Proskauer

California Employment Law Notes

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Employee Non-Solicitation Provision Was An Unenforceable Restraint

AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc., 2018 WL 5669154 (Cal. Ct. App. 2018)

AMN and Aya are competitors in the business of providing travel nurses on a temporary basis to medical care facilities throughout the country. As a condition of employment with AMN, four of its "travel nurse recruiters" had signed a Confidentiality and Non-Disclosure Agreement ("CNDA"), which among other things prohibited them from soliciting any employee of AMN to leave the service of AMN for a period of at least one year. After the travel nurse recruiters left AMN and joined Aya, AMN sued them for breach of contract and misappropriation of confidential information, including trade secrets under the Uniform Trade Secrets Act ("UTSA"); the nurses filed a cross-complaint for declaratory relief and unfair business competition against AMN. The trial court granted the travel nurse recruiters' motion for summary judgment on the ground that the employee non-solicitation provision in the CNDA violated Cal. Bus. & Prof. Code § 16600 (the anti-noncompete statute), enjoined AMN from seeking to enforce it and awarded the nurses their attorneys' fees. The Court of Appeal affirmed, holding that the employee non-solicitation provision "clearly restrained [the travel nurse recruiters] from practicing with Aya their chosen profession – recruiting travel nurses on 13-week assignments with AMN." The Court also affirmed dismissal of AMN's UTSA claim on the ground that the nurses who were recruited already were independently known to Aya and their identity did not constitute a trade secret.

Employer Was Not Liable For Accident Involving Employee Who Was Talking On Her Cell Phone

Ayon v. Esquire Deposition Solutions, LLC, 27 Cal. App. 5th 487 (2018)

Brittini Zuppardo, a scheduling manager for Esquire Deposition Solutions, was talking on her cell phone while driving home from her boyfriend's house when her vehicle struck Jessica Ayon, causing significant injuries. At the time of the accident, Zuppardo was speaking with Michelle Halkett, one of Esquire's court reporters. Zuppardo and Halkett both testified that they were good friends and were talking about family matters on the evening of the accident. Although Zuppardo testified that she spoke on her cell phone with Halkett weekly, if not daily, her cell phone records showed no calls between her and Halkett's cell phone for the prior six months. Since a summary judgment motion cannot be denied on grounds of credibility, the trial court granted Esquire's motion for summary judgment on the ground that plaintiff had no evidence that Zuppardo was operating within the scope of her employment with Esquire at the time of the accident. The Court of Appeal affirmed, holding that "merely offering reasons why a witness might have an incentive to lie, without offering any evidence to suggest Halkett actually was lying, is not enough to create a disputed issue of material fact."

Injured Employee May Have Been "Regarded As" Disabled Under The ADA

Nunies v. HIE Holdings, Inc., 2018 WL 5660625 (9th Cir. 2018)

Herman Nunies was a delivery driver for HIE Holdings who injured his shoulder and wanted to transfer to a part-time, less-physical warehouse job. The requested transfer was approved and was set to go through until Nunies told HIE about his shoulder injury, after which the company allegedly rejected his transfer request and forced him to resign. Nunies sued for disability discrimination under the ADA and state law; the district court granted HIE's motion for summary judgment. The Ninth Circuit reversed the district court's judgment, holding that Nunies established that he may have been "regarded as" having a disability because he had an actual or perceived physical impairment whether or not the impairment limited or was perceived to limit a major life activity. The district court erroneously held that Nunies was required to prove that his employer subjectively believed that he was substantially limited in a major life activity (the superseded definition). The district court also erroneously dismissed Nunies' claim for disability discrimination based upon an actual disability because he did identify two major life activities (working and lifting) that were affected by his impairment.

Dean Of Theological Seminary Was A "Ministerial Employee"

Sumner v. Simpson Univ., 27 Cal. App. 5th 577 (2018)

Sarah Sumner was the dean of the A.W. Tozer Theological Seminary and was employed pursuant to a written employment agreement. Her employment was terminated by Robin Dummer in his capacity as acting provost of the university on the ground that Sumner had been insubordinate. Sumner sued, alleging breach of contract, defamation, invasion of privacy and intentional infliction of emotional distress. The Seminary moved for summary judgment, asserting that Sumner's employment was within the "ministerial exception" and, therefore, that judicial review of her employment-related dispute is precluded by the religion clauses of the First Amendment. The trial court granted summary judgment for the Seminary, but the Court of Appeal reversed in part. The appellate court agreed that the ministerial exception does apply (even though Sumner was not a minister) but that adjudicating her contract cause of action (as distinguished from her tort claims) did not require the court to resolve a religious controversy.

Employee Who Declined Settlement Offer Was Not Entitled To Recover Attorney's Fees

Martinez v. Eatlite One, Inc., 27 Cal. App. 5th 1181 (2018)

Samantha Martinez, a sandwich maker and cashier, sued Eatlite (the owner of a Subway store) for employment discrimination in violation of public policy, gender and pregnancy discrimination, failure to provide reasonable accommodations in the workplace, violation of the California Constitution and negligent supervision and retention. A jury found in favor of Martinez on all grounds and awarded her $11,490 in damages. Prior to trial, Eatlite made a Cal. Code Civ. Proc. § 998 offer of settlement in the amount of $12,001 to which Martinez never responded. Following the judgment, the trial court granted Martinez's motion for attorney's fees and costs because the 998 amount offered by Eatlite was silent as to whether it did or did not include fees and costs. The Court of Appeal reversed, holding that the trial court should have compared the jury's award plus Martinez's pre-offer costs and fees with the amount of the 998 offer plus Martinez's pre-offer costs and fees; the Court also reversed the portions of the post-judgment orders awarding post-offer costs and fees to Martinez and denying post-offer costs to Eatlite. The Court concluded: "Having reached this disposition, we nonetheless believe the bench and bar would be well served if the Legislature amended section 998 to clarify how costs and fees should be addressed in a 998 offer."

