Proskauer

California Employment Law Notes

September 2019

California Supreme Court Invalidates Agreement To Arbitrate Wage Disputes

***OTO, LLC v. Kho*, 2019 WL 4065524 (Cal. S. Ct. 2019)**

In the most recent chapter of the ongoing saga regarding the enforceability of arbitration agreements in California, the California Supreme Court has determined that because the execution of the arbitration agreement in this case involved such an "extraordinarily high" degree of procedural unconscionability, it was unenforceable. According to the Supreme Court, the evidence of "procedural unconscionability" and "significant oppression" included: (1) the arbitration agreement was presented to employee Ken Kho "in his workspace, along with other employment-related documents [and] neither its contents nor its significance was explained" to Kho; (2) Kho was required to sign the agreement to keep the job he had held for three years (though the Court cites no evidence that Kho was actually told that); (3) because the company used a piece-rate compensation system, any time Kho spent reviewing the agreement would have reduced his pay; (4) the agreement was presented to Kho by a "low-level employee, a 'porter,' … creating the impression that no request for an explanation was expected and any such request would be unavailing"; (5) by having the "porter" wait for the documents, the employer conveyed an expectation that Kho sign them immediately, without examination or consultation with counsel; (6) although Kho asked no questions about the agreement before he signed it, "there is no indication that the porter had the knowledge or authority to explain its terms"; and finally (7) Kho was not given a copy of the agreement he had signed.

The Supreme Court also criticized the agreement as a "paragon of prolixity, only slightly more than a page long but written in an extremely small font" with "sentences [that] are complex, filled with statutory references and legal jargon." The agreement also failed to expressly indicate that the employer would pay the arbitration-related costs and fees, though the payment of such fees and costs is already required as a matter of law by prior California Supreme Court precedent – which the Supreme Court worried "would not be evident to anyone without legal knowledge or access to the relevant authorities."

The California Supreme Court's opinion elicited a spirited dissent from Justice Chin who asserted that the holding is inconsistent with California law as well as unambiguous United States Supreme Court precedent interpreting the broad preemptive effect of the Federal Arbitration Act, which "precludes the majority from invalidating this arbitration agreement based on its subjective view" about how best to vindicate employee rights. Eight years ago, the United States Supreme Court, citing its own opinion in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), vacated a similar California Supreme Court judgment invalidating an arbitration agreement in *Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659 (2011). Justice Chin suggests the same fate may befall this latest opinion. *Compare Dorman v. The Charles Schwab Corp.*, 2019 WL 3926990 (9th Cir. 2019) (overruling its prior precedent in light of "intervening Supreme Court case law," Ninth Circuit holds that ERISA claims are arbitrable).

Some Of TV Producer's Discrimination Claims Could Be Stricken Under Anti-SLAPP Statute

***Wilson v. Cable News Network, Inc.*, 7 Cal. 5th 871 (2019)**

Stanley Wilson alleged discrimination, retaliation, wrongful termination and defamation against CNN, et al., where he worked as a television producer before his employment was terminated following an audit of his work involving suspected plagiarism. Defendants answered the complaint and then filed a special motion to strike all causes of action pursuant to Cal. Code Civ. Proc. § 425.16 (the "anti-SLAPP" statute) on the ground that all of their staffing decisions (including those involving Wilson) were acts in furtherance of CNN's right of free speech that were "necessarily 'in connection' with a matter of public interest – news stories relating to current events and matters of interest to CNN's news consumers." The trial court granted CNN's anti-SLAPP motion and dismissed the lawsuit, but the Court of Appeal reversed, rejecting the characterization of defendants' allegedly discriminatory and retaliatory conduct as mere "staffing decisions" in furtherance of their free speech rights to determine who shapes the way they present news stories.

