Proskauer

California Employment Law Notes

July 2019

Filing EEOC Charge Is Not A "Jurisdictional" Requirement To Initiating Title VII Lawsuit

Fort Bend County v. Davis, 587 U.S. ___, 139 S. Ct. 1843 (2019)

Lois M. Davis was employed in the information technology department of Fort Bend County, Texas. In 2010, Davis informed the human resources department that the director of the department (Charles Cook) was sexually harassing her. Following an investigation, Cook resigned. After Cook resigned, Davis alleged that she was subjected to retaliation for reporting Cook's sexual harassment of her. Years into the litigation that followed, Fort Bend moved to dismiss Davis' claim of religious discrimination (she was fired after going to church instead of work on a Sunday) on the ground that she had not identified religious discrimination in the charge she filed with the EEOC. The district court dismissed Davis' religious discrimination claim on the "jurisdictional" basis that she had failed to include it in her EEOC charge. The Fifth Circuit reversed the dismissal, holding that the charge-filing requirement is not jurisdictional, but is a "prudential prerequisite to suit," which had been forfeited in this case because Fort Bend did not raise it until after "an entire round of appeals all the way to the Supreme Court." The Supreme Court agreed and affirmed the judgment of the Fifth Circuit.

Trial Court Properly Reduced $17.4 Million Jury Award By $5 Million

Pearl v. City of Los Angeles, 2019 WL 2511941 (Cal. Ct. App. 2019)

James Pearl worked for the Department of Public Works of the City of Los Angeles before experiencing chest pains and fainting at work allegedly in response to harassment based upon his perceived sexual orientation. Following that incident, Pearl was placed on medical leave and never returned to work. For "reasons not apparent from the record," the city failed to request that the jury be read CACI No. 3924 (a jury instruction admonishing the jury not to include in its award any damages intended to punish or make an example of the city); the city also failed to object to statements made by plaintiff's counsel during closing argument in which counsel suggested that the jury should punish the city for its alleged actions against Pearl. At the conclusion of the trial, the jury awarded Pearl $450,053 in past economic loss; $1.9 million in future economic loss; $10 million in past noneconomic loss (i.e., emotional distress damages); and $5 million in future noneconomic loss. After the trial, the city moved for a judgment notwithstanding the verdict and a new trial. The trial judge conditionally granted the city's new trial motion unless Pearl accepted a reduction by $5 million of the $10 million past economic loss component of the verdict; Pearl accepted the condition. On appeal, the city argued that a new trial should have been ordered nevertheless, but the Court of Appeal affirmed the judgment, holding that the city had not carried "its heavy burden to demonstrate that the [trial] court's carefully reasoned ruling was an abuse of discretion."

See also Le Mere v. Los Angeles Unified School Dist., 35 Cal. App. 5th 237 (2019) (trial court properly sustained demurrer to complaint alleging harassment and FEHA retaliation).

Former Deputy DA Could Proceed With Whistleblower And Disability Discrimination Claims

Ross v. County of Riverside, 2019 WL 2537342 (Cal. Ct. App. 2019)

Christopher Ross worked as a deputy district attorney for the County of Riverside before he was constructively discharged (according to Ross) or had abandoned his job (according to the county). Ross sued the county for violation of Cal. Lab. Code § 1102.5 (the "whistleblower statute") and for disability discrimination. The trial court granted the county's motion for summary judgment, but the Court of Appeal reversed, holding that Ross had engaged in protected activity because he disclosed information to a governmental or law enforcement agency that he reasonably believed disclosed a violation of law applicable to criminal prosecution and prosecutors (i.e., wrongful prosecution of a criminal case against a criminal defendant). The Court of Appeal further held there was sufficient evidence that Ross had a temporary or short-term physical impairment that was actually or perceived by the county to be potentially disabling. *See also Bennett v. Rancho Cal. Water Dist.*, 35 Cal. App. 5th 908 (2019) (worker has burden of proving employee status for purposes of establishing whistleblower claim under Section 1102.5).