Employer May Not Take Tip Credit For Employees Engaged In Non-Tipped Tasks

Marsh v. J. Alexander's LLC, 905 F.3d 610 (9th Cir. 2018) (*en banc*)

Plaintiffs in this case alleged that their employers abused the tip credit provision of the Fair Labor Standards Act ("FLSA") by paying them a reduced tip credit wage and treating them as tipped employees when they were engaged in either non-tipped tasks unrelated to serving and bartending or non-incidental tasks related to serving or bartending such as hours spent cleaning and maintaining soft drink dispensers in excess of 20% of the workweek. The Ninth Circuit deferred to a dual jobs regulation promulgated by the Department of Labor in 1967 and a subsequent guidance from 1988 that foreclosed an employer's ability to engage in this practice. Accordingly, the Court held that Marsh had stated a claim under the FLSA for minimum wage violations. *See also Quiles v. Parent*, 2018 WL 5730179 (Cal. Ct. App. 2018) (federal law applies to the determination of what type of costs are recoverable by a prevailing party in an FLSA action filed in state court); *Campbell v. City of Los Angeles*, 903 F.3d 1090 (9th Cir. 2018) (collective actions were properly decertified because plaintiffs failed to satisfy the similarly situated requirement of the FLSA).

California Supreme Court's *Dynamex* Opinion Only Applies To Independent Contractor Wage Order Claims

Garcia v. Border Transp. Group, LLC, 2018 WL 5118546 (Cal. Ct. App. 2018)

Jesus Cuitlahuac Garcia, a taxicab driver, filed a wage and hour lawsuit against Border Transportation Group ("BTG"), alleging claims based upon the wage orders of the Industrial Welfare Commission; wrongful termination in violation of public policy; failure to pay minimum wage; failure to pay overtime; failure to provide meal and rest breaks; failure to furnish accurate wage statements; waiting time penalties; and unfair competition. The trial court granted BTG's motion for summary judgment on the ground that Garcia was an independent contractor and not an employee. The Court of Appeal reversed in part, holding that the more restrictive test for determining employment status as set forth in *Dynamex Operations W., Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) applies to Garcia's claims based upon the wage orders (*i.e.*, the claims for unpaid wages, failure to pay minimum wage, failure to provide meal and rest periods, failure to furnish itemized wage statements and unfair competition). The remaining claims do not arise under the wage orders and as to them, summary adjudication was properly granted in favor of BTG. *See also California Trucking Ass'n v. Su*, 903 F.3d 953 (9th Cir. 2018) (labor commissioner's use of a common law test to determine whether owner-operator truck drivers were independent contractors was not preempted by federal law).

PAGA Claims Were Barred By Statute Of Limitations

Brown v. Ralphs Grocery Co., 2018 WL 5629874 (Cal. Ct. App. 2018)

Terri Brown brought a representative action against her employer, Ralphs Grocery Company, under the Private Attorneys General Act ("PAGA"), alleging wage and hour violations. In 2009, Brown filed a notice with the California Labor and Workforce Development Agency ("LWDA") as required under PAGA and also filed her complaint alleging PAGA violations. When Brown filed a second amended complaint alleging new violations of the Labor Code, Ralphs successfully moved for judgment on the pleadings on the ground that the 2009 LWDA notice was deficient. In March 2016, Brown amended the 2009 notice and filed a third amended complaint. Ralphs successfully demurred on the ground that the PAGA claims were barred because the 2009 notice was deficient and the 2016 notice and third amended complaint were filed more than five years after the expiration of the statute of limitations. The Court of Appeal reversed, holding that part of the 2009 notice was adequate but that Brown's later-added PAGA claims did not comply with the applicable notice requirements and were time-barred. *See also Atempa v. Pedrazzani*, 27 Cal. App. 5th 809 (2018) (employees had standing to recover civil penalties under PAGA from individual owner/president/secretary/director of employer).

Employer Did Not Violate Wage/Hour Requirements By Offering Productivity Pay

Certified Tire & Serv. Ctrs. Wage & Hour Cases, 28 Cal. App. 5th 1 (2018)

Plaintiffs in this certified wage and hour class action contend that Certified Tire violated applicable minimum wage and rest period requirements by implementing a compensation program, which guaranteed its automotive technicians a specific hourly wage above the minimum wage but also gave them the possibility of earning a higher hourly wage for all hours worked based on certain productivity measures. Following a bench trial, the trial court entered judgment in favor of Certified Tire. The Court of Appeal affirmed, holding that the employees were always paid at an hourly rate that exceeded the minimum wage for all hours worked regardless of the type of work involved, and they were provided paid rest periods on the clock as required by law. *See also Payton v. CSI Elec. Contractors, Inc.*, 27 Cal. App. 5th 832 (2018) (trial court properly denied class certification to two putative classes of employees based upon conclusion that individual questions would predominate and Payton was not an adequate class representative.

Related Professionals

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