In this opinion, the California Supreme Court reversed in part and affirmed in part the Court of Appeal, holding that "the plaintiff's allegations about the defendant's invidious [*i.e.*, discriminatory] motives will not shield the claim from the same preliminary [anti-SLAPP] screening for minimal merit that would apply to any other claim arising from protected activity." However, the Supreme Court further held that "CNN has the burden of showing Wilson's role bore such a relationship to its exercise of editorial control as to warrant protection under the anti-SLAPP statute. CNN has failed to make that showing." The Supreme Court remanded to the Court of Appeal the question of whether Wilson's termination claims (only) could be stricken under the anti-SLAPP statute – but the Supreme Court held that his claims of discrimination and retaliation involving CNN's alleged actions that preceded his termination would survive regardless because CNN was unaware of any potential plagiarism by Wilson until a few weeks before his termination. Also surviving CNN's anti-SLAPP motion was Wilson's defamation claim, which was based upon alleged statements by CNN that did not constitute "conduct in furtherance of the exercise of [free speech rights] in connection with a public issue or an issue of public interest" (quoting the anti-SLAPP statute). *See also Jeffra v. California State Lottery*, 2019 WL 4072398 (Cal. Ct. App. 2019) (although employer's investigation of possible misconduct by employee was protected activity within the meaning of the anti-SLAPP statute, plaintiff established a probability of prevailing on the merits of his claim, so employer's motion was properly denied).

Bill Cosby May Be Liable For His Attorney's Statements About Accuser

***Dickinson v. Cosby*, 37 Cal. App. 5th 1138 (2019)**

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.

In an earlier opinion (*Dickinson I*), 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). On remand, Cosby filed a second anti-SLAPP motion seeking to strike claims newly asserted in Dickinson's amended complaint. The trial court granted the motion in substantial part, but refused to strike Dickinson's claims premised on two allegedly defamatory statements that appeared in Singer's press releases.

In this appeal, Cosby argued that Dickinson cannot show that he is directly or vicariously liable for his attorney's statements and also that the allegedly defamatory statements were his attorney's nonactionable opinions. The Court of Appeal disagreed and affirmed the trial court's order, holding that "there is evidence that Cosby personally approved or authorized the statements before Singer issued them. Cosby had no ethical obligation to issue press releases containing known falsehoods, nor does it benefit our free and open society for him to do so."

Court Reverses Two Summary Judgments Entered In Favor Of Hospital

***Ortiz v. Dameron Hosp. Ass'n*, 37 Cal. App. 5th 568 (2019)**

Nancy Ortiz, a nurse of Filipino national origin, sued Dameron Hospital Association for constructive discharge arising from allegedly demeaning criticisms directed at her by her former supervisor (Doreen Alvarez). Ortiz claimed she was harassed and discriminated against based upon her age and national origin. Ortiz contended that Alvarez "singled out" for criticism employees who spoke English as a second language and told them that another employee who was white "speaks good English," was "well-educated," and "is going to do a better job than most of you guys here because you guys don't know how to speak English." Alvarez also allegedly said the Filipino employees were "too old and had been there too long." Alvarez allegedly fired another employee (Bassey Duke) for refusing to lie about seeing Ortiz sleeping on the job (a terminable offense). Shortly thereafter, Ortiz resigned because she felt she was "about to have a mental breakdown from all the stress." The trial court granted the hospital's summary judgment motion "because Dameron engaged in no conduct in regards to Ortiz's resignation." The Court of Appeal reversed, holding (unremarkably) that because Alvarez's status as a supervisory employee of the hospital was undisputed, the hospital could not escape liability based upon its own "nonaction." The appellate court further held that there was sufficient evidence to allow a reasonable trier of fact to find that the alleged harassment to which Ortiz was subjected was severe or pervasive. *See also Galvan v. Dameron Hosp. Ass'n*, 37 Cal. App. 5th 549 (2019) (same).

Morbidly Obese Employee Failed To Establish Causal Relationship To His Termination

***Valtierra v. Medtronic Inc.*, 2019 WL 3917531 (9th Cir. 2019)**

Jose Valtierra claimed he was terminated on account of his morbid obesity (370 lbs.) in violation of the Americans with Disabilities Act (ADA). Medtronic terminated Valtierra for falsifying records, which indicated he had finished more assignments than he had in fact completed before going on vacation. The district court granted summary judgment to Medtronic on the ground that obesity, no matter how great, cannot constitute a disability under the applicable EEOC regulations unless the obesity is caused by an underlying physiological condition. The Ninth Circuit affirmed summary judgment in favor of Medtronic on different grounds, holding that "we need not take a definitive stand on the question of whether morbid obesity itself is an 'impairment' under the ADA" because in this case Valtierra had failed to show some causal relationship between his alleged impairments and his termination – there is "no basis for concluding that he was terminated for any reason other than Medtronic's stated ground that he falsified records to show he had completed work assignments" and there was no evidence that Medtronic "ever knew of similar misconduct on the part of others" who were not subjected to termination. *See also Murray v. Mayo Clinic*, 2019 WL 3939627 (9th Cir. 2019) (district court correctly applied a "but for" causation (rather than a "motivating factor") standard in instructing the jury in this ADA discrimination case).