Employee Could Proceed With Malicious Prosecution Action Against Former Employer

Cuevas-Martinez v. Sun Salt Sand, Inc., 35 Cal. App. 5th 1109 (2019)

Antonio Cuevas-Martinez worked as the head cook at a Palm Desert restaurant called Grill-A-Burger before he was fired by the owners (Farouk and Salima Nurani) allegedly for showing up late and missing shifts. After Cuevas-Martinez was fired, the Nuranis learned that over the previous few months, Cuevas-Martinez had been working to open his own restaurant, had been soliciting their employees and customers, using their "exact recipes" while using "confusingly similar names" for items on the menu, etc. The Nuranis sued Cuevas-Martinez for misappropriation of trade secrets; interference with contractual relationships with suppliers; interference with prospective economic advantage with customers, suppliers and employees; conversion; and unfair business practices. After Cuevas-Martinez moved successfully for summary judgment in response to the lawsuit filed against him, he sued his former employers for malicious prosecution. They responded with an anti-SLAPP motion, which the trial court granted. The Court of Appeal reversed, however, holding that Cuevas-Martinez established a reasonable probability of success on his claims as well as malice on the part of his former employers who "pursued their interference with contractual relations claim against Cuevas-Martinez for over 20 months…despite knowing the claim was baseless."

Lawyers Who Approved Settlement As To "Form And Content" May Be Bound

Monster Energy Co. v. Schechter, 2019 WL 3022773 (Cal. S. Ct. 2019)

The parties in a (non-employment-related) tort action agreed to settle their lawsuit. Their agreement was reduced to writing and included several provisions purporting to impose confidentiality obligations upon the parties and their counsel. All parties signed the agreement and their lawyers signed under a notation that they approved the written agreement as to "form and content." When some of the lawyers allegedly violated the confidentiality obligations contained in the agreement and were sued for breach of contract, they asserted they were not bound by the agreement and filed an anti-SLAPP motion in response to the lawsuit. The trial court denied the anti-SLAPP motion, but the Court of Appeal reversed, holding that the "form and content" notation meant only that counsel recommended their clients sign the document. In this opinion, however, the California Supreme Court reversed the judgment of the Court of Appeal, holding that the notation does not preclude a factual finding that counsel both recommended their clients sign the document *and* intended to be bound by its provisions. *Cf. Wojciechowski v. Kohlberg Ventures, LLC*, 923 F.3d 685 (9th Cir. 2019) (claim preclusion did not bar WARN Act claim against entity that was not a party in a prior action approved by a bankruptcy court).

Employee's Lawyer Was Improperly Disqualified After Contacting "Me-Too" Co-Employee Witness

Doe v. Superior Court, 36 Cal. App. 4th 199 (2019)

Jane Doe, a student-employee in the campus police department at Southwestern College, brought claims relating to sexual harassment and sexual assault against the Southwestern Community College District and three District employees. Doe also alleged that two other employees were sexually harassed by one of the employees who had harassed Doe. Doe's lawyer, Manuel Corrales, Jr., contacted one of those employees ("Andrea P.") as a possible percipient witness. The trial court disqualified Corrales based upon Cal. Rule of Prof. Conduct 4.2, which prohibits a lawyer from communicating with a "person the lawyer knows to be represented by another lawyer in the matter." The Court of Appeal issued a writ of mandate directing the trial court to vacate its disqualification order relating to Corrales and to enter a new order denying the motion to disqualify, holding that (1) Andrea P. was not represented by counsel at the time Corrales contacted her; and (2) Andrea P. was not a current employee covered by Rule 4.2(b)(2) because she could not make statements that might be "binding upon or imputed to the organization": "We therefore hold that where a plaintiff-employee claiming harassment and/or a hostile work environment seeks to rely on evidence of similar misconduct provided by another alleged employee-victim, ex parte communication with that second employee does not concern 'an act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability'."

