong legal standard, the Court of Appeal issued a writ of mandate ordering the trial court to apply the correct legal standard: "There must be an inequitable result if the acts in question are treated as those of the corporation alone." The Court of Appeal also determined that the trial court erred in concluding that Parent was not liable as a joint employer and ordered the trial court on retrial to consider and apply the joint employer standards set forth in *Martinez v. Combs*, 49 Cal. 4th 35 (2010).

Claims For Alleged Unauthorized Payments To Retirement Plan Are Preempted By ERISA

Skillin v. Rady Children's Hosp. of San Diego, 2017 WL 6029754 (Cal. Ct. App. 2017)
David Skillin brought a Private Attorneys General Act lawsuit against his former employer, Rady Children's Hospital of San Diego, based upon allegedly unauthorized payroll deductions that the hospital made from his wages, resulting in higher than desired contributions to his retirement plan. The trial court granted summary judgment in favor of the hospital, and the Court of Appeal affirmed, holding that Skillin's claims were preempted by the Employee Retirement Income Security Act of 1974 ("ERISA").

Related Professionals

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