Prevailing-Party Employer Could Not Recover Its Costs Despite Successful CCP § 998 Offer

***Scott v. City of San Diego*, 38 Cal. App. 5th 228 (2019)**

Arthur Scott sued the San Diego Police Department for race discrimination and retaliation in violation of the Fair Employment and Housing Act ("FEHA"). Scott rejected a $7,000 pre-trial offer to compromise made by the City pursuant to Code of Civil Procedure § 998. After the City prevailed at trial, the trial court awarded it a total of $51,946.96 in costs incurred after the Section 998 offer was made. While this appeal was pending, the legislature amended Cal. Gov't Code § 12965(b) to preclude an award of fees and costs to a prevailing defendant unless the court finds the plaintiff brought or maintained a frivolous action under FEHA. The Court of Appeal determined that because the statute merely clarified existing law, it applied to this case, which was tried before its enactment.

Attorney For Former Employee Recovers His Fees From Employer

***Mancini & Assocs. v. Schwetz*, 2019 WL 4187472 (Cal. Ct. App. 2019)**

The Mancini law firm brought this contractual interference action against Jason Schwetz, the former employer of Mancini's client, Gina Rodriguez. Mancini and Rodriguez had agreed in writing that Mancini would represent Rodriguez in a sexual harassment/breach of contract lawsuit against her former employer NADT, LLC and its principal, Schwetz. In the underlying trial, Mancini obtained a judgment against Schwetz in the amount of $68,650 for breach of contract, plus approximately $149,000 in costs and attorney's fees. Mancini (on behalf of Rodriguez) was unable to collect the damages from Schwetz. Six years later, Rodriguez contacted Schwetz on Facebook, expressing interest in his well-being and noting that she was "single as usual." Thereafter, they met for lunch, "resumed their friendship" and executed a "Memorandum of Settlement and Mutual Release" whereby the parties released each other (and their agents and attorneys) from all judgments, fees, claims, damages, etc. Notwithstanding the release, Mancini successfully sued Schwetz for interfering with Mancini's retainer agreement with Rodriguez. The trial court entered judgment in favor of Mancini in the amount of $409,351.81. The Court of Appeal affirmed, holding that "sufficient evidence and all reasonable inferences therefrom establish that Schwetz knew that Mancini had a fee agreement with Rodriguez and that he intentionally and wrongfully interfered to avoid paying the attorney fees and costs." The Court also held that the litigation privilege of Civil Code § 47 did not protect Schwetz's noncommunicative conduct. *See also Robles v. Employment Dev. Dep't*, 38 Cal. App. 5th 191 (2019) (employee was entitled to attorney's fees pursuant to Cal. Code Civ. Proc. § 1021.5 incurred in obtaining his unemployment insurance benefits).

Five Days' Notice Is Required For Workplace Restraining Order

***Severson & Werson v. Sepehry-Fard*, 37 Cal. App. 5th 938 (2019)**

Severson & Werson, a law firm, filed a petition for a workplace violence restraining order seeking protection for all of its employees, contending that Sepehry-Fard (a member of the "sovereign citizen movement") had made "veiled threats of physical violence," performed a "citizen's arrest" of two employees, drafted papers that purported to be "arrest warrants" listing 23 "felony counts," including "treason," against employees, etc. The Judicial Council form used by the law firm required that documents be served upon Sepehry-Fard at least five days before the hearing unless the petitioner specifically requested fewer than five days' notice, which it had not. The trial court entered the restraining order, but the Court of Appeal reversed, holding that Sepehry-Fard did not receive adequate notice or an opportunity to be heard to contest the issuance of the restraining order.