Prevailing Employer May Not Recover Fees Unless Wage Claim Was Made In Bad Faith

Dane-Elec Corp., USA v. Bodokh, 35 Cal. App. 5th 761 (2019)

Dane-Elec sued its former CEO, Nessim Bodokh, for breach of a promissory note. Bodokh filed a cross complaint against Dane-Elec for failure to pay wages and unfair competition. Dane-Elec prevailed against Bodokh on both the complaint and the cross-complaint in a bench trial. Following the trial, Dane-Elec filed a motion to recover its attorney's fees based upon a prevailing party attorney's fees provision in the promissory note. The trial court granted the motion, with the exception of the attorney's fees Dane-Elec incurred in defending Bodokh's wage claim (Cal. Lab. Code § 218.5(a) prohibits the recovery of attorney's fees by a prevailing-party employer unless the employee's wage claim was made in bad faith). The Court of Appeal reversed in part, ordering the trial court on remand to determine the attorney's fees Dane-Elec incurred solely in connection with its successful enforcement of the promissory note. *See also Chavez v. Sarumi*, 2018 WL 8584279 (Cal. Super. Ct. App. Div. 2018) (employer's appeal bond should have been forfeited to employee not employer's surety pursuant to Cal. Lab. Code § 98.2(b)).

Nike Employees May Be Entitled To Pay Spent In Exit Inspections

Rodriguez v. Nike Retail Servs., 2019 WL 2701332 (9th Cir. 2019)

Nike Retail Services requires its retail employees to undergo "off the clock" exit inspections every time they leave the store. In this action, Isaac Rodriguez sought compensation on behalf of a class of similarly-situated employees who went through these exit inspections – which usually lasted between one and two minutes or less per employee. The district court dismissed the case based upon the federal "*de minimis* doctrine," which precludes recovery for otherwise compensable amounts of time that are small, irregular or administratively difficult to record. Following the district court's dismissal, the California Supreme Court issued its opinion in *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018), rejecting application of the federal *de minimis* doctrine to wage and hour claims brought under California law. In this opinion, the Ninth Circuit reversed the district court's judgment and remanded the case for further proceedings consistent with *Troester*. *See also Stoetzl v. Department of Human Resources*, 2019 WL 2722597 (Cal. S. Ct. 2019) (state correctional employees may be entitled to compensation for "duty-integrated walk time" but not for "entry-exit walk time").

Restaurant Is Not Required To Reimburse Employees For Slip-Resistant Shoes

Townley v. BJ's Restaurants, Inc., 2019 WL 2913303 (Cal. Ct. App. 2019)

Krista Townley filed this class action and Private Attorneys General Act ("PAGA") claim against her employer, seeking penalties on behalf of herself and other aggrieved employees for alleged Labor Code violations. Townley claimed that BJ's violated Cal. Lab. Code § 2802 by not reimbursing its employees for the cost of purchasing slip-resistant, close-toed shoes. (To avoid slip and fall accidents, BJ's adopted a safety policy requiring all hourly restaurant employees to wear black, slip-resistant, close-toed shoes, but the restaurant did not reimburse employees who purchased shoes to comply with the safety policy.) The trial court granted summary judgment to BJ's on the ground that OSHA and Cal-OSHA specifically provide that an employer is not required to reimburse employees for the cost of non-specialty shoes that offer some slip-resistant characteristics, but are otherwise ordinary clothing in nature. The Court of Appeal affirmed, holding that "the cost of the shoes does not qualify as a 'necessary expenditure' within the meaning of the statute." *See also Esparza v. Safeway, Inc.*, 36 Cal. App. 5th 42 (2019) (trial court properly dismissed class claims for failure to pay premium wages for alleged meal period violations and properly struck untimely PAGA claim).

Federal Law Applies To Employees Working On Coastal Drilling Platforms

Parker Drilling Mgmt. Servs., Ltd. v. Newton, 587 U.S. ___, 139 S. Ct. 1881 (2019)

Brian Newton worked for Parker Drilling on drilling platforms located off the coast of California. Newton's 14-day shifts involved 12 hours per day on duty and 12 hours per day on standby during which time he could not leave the platform. Newton, who was not paid for his standby time, filed this class action in California state court alleging violations of California wage-and-hour laws. After the case was removed to federal court, the parties agreed that the platforms are subject to the Outer Continental Shelf Lands Act, which denies states any interest in or jurisdiction over the Outer Continental Shelf ("OCS"). The Supreme Court unanimously held that where federal law addresses the relevant issue (as it does in this case through the Fair Labor Standards Act), state law is not adopted as federal law on the OCS.

Related Professionals

- **Anthony J. Oncidi**
  Partner