Property Inspectors' Class Action Was Properly Denied Certification

***McCleery v. Allstate Ins. Co.*, 37 Cal. App. 5th 434 (2019)**

In this putative class action, property inspectors alleged they were misclassified as independent contractors and that they were entitled to but deprived minimum wages, overtime, meal and rest breaks, reimbursement of expenses and accurate wage statements. The trial court denied class certification on the ground that plaintiffs' trial plan was unworkable because it failed to address individualized issues and deprived defendants of the ability to assert defenses. *See also Tijerino v. Stetson Desert Project, LLC*, 2019 WL 3849570 (9th Cir. 2019) (exotic dancers did not have the burden to prove at the outset of the case that they were employees rather than independent contractors under the Fair Labor Standards Act); *Dawson v. NCAA*, 932 F.3d 905 (9th Cir. 2019) (college football player was not an employee of the NCAA or PAC-12).

Employee Who Was Not Paid Wages May Not Sue For Conversion

***Voris v. Lampert*, 2019 WL 3820000 (Cal. S. Ct. 2019)**

Brett Voris worked alongside Greg Lampert to launch three start-up ventures, partly in return for a promise of later payment of wages. Voris was fired after a falling out arose between him and Lampert. Voris sued the companies and won, successfully invoking both contract-based and statutory remedies for the nonpayment of wages. In this lawsuit, Voris claimed that by failing to pay him the wages that were due, the companies converted his personal property to their own use and, further, that Lampert is individually liable for the companies' alleged misconduct. The California Supreme Court affirmed the Court of Appeal in dismissing Voris' claim, declining "to supplement the existing set of remedies for wage nonpayment with an additional tort remedy in the nature of conversion."

Residential Care Facility Must Provide At Least 30-Minute Meal Periods To Employees

***L'Chaim House, Inc. v. DLSE*, 38 Cal. App. 5th 141 (2019)**

L'Chaim House was cited for wage and hour violations by the Division of Labor Standards Enforcement ("DLSE"). After an unsuccessful administrative appeal, L'Chaim filed a petition for a writ of administrative mandamus, which the trial court denied. In this appeal, L'Chaim argued that under the applicable Industrial Welfare Commission Wage Order, it could require its employees to work "on-duty" meal periods that did not have to be at least 30 minutes long. Pursuant to Wage Order No. 5, employees of "24 hour residential care facilities for the elderly… may be required to work on-duty meal periods without penalty when necessary to meet regulatory or approved program standards and one [of two conditions is met]." The Court disagreed with L'Chaim's position, citing the requirements of Cal. Lab. Code § 512 and stating that "[w]hat L'Chaim misunderstands is that an on-duty meal period is not the functional equivalent of no meal period at all. On-duty meal periods are an intermediate category requiring more of employees than off-duty meal periods but less of employees than their normal work."

Former Employee's Lawyer Was Improperly Disqualified From Prosecuting Action

***Wu v. O'Gara Coach Co.*, 2019 WL 3942920 (Cal. Ct. App. 2019)**

Thomas Wu sued his former employer (O'Gara Coach Bentley) for race discrimination and other employment-related misconduct. The trial court granted O'Gara Coach's motion to disqualify Wu's attorneys (Richie Litigation) because Darren Richie is a former president and chief operating officer of O'Gara Coach who had had responsibility for the company's employment policies and who could be a percipient trial witness in the case. The Court of Appeal reversed, holding that O'Gara Coach failed to present evidence that Richie possessed confidential attorney-client privileged information material to the dispute, that Wu gave informed written consent to Richie's being called as a witness and Richie's firm (not Richie himself) would represent Wu at trial.

District Court Improperly Remanded Action Removed Under CAFA

***Arias v. Residence Inn by Marriott*, 2019 WL 4148784 (9th Cir. 2019)**

Blanca Arias filed a putative class action against Marriott in the California Superior Court, alleging failure to compensate employees for wages, missed meal breaks and inaccurate itemized wage statements. Marriott removed the action to federal court, alleging diversity jurisdiction under the Class Action Fairness Act ("CAFA"). One month later, the district court remanded *sua sponte* the case back to state court because it found Marriott's calculations of the amount in controversy to be "unpersuasive" and based upon "speculation and conjecture." Citing the Supreme Court's pronouncement in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014) that "no anti-removal presumption attends cases invoking CAFA," the Ninth Circuit reversed the remand order, holding that a district court may not remand a case back to state court without first giving the defendant an opportunity to show by a preponderance of the evidence that the jurisdictional requirements are satisfied. The Court further held that Marriott's notice of removal need not contain "evidentiary submissions" and may be based upon "a chain of reasoning that includes assumptions" about the amount in controversy. Further, the district court erred by excluding prospective attorney's fees from the amount in controversy.

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